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JURISDICTIONAL DEFENCES IN PERSONAL INJURY ACTIONS

Why should the Canadian jurisdiction rules matter to you if you own a resort in Punta Cana [or anywhere else in the world outside of Canada]?

By Arie Odinocki[1]

Introduction

Every year, millions of starved-for-the-sun Canadians flock to the thousands of hotels and resorts throughout the Caribbean region and Mexico in search of their one week in paradise. Frequent international travel is one of the pleasant aspects of globalization. According to the Caribbean Tourism Organization, the number of Canadian visitors has been steadily increasing since 1997, peaking in 2013 (the latest year for which statistics are available) at just over 3.1 million visitors. According to Statistics Canada, an additional 1.6 million Canadians have travelled to destinations in Mexico. Mexico, Cuba, Dominican Republic and Jamaica, in that order, are on the list of top 15 countries visited by Canadians. Dominican Republic has experienced the highest year-over-year growth rates in terms of Canadian visitors, with approximately 530,000 Canadians visiting that country in 2013 alone. It is worth noting that the Caribbean region (excluding Mexico) welcomed approximately 25 million visitors in 2013, which means that Canadian tourists accounted for roughly 13% of the total. Whereas this does not look like much on first glance, second only to the Americans, the Canadians are the largest group of tourists from a single country. Moreover, whereas the number of European tourists visiting the region has been steadily falling (by approximately 4% annually since 2008) the Canadians visit the region in ever increasing numbers (by proximately 2.8% annually). To put it in perspective – every year roughly 14%

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of all Canadians pack their bags and head south for a week – often to spend time in all inclusive resorts with easy access to alcohol in the sun. What could possibly go wrong?

It is not surprising that considering the number of tourists involved, some of them will become involved in accidents and will sustain injuries, ranging from trivial to very serious, up to and including death. What happens when a Canadian becomes involved in an accident at a Caribbean resort? Can the tourist commence a court action against the resort and its owners in his or her home province in Canada? If so, what law will apply to the determination of whether or not the resort is liable to its guests? Under what law and on what matrix will the damages in such cases be assessed?

This paper provides an overview of the jurisdictional defences available to the owners and operators of resorts and hotels outside of Canada to claims commenced by Canadians in their home jurisdictions.

Assumption and Exercise of Jurisdiction

Common sense and sound business practice dictate that the hotels and resorts operated in various Caribbean destinations be operated according to the standards set by the laws of the jurisdiction in which the properties are located. In other words, it makes sense that a resort in the Dominican Republic should be built and operated pursuant to the laws of the Dominican Republic. Whereas it is common for the operators of the Caribbean resorts to exceed the local standards with respect to areas such as food and premises safety, environmental protection or labour standards, nevertheless the operators of such facilities are obliged to conduct their affairs in accordance with the local laws. Since the hotels and resorts host guests from all over the world, it would be unreasonable to expect that they operate their affairs in compliance with the legal regimes of every country from where their guests originate. Occupier liability laws may be different in Canada, the United States, the 27 members of the European Union, Russia, Mexico, Brazil or Argentina - all of which are the source countries for large numbers of tourists vacationing in the Caribbean. Whereas the common thread with respect to the standard of care which the hotel owes the tourist is that

the premises should be maintained up to a reasonable standard, what that actually means is subject to a complex set of rules and customs, unique to each jurisdiction.

Consequently, it only makes sense that whereas the Dominican resorts are operated up to the standard established by the Dominican law, the Jamaican resorts are operated up to the standard established by the Jamaican law, etc. There is an expectation at law, therefore, that any tort claims arising from incidents which occur at the hotel should be resolved in accordance with the local law of the jurisdiction where the hotel is located. This principle, known as *lex loci delicti commissi* - meaning the law of the place where the tort was committed - is enshrined in the common law of Canada and the United States. Generally speaking, therefore, it is common ground that when accidents do happen, the owners and operators of the resort will have to establish that they met whatever standard of care is in place in the jurisdiction where the hotel or resort is operated.

A far more complex question, however, is where the potential plaintiff can seek compensation and commence his or her action. From the perspective of the owners and operators of the hotels and resorts, it is obviously preferable that all disputes be adjudicated in the jurisdiction where the hotel or resort is operated. In other words, not only should the disputes arising from injuries in Dominican resorts be adjudicated under the Dominican law, but they should be adjudicated before the courts of the Dominican Republic. After all, what other court is better positioned to interpret and apply the laws of a given jurisdiction other than the courts of that very jurisdiction?

Nevertheless, tourists who return to their home jurisdictions often seek to commence actions in those jurisdictions. This is done in part due to the convenience associated with bringing a legal proceeding in the tourist's home jurisdiction but also because the courts of the various jurisdictions in Canada and the United States are perceived as better fora for pursuing awards in personal injury lawsuits. It is not an overstatement to suggest that the area of personal injury litigation is extremely well-developed in North America by comparison to many other jurisdictions around the world, including the Caribbean or Mexico. In other words, a plaintiff in a personal action in Canada or the U.S. can reasonably expect a considerably higher damage award than he or she would have received had they brought the

same lawsuit in Dominican Republic, Jamaica or Mexico. This inevitably leads to lawsuits in Canada against foreign resort operators for injuries that occur in foreign locations.

Jurisdiction *Simpliciter* – Four Ways of Asserting Jurisdiction over a Foreign Defendant

A defendant who maintains that the court does not have jurisdiction over the subject of an action or over the defendant may make a motion under the rules of the various jurisdictions in Canada to have the action dismissed for want of jurisdiction. Jurisdiction will be assumed by a Canadian court where (a) the foreign defendant is physically present in the Canadian jurisdiction at the time of service of the claim; (b) where the defendant attorns either by agreement or by taking steps to defend the action or (c) where the Court finds that there is a "real and substantial connection" between the subject matter of the claim and a Canadian jurisdiction.

The test for the determination of whether a Canadian court has jurisdiction over the subject matter of an action or a particular defendant was set out in the Supreme Court of Canada decision of *Club Resorts Ltd. v. Van Breda* and *Club Resorts Ltd. v. Charron* ("*Van Breda*").[2] In two separate cases heard by the Supreme Court of Canada together, two individuals were injured while vacationing in Cuba. Morgan Van Breda suffered catastrophic injuries on a beach whereas Claude Charron died while scuba diving. Both actions were brought in Ontario against a number of parties, including the operators of the resorts involved, Club Resorts Ltd., a company incorporated in the Cayman Islands that managed the two hotels where the accidents occurred. Club Resorts sought to stay or dismiss the proceedings, arguing that the Ontario courts lacked jurisdiction and, in the alternative, that Cuban courts would be a more appropriate forum on the basis of the doctrine of *forum non conveniens* - a legal principle which holds that the jurisdiction of the location of the place where the accident took place is more convenient compared to the otherwise correct forum, because the dispute can be resolved there more fairly and efficiently.

The Supreme Court of Canada held that whether or not the Canadian court ought to assume jurisdiction of a dispute hinges on whether the plaintiff is able to establish a real and substantial connection between the subject matter of the litigation on the one hand and the

[2] Club Resorts Ltd. v. Van Breda and Club Resorts Ltd. v. Charron, [2012] 1 SCR 752.

defendant and the provincial courts in Canada where the action is commenced on the other. The Supreme Court of Canada endorsed a framework for the "real and substantial connection test" with reference to four presumptive connecting factors which, *prima facie*, entitle the Canadian court to assume jurisdiction over a dispute:

(a) The defendant is domiciled or resident in the Canadian province;

(b) The defendant carries on business in the Canadian province;

(c) The tort was committed in one of the Canadian provinces; and

(d) A contract connected with the dispute was made in a Canadian province.

Crucially, the list of presumptive connecting factors is not closed. The Supreme Court of Canada held that, over time, courts may identify new factors which also presumptively entitle a court to assume jurisdiction. In identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors. The considerations to be taken into account in this analysis include:

(a) Similarity of the connecting factor with the recognized presumptive connecting factors;

(b) Treatment of the connecting factor in the case law;

(c) Treatment of the connecting factor in statute law; and

(d) Treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity (reciprocity).

The burden of establishing one of the presumptive connecting factors is on the plaintiff and the court may not assume jurisdiction unless one of the connecting factors is established. Even where a recognised connecting factor appears to apply, the presumption of jurisdiction is rebuttable. The presumption can be rebutted by demonstrating, for example, that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum, or point only to a weak relationship between them.

Every jurisdictional challenge will, therefore, involve the careful analysis of the above-mentioned four presumptive connecting factors. In the vast majority of cases, the owners and operators of the Caribbean resorts are not domiciled or resident in Canada, and the torts complained of, generally speaking, are not committed in Canada. Therefore, the vast majority of jurisdictional challenges will deal with the questions of whether the owners or operators of such resorts carry on business in Canada or whether a contract connected with the dispute was made in a Canadian province.

Contract Connected with the Dispute

It is commonly alleged on behalf of the plaintiffs in personal injury actions arising from accidents in foreign resorts, that a contract connected with the dispute [in most cases, a personal injury law suit] was made in Canada. The determination of which contract should be considered can often be a fairly complicated exercise. For example, in *Van Breda*, it was held that the relevant contract had in fact been entered into in Ontario. In that case the plaintiff, Viktor Berg, was a professional squash player who went on a trip to Cuba with his wife, Morgan Van Breda. The arrangements for the hotel stay were made through an Ottawa-based travel agent. That agent's business involved arranging for racket sport professionals for hotels in exchange for compensation. The agent received a fee from each professional. Once the arrangements for Mr. Berg were finalized, the agent sent him a letter confirming the details of the agreement with the hotel: Mr. Berg was to provide two hours of tennis lessons each day in exchange for room and board and other services for two people at the hotel. On the first day of their stay, Ms. Van Breda was exercising on a metal structure on the beach when the structure collapsed and she suffered catastrophic injuries, becoming paraplegic. On the basis of the contractual relationship between Mr. Berg and the hotel through the Ottawa-based agent, the Supreme Court of Canada upheld the lower court's finding that Mr. Denis, as an agent, had the authority to represent the hotel and that a contract existed under which Mr. Berg was to provide services to the hotel. The benefit of this contract – the accommodation at the resort - was extended to Ms. Van Breda, who was injured while there in the context of Mr. Berg's performance of his contractual obligation. A contract was entered into in Ontario and the relationship was thus created in Ontario between Mr. Berg, the hotel and Ms. Van

Breda, who was held to have been brought within the scope of this relationship by the terms of this contract.

Other contracts which may be connected to the dispute may also be found to be the basis on which Canadian jurisdiction may be established. For example, where the owners and operators of a hotel travel to a Canadian jurisdiction to promote their business and sign room allotment contracts with Canadian tour operators in Canada, such contracts could be held to be made in Canada and, therefore, the basis of establishing jurisdiction in the context of a personal injury action arising from an injury abroad.

Ordinarily, however, the owners and operators of most resorts will not enter into direct negotiations with Canadian tour operators and much less will they sign any accommodation or other contracts in Canada. In most cases, the owners of the resorts will enter into contracts with wholesalers, often in Europe or the United States, who will then sell blocks of rooms to tour operators in Canada. In turn, the Canadian tour operators package those rooms with other services, such as air and bus travel, in order to sell them to Canadian tourists as all inclusive vacation packages. Thus two sets of contracts are in place: (a) a contract between the consumer and the tour operator, made in Canada – to which the owner of the hotel is not a privy; and (b) a contract between the owner of the hotel and a foreign rooms' wholesaler, made outside of Canada. In such cases, the Courts should accept an argument that no contract exists which was made in Canada and which had sufficient connection to the dispute.

Even where there may be a contract made in a Canadian province, the presumption of jurisdiction can be rebutted by showing that the contract has little or nothing to do with the subject matter of the litigation. The Ontario Court of Appeal considered this defence in the case of *Export Packers Co. v. SPI International Transportation*.[3] The plaintiff in that case, a dealer in food products, had purchased a shipment of pork in Québec and stored it on a temporary basis in a warehouse operated by a Québec company called EDN. The plaintiff then sold the pork to a Florida company and contracted with the defendant, SPI, to arrange

[3] Export Packers Co. v. SPI International Transportation [2012] OJ No. 3126.

for the transportation of the pork from EDN's warehouse to Florida. SPI, in turn, engaged an Ontario company to actually truck the cargo to Florida. Unfortunately, EDN mistakenly released the cargo to a thief, who absconded with it.

The plaintiff sued SPI in Ontario and SPI, in turn, brought third party proceedings against EDN, asserting that it negligently released the cargo to the fraudster without obtaining proper identification. The Court of Appeal affirmed the motion judge's dismissal of the claim against EDN on the basis of want of jurisdiction. It was argued that there were several contracts connected with the dispute in question which were made in Ontario. However, the Ontario Court of Appeal held that the contracts in question had no connection with EDN, the operator of the warehouse:

> The three contracts relied upon by the appellants relate to arrangements between the owner, the broker and the proposed carrier of the cargo. They have no connection to EDN other than they anticipate that the cargo would be picked up at EDN's warehouse in Quebec. The dispute in issue between SPI and EDN relates solely to the alleged negligence of EDN in releasing the cargo. The contracts relied upon do not address the issue of release of the cargo by EDN as storer. That dispute will be resolved according to the laws of Québec.

It is, therefore, a valid jurisdictional defence in Canada to establish that a contract entered into between the traveller on the one hand and the Canadian tour operator on the other has no connection to the owner or operator of the resort in a foreign destination, other than anticipating that the traveller would eventually stay at the hotel. There may be exceptions to this principle, such as where contractual arrangements exist between the tour operator and the hotel which clearly mandate the hotel to take over the tour operator’s defence. However, in many cases (particularly where no clear and unambiguous indemnity clauses exist) it can be argued, by analogy to the *Export Packers* case, that a contract made in Ontario is not "sufficiently connected" to the dispute to raise the presumption of real and substantial connection to a Canadian province.

Carrying On Business in Canada

Where the defendant can establish that there is no contract connected to the dispute involving the defendant that was entered into in Canada, the plaintiff's action may still

survive a jurisdictional challenge if he or she can demonstrate that the defendant (being the owner or operator of the hotel or resort) actually carries on business in a Canadian province where the lawsuit was commenced. In *Haufler v. Hotel Riu Palace Cabo San Lucas*,[4] the Ontario Superior Court of Justice undertook a detailed analysis of whether a foreign hotel defendant carries on business in a Canadian province following the test set out by the Supreme Court of Canada in *Van Breda*. Angela Haufler was injured while she was participating in an all-terrain vehicle excursion in Mexico. As a result, she sued the hotel where she was staying during her Mexican vacation. Ms. Haufler argued that the Ontario court should assume jurisdiction on the basis that the Mexican hotel carried on business in Ontario.

The hotel at issue, Hotel Riu Cabo San Lucas, was operated by a Spanish company headquartered in Palma de Mallorca, Spain. The owner of the hotel was a company incorporated and domiciled in Mexico.

Hotel Riu sold its rooms in very much the same way as many hotels operated throughout the Caribbean - it sold blocks of rooms to arm's length travel wholesalers who then packaged them with other services and sold them in the form of vacation packages. Hotel Riu did not receive any payment from its guests directly. Rather, it earned revenue by selling blocks of rooms to corporate entities. Hotel Riu did not carry any of its own advertising and did not promote itself directly to the Canadian public.

Justice Quigley of the Ontario Superior Court of Justice found that Hotel Riu did not carry on business in Ontario. In particular, he rejected the plaintiff's argument that travel wholesalers and travel agents were agents of Hotel Riu. Justice Quigley went so far as to find that the fact that the Spanish company which owned the Hotel Riu trademarks had a representative visit the Ontario market to promote it to wholesalers was insufficient to constitute carrying on business in Ontario. Some permanent presence by means of a clearly advertised and identifiable office, staffed by employees (as opposed to contractors free to work for others) would likely be required in order to establish that a hotel carries on business

[4] Haufler v. Hotel Riu Palace Cabo San Lucas, [2013] ONSC 6044.

in Canada. That level of presence is, generally, not at issue in disputes involving Caribbean resorts.

The plaintiffs sometimes argue that the owners of the hotels and resorts have what amounts to a "virtual presence in Ontario", focusing on the development of the internet sites through which travellers from across Canada may access and book the hotels, transportation or activities. Both the *Haufler* and *Van Breda* cases considered the "virtual presence" arguments in the travel business context and whether maintaining a website by a hotel, accessible from anywhere, can constitute carrying on business by a foreign defendant in a Canadian jurisdiction. The courts observed that the fact that a website relating to a hotel might be accessed from Ontario would not in and of itself suffice to establish that a hotel is carrying on business there. The courts emphasised that the notion of carrying on business requires actual, not only virtual, presence in the jurisdiction.

Nevertheless, it should be noted that these arguments remain potentially available to the plaintiffs as our courts have not conclusively rejected them. In both *Haufler* and *Van Breda* cases, the websites were developed subsequent to the incidents in question and were not in fact available at the time of the accidents. These cases, therefore, are not dispositive of this issue. In *Equustek Solutions Inc. v. Jack*[5], a case decided in British Columbia in June 2014, Google – an American company which was not a party to the action, appealed from an interlocutory injunction which had the effect of prohibiting it from including certain websites in the results delivered by its search engines. Google argued that the Canadian courts had no jurisdiction to order it to do anything, because Google did not carry on business in Canada. The Court found that Google indeed did not have resident employees, business offices or servers in Canada. However, its activities in gathering data through web crawling software, in distributing targeted advertising to users in Canada and in selling advertising to Canadian businesses were sufficient to uphold the chambers judge's finding that it does indeed do business in Canada. The court, therefore, held that it had *in personam* jurisdiction over Google. This case is obviously not dispositive of the issue in the context of hotel operators, but it certainly opens the door to an argument that by operating a website on which, for

[5] Equustek Solutions Inc. v. Jack, [2014] B.C.J. No. 1193.

example, targeted advertising is presented (meaning advertising aimed squarely at Canadians as opposed to others) the hotel opens itself up to a finding that it carries on business in Canada. This important issue will certainly be addressed in future litigation.

Preferable Forum - *Forum Non Conveniens*

Where a Canadian court finds that jurisdiction *simpliciter* is in fact established, it may still decline to exercise its jurisdiction on the ground that some other forum is in fact more appropriate for the resolution of the dispute between the parties. Judges in Canada retain broad discretion in determining whether there is clearly a more appropriate forum elsewhere for the determination of the dispute. The Supreme Court of Canada in *Van Breda* emphasised that the doctrine of *forum non conveniens* focused on the context of individual cases and therefore facts of each case must be carefully considered.

The Supreme Court of Canada in *Van Breda* held that purpose of the doctrine of *forum non conveniens* is "to ensure that both parties are treated fairly and that the process for resolving their litigation is sufficient". The factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context and might include the location of the parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation and on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments and the relative strength of the connections of the two parties to their local jurisdictions.

Our courts will refuse to exercise jurisdiction which they have in favour of an alternative forum only where the alternative forum clearly more appropriate, not where it is simply comparable. Proceeding elsewhere must be clearly fairer and more efficient. The Court in *Van Breda* stated:

> The use of the words 'clearly' and 'exceptionally' should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that

> is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation.

The Court decisions interpreting the *forum non conveniens* doctrine do not provide a clear test for what justifies a stay beyond the above general statement that a preferable forum must be clearly fairer and more efficient. In the recent cases that addressed this issue, the courts found that the appellants generally failed to meet the burden of demonstrating that the alternative fora were clearly more appropriate than Ontario. For example, in *Van Breda*, Cuba was held not to be a clearly more appropriate forum despite the fact that the accident happened on a Cuban beach at a hotel managed by a foreign company with the injury having been suffered in Cuba and where many of the defendant witnesses resided in Cuba. The court in *Van Breda* simply noted that the trial in Cuba would present "challenges" to the plaintiffs and that they would be at a disadvantage if forced to litigate there. Clearly that is true of any plaintiff in Canada and so it cannot possibly be the basis of a real test. In the companion action, *Charron*, the court stated that "considerations of fairness to the parties weigh heavily in the respondents' favour" and held, without any analysis, that "the inconvenience to the individual plaintiffs of transferring the litigation is greater than the inconvenience to the corporate defendant of not doing so". Again, this statement amounts simply to the rejection of the Cuban forum as a legitimate forum for resolving disputes but does not stand in place over a rational test for the determination of a convenience of a particular forum. Perhaps the conclusion to be drawn is that the *forum non conveniens* analysis performed by Canadian courts is highly contextual and discretionary. Whereas this approach fails to provide the litigants with any real framework within which they can assess whether or not their *forum non conveniens* arguments may succeed, nevertheless this is the state of the law in Canada at the moment. Unless a clearer test emerges, it would be safe for litigants to assume that where a jurisdiction simpliciter is found, it will be a rare case indeed where the court in Canada refuses to assume its jurisdiction on the ground that the Canadian province is a less convenient forum for dispute of a resolution than a foreign forum.

Conclusion

Personal injury litigation is big business in Canada. In October 2015, one of the personal injury firms in Toronto advertised heavily on the basis that it achieved a settlement on behalf of a brain injury victim in the amount of $21 million dollars – apparently the highest personal injury award in Canadian history. Seven figure settlements and judgments are the order of the day. Many resorts and hotels operating in the Caribbean and Mexico do not arrange for liability insurance in the amount sufficient to meet this kind of exposure.

Jurisdictional defences, therefore, particularly in large personal injury actions commenced in Canada and arising from injuries sustained abroad, are a viable form of defence which can often save the owners and operators of hotels and resorts outside of Canada from financially crippling (or at least very painful) damage awards. The determination of whether or not a Canadian court has a jurisdiction over the dispute will largely focus on whether the owners or operators of the hotel carry on business in Canada or whether they have entered into a contract in Canada which has some connection to the subject matter of the lawsuit at hand. Our courts will engage in a careful analysis of the corporate structure of the owners and operators of the hotels and the analysis of the contracts into which they had entered. Increasingly, the hotels' online presence can be expected to become a focus of jurisdictional analysis.

Since the insurance arrangements in place for many of the hotels outside of Canada do not provide coverage with limits sufficient to meet personal injury awards made in Canada, the owners and operators of the hotels face personal exposure unless jurisdictional defences can be established. It is, therefore, a prudent practice for such owners to consult Canadian counsel in advance of placing insurance coverage to determine whether its operations would give rise to exposure under the Canadian law. Where the business arrangements involving the hotel operator are such that would expose it to a finding that it is subject to Canadian jurisdiction, the hotel would be well-advised to reconsider their insurance arrangements. In the alternative, it may choose to restructure its affairs in such a manner as to avoid a finding that Canada is the appropriate forum for the resolution of claims arising from injuries occurring on its premises.