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Product Liability: Jurisdictional Issues in Canada

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Introduction

The proliferation of international trade and commerce has led to increasingly complex product liability litigation with potential parties located across all parts of the globe. Simply stated, a person could be hurt in Ontario by a product designed in Germany, sold in Pennsylvania, and assembled in India with parts manufactured in Japan. With each party in the chain of commerce a potential defendant, there are important jurisdictional issues which arise in the product liability context.

In cases of multi-jurisdiction litigation, three issues frequently arise: the appropriate jurisdiction in which to commence a proceeding; the correct law to be applied; and the likelihood of successfully enforcing a foreign judgment. These issues have been the subject of considerable attention by Canadian courts and will be discussed in turn below.

Jurisdiction: Where can the plaintiff sue the defendant?

Selecting a jurisdiction in which to commence an action can result in advantages or disadvantages to the various parties depending on the location chosen. "Forum shopping" is a term used to describe plaintiffs who bring their actions in those locations which are notoriously plaintiff-friendly and where prospects for recovery are the highest. The risk of forum shopping is increased in product liability cases because plaintiffs are often suing parties from numerous jurisdictions. In order to discourage forum shopping, Canadian courts rely on the doctrines of *jurisdiction simpliciter* and *forum non conveniens* to determine the appropriate jurisdiction in which to try a case.

In determining whether it may assume jurisdiction, a court will first look at *jurisdiction simpliciter*, the legal power to preside over both the party and the subject matter of the litigation. *Jurisdiction simpliciter* is established by showing that a claim has a real and substantial connection to the jurisdiction in which it is to be tried. The test to prove a real and substantial connection was originally set out as an eight-factor analysis by the Ontario Court of Appeal in a series of decisions known as the *Muscutt* quintet.

In 2010, the Ontario Court of Appeal re-examined the real and substantial test set out in the *Muscutt* Quintet in the case of *Van Breda v. Village Resorts Ltd.* Although the Court of Appeal preserved the general essence of the real and substantial test from *Muscutt*, it revised the weight to be afforded to each factor.

Pursuant to *Van Breda*, the test for *jurisdiction simpliciter* is as follows:

i) A court first will look to whether a claim falls under an enumerated ground set out in Rule 17.02 of Ontario's *Rules of Civil Procedure* governing foreign service of claims. If the claim falls within one of those grounds, there will be a rebuttable presumption that there is a real and substantial connection. If the plaintiff's claim does not fall under one of the grounds in Rule 17.02, a court will look next to additional factors to establish a real and substantial connection.

Of these additional factors, primary weight is to be placed on the following two:

ii) The connection between the forum and the plaintiff; and
iii) The connection between the forum and the defendant.

Thereafter, other factors of more or less equal weight may be applied as general legal principles on a case-by-case basis. These factors are:

iv) Fairness to the plaintiff or defendant in asserting jurisdiction;
v) The involvement of other parties to the lawsuit;
vi) The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
vii) Whether the case is interprovincial or international in nature; and
viii) Comity and standards of jurisdiction prevailing elsewhere.

In March 2011, the Supreme Court of Canada heard an appeal of the *Van Breda* decision. One of the respondents in the Supreme Court appeal, Bel Air Travel Group, was represented attorneys at McCague Borlack LLP. The Supreme Court has yet to release its decision but it will be certain to attract considerable attention across Canada as it may change the test for *jurisdiction simpliciter*.

In addition to *jurisdiction simplicter*, a court may be asked to consider the doctrine of *forum non conveniens*, the discretionary power to decline jurisdiction where the case is more appropriately dealt with elsewhere. In the leading 1993 case of *Amchem Products Inc. v. British Columbia (Workers' Compenation Board)*, the Supreme Court of Canada established a set of factors that courts should apply when assessing *forum non conveniens*. The factors include location of the parties, location of key witnesses and evidence, any contractual provisions specifying the applicable forum, the avoidance of a multiplicity of proceedings, geographical issues, and whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court. Because *forum non conveniens* is a discretionary decision, the weight of each factor will vary on a case-by-case basis. Invoking the doctrine of *forum non conveniens* may be an effective strategy for a defendant concerned with forum shopping and seeking to have a case tried in a different jurisdiction.

Two additional strategic options may be available to a defendant to protect against forum shopping. The first is the anti-suit injunction whereby a defendant obtains a mandatory order of a court in one jurisdiction requiring an opposing party to discontinue proceedings in another jurisdiction. These are granted where a foreign court improperly assumes jurisdiction over a matter that is properly addressed in a local court. In *Amchem*, the Supreme Court of Canada stated that courts are to grant anti-suit injunctions with caution and may only do so after applying *forum non conveniens* principles to exceptional cases where the respondent would not be unjustly deprived of a personal or juridical advantage available to them in the other forum.

The next strategic option to thwart forum shopping is the defensive declaratory action. This may be used where an action is commenced in two equally qualified jurisdictions. Using this strategy, a defendant applies for a declaration from a local court stating that it is not liable to the respondent plaintiff. This declaration will apply to the same action commenced concurrently in the other jurisdiction rendering the other action moot. Defensive declaratory actions are particularly useful

where a plaintiff sues in a jurisdiction that notoriously awards significantly higher damages and has little or no connection to the substance of the case.

Choice of Law: What law applies to the plaintiff's claim?

Choice of law is an essential consideration in product liability cases because it determines the applicable burden of proof, the test for liability and the quantum of damages. There are three competing theories that have been applied to the choice of law in tort cases – *lex fori*, *lex loci delicti* and proper law of the tort theory.

Following the Supreme Court's 1994 decision in *Tolofson v. Jensen*, Canadian courts adhere to the *lex loci delicti* theory whereby the law of the jurisdiction where the wrong occurred prevails. For product liability litigation, this means that the applicable law will be that of the jurisdiction where the plaintiff was injured and not that of where the product was manufactured or where the negligence occurred. This rule applies to substantive law only. The procedural law will be that of the jurisdiction in which the case is heard.

Enforcement of Foreign Judgments

When choosing the appropriate jurisdiction, parties must consider whether a judgment will be enforced in foreign jurisdictions. The Supreme Court of Canada established four principles governing inter-jurisdictional enforcement in *Moran v. Pyle National Ltd.* and later in *Morguard Investments Ltd. v. DeSavoye*. First, parties seeking to enforce foreign judgments must show that the ruling court acted through fair process. Second, fair process will not be an issue with inter-provincial judgments. Third, the parties must show that the ruling court's jurisdiction was founded on a real and substantial connection to the harm suffered. Last, for product liability cases, the manufacturer will have a real and substantial connection to the place of injury if it was reasonably foreseeable at the time of distribution that its product could be used in that jurisdiction through the ordinary course of commerce.

Ultimately, Canadian courts will enforce foreign judgments as a matter of international comity and will only refuse to do so in cases of fraud, conflict with public policy or conflict with section 7 of the *Canadian Charter of Rights and Freedoms*.

Parties must be careful to ensure that they will be able to enforce judgments outside of Canada if necessary. As a matter of practice, counsel suing a foreign party should research the law of its jurisdiction to determine whether it will be able to enforce any judgment rendered against it in the foreign jurisdiction.

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