July 29th, 2008

Ability to Sue in Alberta for Injuries Sustained on a Holiday Abroad

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Cases Considered:

Robinson v. Fiesta Hotel Group Resorts, 2008 ABQB 311

If like many Canadians you decide to take a winter vacation to follow the sun and you sustain serious personal injuries because of the negligence of your hotel, you may well want to sue the hotel in Alberta. Can you do so? Is it worthwhile to do so? These were two of the questions facing James Robinson.

Facts

In August 2004, Robinson and his wife booked a vacation through a travel agent in their home city of Edmonton. Following an examination of travel brochures which promoted the defendants' facilities, they had decided to fly to Punta Cana in the Dominican Republic to stay at a resort operated by the defendants. On December 8th, they arrived in the Dominican Republic where they intended to remain for 15 nights. Three days later, Robinson fell and hit his head when a rock or tile on which he was standing gave way. At the time of the accident, he was standing by a lagoon on resort property. Following the accident, Robinson had difficulty moving and he was placed in a wheelchair for the balance of his vacation. Eventually, he was admitted to hospital in the Dominican Republic. On December 24th, he was transported back to Canada by air ambulance. Upon his return to Edmonton, he was immediately admitted to the University of Alberta Hospital where he underwent surgery for crushed vertebrae. He was later moved to a rehabilitation hospital where he received intensive treatment for almost three months. He continued to suffer pain and the accident resulted in partial paralysis of his lower extremities. He carried on working but in different jobs from his previous occupation as a taxicab driver. Consequently, he had a reduced level of income.

Robinson launched an action against the resort in June 2005. He obtained an order for *ex juris* and duly served the defendants with the statement of claim in the Dominican Republic. The defendants, however, failed to file any statement of defence. Indeed, they did not respond to any documents served by the plaintiff and they were noted in default. The case came on for a trial on the assessment of damages before Mr. Justice Keith Yamauchi of the Alberta Court of Queen's Bench at which only the plaintiff was represented.

Effect of Noting Defendants in Default

Initially, Justice Yamauchi considered the effect of noting the defendants in default. He held that the defendants were to be taken as having admitted the facts alleged in the statement of claim by their failure to deny them. While the amount of damages to which the plaintiff was entitled would have to be determined, the defendants' liability could be assumed. The only exception noted by Justice Yamauchi was where the court was not satisfied that the plaintiff had a cause of action. If that were the case, the court had a duty to order a hearing on the question of liability. Justice Yamauchi, however, was in no doubt that Robinson had a cause of action against the defendants based on a review of the pleadings and the plaintiff's own testimony.

Justice Yamauchi devoted most of his judgment to the assessment of the plaintiff's damages. Before doing so, however, he raised the issue of whether the Alberta courts had any jurisdiction over the defendants under principles of private international law to assess the damages. The plaintiff argued that the court had jurisdiction based on the pleadings, proof of service of those pleadings upon the defendants and the noting of the defendants in default. Justice Yamauchi rejected that contention and held that the court still had to determine "whether it ha[d] jurisdiction even in the face of the noting in default" (at para. 13). The jurisdictional question depended upon the principles underlying the Supreme Court's decisions in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 and *Beals v. Saldanha*, [2003] 3 S.C.R. 416 and whether there was a real and substantial connection between the province and the subject matter of the action or the defendant. Justice Yamauchi then applied the reasoning of the Ontario Court of Appeal in *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577 and concluded that the court had jurisdiction based upon the real and substantial connection test. This comment focuses upon the jurisdictional issue and has nothing to say on the court's assessment of the plaintiff's damages.

Jurisdiction and Default Judgments

It is interesting to observe that the question of the court's jurisdiction was not raised by the defendants since they failed to participate in the proceedings. Rather, the court itself raised the issue. Justice Yamauchi relied, at para. 13, upon the statement of Johnson J.A. in *Spiller v. Brown* (1973), 43 D.L.R. (3d) 140, at 143 (Alta. S.C. App. Div.) that "[n]either by pleadings nor admissions [could] a defendant give a court jurisdiction that it [did] not otherwise have". *Spiller* did not in fact deal with the question of whether the court had jurisdiction. Moreover, the authority cited by Johnson J.A. for his proposition, *Donald Campbell & Co. v. Pollak*, [1927] A.C. 732 (H.L.), did not address in any fashion a court's jurisdiction in personam in a conflicts case. Instead, the House of Lords was considering there the question of whether it could examine the jurisdiction of the Court of Appeal to interfere with a trial judge's decision as to costs despite the fact that the issue had not been raised on the appeal.

Justice Yamauchi also cited *Muscutt v. Courcelles* to support the position that he was obliged to determine whether the court had jurisdiction. In particular, he referred to paragraph 50 of the *Muscutt* case. The relevance of that paragraph, however, is not immediately obvious. Sharpe J.A. pointed out there that service of process in accordance with the rules of court did not determine the issue of jurisdiction and that the rules for service *ex juris* were "part of a procedural scheme

that operate[d] within the limits of the real and substantial connection test". The Ontario Court of Appeal, however, said nothing about whether a court was required to determine whether jurisdiction existed when the defendant had failed to participate in the proceedings.

It is in fact an intriguing question as to whether in *Robinson* the court should have raised the issue of jurisdiction of its own motion. It is true that the onus rests on the plaintiff to establish that the court has jurisdiction over the defendant. However, before serving a statement of claim *ex juris*, a plaintiff is required to obtain the leave of the court pursuant to Rules 30 and 31 of Alberta's *Rules of Court*, Alta. Reg. 390/1968. Robinson obtained the requisite order in August 2005. While such leave is typically obtained *ex parte*, the plaintiff bears the onus even at that stage of establishing that it has a good, arguable case on the merits and that there is a sufficient real and substantial connection between the action and the province: see generally *United States Satellite Broadcasting Co. v. WIC Premium Television Ltd.* (2000), 266 A.R. 142, at paras. 4-9 (C.A.). Justice Yamauchi posed the question, at para. 15, whether "the granting of the order for service *ex juris* provide[d], by its granting . . . jurisdiction". He held that it did not. One would have thought, however, that the plaintiff had discharged the burden on him. The defendants could have challenged the service *ex juris* on jurisdictional grounds but, apparently, they did not. Surely the court was not obliged of its own accord to revisit the issue of jurisdiction.

Application of the Real and Substantial Connection Test

In determining that the Alberta courts had jurisdiction based upon the real and substantial connection test, Justice Yamauchi adopted the approach proposed by the Ontario Court of Appeal in *Muscutt*. In a previous post on *Wheeler v. 1000128 Alberta Ltd.*, 2008 ABQB 70, I pointed out the tendency of the Alberta courts to follow Muscutt and to apply, almost religiously the eight factors identified there as relevant to the assessment of the court's jurisdiction: see *Wheeler*, at para. 21. At that time, I questioned the utility of the *Muscutt* approach which appears overly complex and tends to blur the distinction between the existence of jurisdiction (jurisdiction *simpliciter*) and the identification of the most convenient forum (*forum non conveniens*).

Clearly the facts of *Robinson* bore some similarity to those in *Muscutt* itself. Justice Yamauchi recognized that fact (at para. 14). The claim was in respect of damage sustained in Alberta as a result of a tort committed outside the province. Indeed, Robinson particularly resembled one of the companion decisions to *Muscutt*, *Leufkens v. Alba Tours International Inc.* (2002), 213 D.L.R. (4th) 614 (Ont. C.A.). In *Leufkens*, the plaintiff purchased from a Canadian tour company in Ontario a package holiday in Costa Rica. The Canadian company had arranged for a Costa Rican company, Swiss Travel Service, to provide optional local excursions for tourists. While in Costa Rica, the plaintiff purchased an excursion from Swiss Travel Service during the course of which he was injured.

The Ontario Court of Appeal applied the *Muscutt* factors and held that it lacked jurisdiction over the Costa Rican defendant. In particular, Sharpe J.A. pointed to the fact that the Swiss Travel Service had no direct contact with Ontario. It did not carry on business there and it had no assets there. While it could certainly foresee that negligence on its part could lead to injury to foreign

tourists, including those from Ontario, the action was essentially a claim against a Costa Rican defendant for harm suffered in Costa Rica. Moreover, within the *Muscutt* reasoning, the fact that it was an international rather than an interprovincial case rendered the assumption of jurisdiction more difficult to justify.

Justice Yamauchi refused to draw any analogy with *Leufkens* because the defendants in *Robinson* had promoted their resorts in the Dominican Republic through Alberta travel agents and travel brochures which were circulated in Alberta. In that respect, he relied, at paras. 21-23, upon the little-known Ontario case of *Eid v. Hola Sun Holidays Ltd.*, 2006 CarswellOnt 8583 (S.C.J.) where the court had distinguished *Leufkens* on the ground that the defendant hotel company, through its Canadian subsidiary, had actively marketed its resorts in Cuba to Ontario residents.

Some of Justice Yamauchi's reasoning and conclusions appear questionable. There does not seem to be a significant distinction between *Robinson* and *Leufkens*. Both cases involved services provided to tourists by foreign defendants in their own country. It is true that, in *Robinson*, the defendants did advertise their hotels in Canada. It is also true, however, that, in *Leufkens*, the Costa Rican defendant had a contractual arrangement with Canadian travel companies that carried on business in Ontario.

Justice Yamauchi indicated, at para. 15, that "[h]istorically, courts required plaintiffs to commence tort cases in the place where the tort occurred" but that "*Muscutt* said that jurisdiction could be asserted against an out-of-province defendant through 'assumed jurisdiction'". These are propositions of doubtful validity. Historically, plaintiffs were required to sue defendants where they could be found and served. Jurisdiction over foreign defendants was first asserted in the nineteenth century with the establishment of rules for service ex juris which originated in England with the passage of the *Common Law Procedure Act*, 1852, 15 & 16 Vict., c. 76 (U.K.). One of the standard grounds for service *ex juris* was that the action was founded on a tort committed in the province: see, for example, Alberta's *Rules of Court*, Rule 30(h). In *Robinson* itself, of course, the Dominican Republic was both the place where the defendants could be found through the conduct of their business and the place where the tort was committed.

One of the *Muscutt* factors is the court's willingness to enforce an extra-provincial judgment rendered on the same basis that the domestic court is said to have jurisdiction. In some ways, this criterion seems meaningless because the *Morguard* real and substantial connection test was in fact applied in that case to the jurisdiction of a foreign court for the purpose of enforcing a foreign judgment. Nevertheless, as Justice Yamauchi pointed out, at para. 26, this factor played a significant role in *Leufkens* itself. Sharpe J.A. wrote, at para. 33:

[F]inding that the real and substantial connection test has been met would require Ontario courts to enforce foreign judgments rendered on the same jurisdictional basis against Ontario defendants who offer tourism services to visitors of this province. In my view, we should not adopt such a rule, since it would impose an unreasonable burden on providers of tourism services in Ontario. To take the example mentioned during oral argument, it would seem harsh to require

an Algonquin Park canoe rental operator to litigate the claim of an injured Japanese tourist in Tokyo. Although negligent operators should certainly be held to account for their negligence, if they confine their activities to Ontario, they are entitled to expect that claims will be litigated in the courts of this province.

Justice Yamauchi distinguished *Leufkens* on the ground that the defendants in *Robinson* had not confined their activities to the Dominican Republic because they had promoted their resorts in Canada. Despite this valiant attempt to differentiate the facts of *Leufkens*, it is not at all clear that an Alberta court would enforce a judgment obtained in the Dominican Republic by a resident thereof in respect of an accident occurring at an Alberta hotel that was marketed in the Dominican Republic. Justice Yamauchi certainly goes too far when he says, at para. 26, that "by promoting their resorts in Canada, the Defendants have submitted to the Alberta courts and therefore they should expect that claims may be litigated in the Alberta courts".

One mystery in *Robinson* that was not raised before Justice Yamauchi was the particular ground on which the service *ex juris* was based. In Alberta, service out of the jurisdiction has to fit one of the grounds enumerated in Rule 30. Justice Yamauchi observed, at para. 18, that it is not a basis for service *ex juris* in Alberta, unlike Ontario, that the action is in respect of damage sustained in Alberta from a tort wherever committed. In fact, there is no obviously applicable ground for service *ex juris* listed in Rule 30. In particular, Rule 30(h) would not apply because, as Justice Yamauchi himself admitted, at para. 8, the tort was committed in the Dominican Republic and not Alberta. This lack of a basis for service *ex juris* also casts some doubt on the view that there was a real and substantial connection with the province.

Conclusion

If the defendants in *Robinson* had at least contested jurisdiction, then, to my mind, there is a strong argument that the Alberta courts lacked jurisdiction. However, in light of the fact that the plaintiff had obtained an order for service *ex juris* and that the defendant did not participate in any fashion, then surely the court was not required to address the issue of jurisdiction. In any event, it is not at all clear what the plaintiff expected to gain from his suit. The defendants had no assets in Alberta. Presumably, therefore, the plaintiff was counting on enforcing his Alberta judgment in the Dominican Republic. There is no indication of whether the courts in the Dominican Republic would be inclined to enforce the Alberta judgment but it seems doubtful. The effect of cases like *Morguard* and *Beals* has been to make Canada particularly generous when it comes to the recognition of non-Canadian judgments, a generosity that is not shared by the rest of the world.