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COURT OF APPEAL FOR ONTARIO

WEILER, ROSENBERG and BLAIR JJ.A.

B E T W E E N :	)	
	)	
NIVEKHA MARKANDU, a minor by her Litigation Guardian, SAJENTHARAN MARKANDU, SAJENTHARAN MARKANDU, personally and GNANESWARY SAJENTHARAN	)	Hillel David for the appellants
Plaintiffs (Appellants)	)	
	)	Frank J. McLaughlin for the respondent Dr. Thierry Benaroch
- and -	)	
DR. THIERRY BENAROCH, DR. J. DOE # 1, DR. J. DOE # 2, NURSE J. DOE # 1, NURSE J. DOE # 2 and McGILL UNIVERSITY HEALTH CENTRE	)	Ira Parghi for the respondent McGill University Health Centre
Defendants (Respondents)	)	Heard: May 18, 2004

On appeal from the orders of Justice P. Ted Matlow of the Superior Court of Justice dated December 10, 2003.

ROSENBERG J.A.:

[1] This is an appeal from orders made by Matlow J. on motions by the respondents as defendants, Dr. Benaroch and the McGill University Health Centre, to stay the action brought by the appellants-plaintiffs. The respondents submitted that the Ontario courts had no jurisdiction to try the action or in the alternative that Ontario is not a convenient forum. The motions judge granted the motions and stayed the action. Regrettably, his reasons for doing so are unhelpful. He wrote the following endorsement:

> Staying this action for the reasons set out in the moving party's factum.

[2] I have nevertheless concluded that the motions were properly granted and I would therefore dismiss the appeal. In my view, Ontario courts do not have jurisdiction over this action and in any event, the respondents have demonstrated that Ontario is not a convenient forum.

FACTS

[3] The appellants emigrated from Sri Lanka to Montreal in 1992. In December 1999, the respondent Dr. Benaroch performed surgery on the minor appellant Nivekha to correct a condition resulting from bilateral Blount's disease. The surgery was performed at the Montreal Children's Hospital, a division of the respondent, McGill University Health Centre. Following the surgery, Nivekha's legs were placed in casts. It would seem that the surgery was successful. However, the appellants allege that after Nivekha was discharged from hospital, she developed a high fever and severe swelling in her legs. Dr. Benaroch saw Nivekha about ten days later and prescribed some medication. Several days later, the appellants returned to the hospital and this time a different physician saw Nivekha. This physician diagnosed Nivekha as suffering from compartment syndrome in the left lower leg. Nivekha was readmitted to hospital where a surgeon other than Dr. Benaroch performed further surgery. Several days later again, the appellant underwent further surgery, performed by a third physician. The appellants allege that Nivekha has been left with severe and permanent disabilities and deformities in her left leg. From January to March 2000, Nivekha was monitored by Dr. Benaroch. She also received occupational and physical therapy in Montreal.

[4] In April 2000, the appellants moved to Toronto so that the children could receive education in English. Nivekha has been treated by several physicians in Toronto including her family doctor and Dr. Miah Hahn, a pediatric orthopaedic surgeon. She also received some treatment at the Hospital for Sick Children, the Centenary Health Centre and the Back 2 Feet Clinic in Toronto. She receives home care treatment, and her parents provide her with extensive therapy every day. Nivekha is now seven years of age.

[5] The appellants started their action in Ontario on December 11, 2002. They commenced a further action in the Province of Québec the following day. The appellants state that the Québec action was commenced out of an abundance of caution and to protect their rights.

[6] The male plaintiff, Nivekha's father, operates a part-time home renovation business and also works for another company. He works seven days a week, fourteen hours a day. His wife presently receives unemployment insurance. The gross family income is approximately $35,600 per year plus unemployment benefits. The family has two other children, aged three and five years respectively. They have no relatives in Montreal. They allege that it would be a considerable hardship for them to attend Montreal for trial.

[7] The appellants take the view that the major issue at trial will be damages and that most of the witnesses on this issue, the various physicians and physiotherapists, reside in Ontario. Nivekha's parents will also be witnesses at the trial.

[8] The respondents submit that liability will be the principal issue at trial. Some twenty physicians were involved in the treatment of the plaintiff. One of those physicians, a radiologist, has moved to Toronto. Five others have moved to the United States. The others continue to reside in Québec, with the exception of one whose location is unknown. The fourteen nurses involved in Nivekha's care continue to reside in Québec.

[9] The parties concede that the law of Québec will apply. The appellants allege that the law of negligence and medical malpractice of Québec is similar to that of Ontario. It may be, however, that if the case is tried in Ontario, expert evidence on the law of Québec will have to be called.

ANALYSIS

Jurisdiction

[10] Since the extra-provincial defendants (respondents) are not present in Ontario and have not consented to Ontario asserting jurisdiction, the courts of Ontario have jurisdiction to try this action only if the real and substantial connection test is met. If this test is met, the discretionary doctrine of *forum non conveniens* must then be considered.

[11] In *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.) and the companion cases,[1] Sharpe J.A., speaking for the court, explained the scope and application of the real and substantial connection test. The test is not susceptible of a fixed formula but rather

[1] *Sinclair v. Cracker Barrel Old Country Store Inc.* (2002), 60 O.R. (3d) 76 (C.A.); *Lemmex v. Sunflight Holidays Inc.* (2002), 60 O.R. (3d) 54 (C.A.); *Leufkens v. Alba Tours International Inc.* (2002), 60 O.R. (3d) 84 (C.A.); and *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68 (C.A.).

requires consideration and weighing of a number of factors. In all, there are eight factors to be considered. However, the question of whether this province's courts should assume jurisdiction does not depend simply on adding up the number of factors that favour one party over the other. As Sharpe J.A. said at para. 75, "A considerable measure of judgment is required in assessing whether the real and substantial connection test has been met on the facts of a given case. Flexibility is therefore important." I will consider the application of these factors in this case.

(1) The connection between the forum and the plaintiff's claim

[12] In my view, this factor weighs against the appellants. This action concerns allegations of negligence that took place in Québec in the treatment of a Québec resident. The initial follow-up treatment also occurred in Québec. At this stage, one has to assume that liability and damages are both in issue. The appellants and the respondents will all have to depend upon Québec physicians and nurses with respect to liability and damages.

[13] As mentioned, the appellants submit that the main issue at trial will be damages. They further submit that virtually all the witnesses with evidence to give on the issue of damages are from Ontario. I do not accept this proposition. It seems to me that the physicians and nurses that dealt with Nivekha while she was still in Québec will also have some evidence to give on the issue of damages. While Nivekha has had follow-up treatment in Ontario, that treatment has been sporadic. At this time, most of the treatment is being provided by her parents, not by professionals. There is little beyond residence in Ontario that connects this claim to Ontario, and as Sharpe J.A. said in *Muscutt* at para. 79, "[m]ere residence in the jurisdiction does not constitute a sufficient basis for assuming jurisdiction."

[14] The appellants rely heavily upon *Oakley v. Barry* (1998), 158 D.L.R. (4th) 679 (N.S.C.A.), leave to appeal to the Supreme Court of Canada dismissed [1998] S.C.C.A. No. 282, to which Sharpe J.A. referred with approval in *Muscutt.* In *Oakley*, the plaintiff claimed that while living in New Brunswick she was misdiagnosed as having hepatitis "B". She was treated for three years in New Brunswick before moving to Nova Scotia. It was only when she was seen by physicians in Nova Scotia that she learned of the misdiagnosis. She then received extensive treatment from physicians in Nova Scotia. She was very ill, impecunious and unable to travel. She would not be able to prosecute a claim in New Brunswick. At p. 691, Pugsley J.A. summarized the factors that he found showed a real and substantial connection to Nova Scotia:

> I would apply *Morguard* [*Morguard Investments Ltd. v. De Savoye,* [1990] 3 S.C.R. 1077] in a flexible manner and conclude that in this case, *there is both a real and substantial connection between the subject matter of the action and the*

> *Province of Nova Scotia, as well as a real and substantial connection between the damages caused by the alleged negligence of the appellant physicians, and the defendant hospital, and the Province of Nova Scotia*.
>
> The respondent was not aware that her treatment by the appellant physicians was allegedly negligent until she was examined in Nova Scotia by Nova Scotia physicians. This province is responsible for providing care to the respondent. Her recovery proceeds in this province under the care of Nova Scotia physicians, aided by provincial medical centres and staff. The province has a significant financial interest in the well-being of the respondent. The respondent is, as well, financially disadvantaged and dependant upon the province for assistance to meet her day-to-day living requirements. The damages allegedly suffered are on-going, and since the fall of 1990, have been sited in this province.
>
> The respondent has deposed that she has suffered "problems, trauma and personal despair" as a result of the alleged misdiagnosis of the appellant physicians and the defendant hospital. While she does not particularize the cost directly attributable to the alleged misdiagnosis, it is a fair inference, that if her allegations are subsequently accepted by a Court, a portion of the cost of her monthly expenses to date, presently borne by this province, and perhaps in the future, may be recoverable from the appellant physicians and for the defendant hospital. [Emphasis added.]

[15] There is some similarity between the case before this court and that of *Oakley*. In both cases, the alleged negligent act occurred in one province but the suffering is on-going in the new province, and it is the new province that is responsible for providing care. Further, in both cases it would be difficult for the plaintiffs to pursue the claim in the original province. Finally, in *Oakley*, the plaintiff was dependent upon her province of residence for welfare and other assistance and Nivekha is, of course, dependent upon her parents who reside in Ontario.

[16] There are, however, important differences. In *Oakley* the allegedly negligent diagnosis occurred in New Brunswick and the plaintiff received care there based on the erroneous diagnosis for three years until 1989 when she moved to Nova Scotia. She continued to live with the incorrect diagnosis until 1993 when Nova Scotia physicians made the correct diagnosis. She frequently made use of Nova Scotia hospitals, and her witnesses respecting the impact of the misdiagnosis all lived in Nova Scotia.

[17] In the appellants' case there is little beyond mere residence to connect Ontario with the claim. The original allegedly negligent act occurred in Québec. There is a dispute as to whether the "negligence" was detected in Ontario or Québec. However, the harm was detected in Québec and the subsequent operations to try to deal with the complications from the surgery were in Québec. As I have said, Nivekha has only infrequent contact with medical professionals and institutions in Ontario concerning treatment for the disability in her left leg. There is some suggestion that more surgery may be required, but my reading of the record indicates that any further surgery is well into the future and will not likely have occurred before the trial. In short, this is not a case where the infant appellant is receiving extensive medical attention in this province.

[18] The appellants also rely upon the result in *Muscutt* itself. In *Muscutt*, the plaintiff was injured when a motor vehicle in which he was a passenger was struck by a motor vehicle owned by one defendant and driven by another. The accident occurred in Alberta, where the plaintiff had just recently moved to take up new employment. After being released from hospital in Alberta, the plaintiff returned to Ontario to live with his mother because of the severity of his injuries. He required extensive ongoing medical care in Ontario. Following the accident, one of the defendants also moved to Ontario. At para. 81, Sharpe J.A. found there was a significant connection with Ontario because the plaintiff "required extensive medical attention in Ontario", and his claim was "*inter alia*, for pain and suffering in Ontario".

[19] The appellants in this case allege that Nivekha has been left with a permanent disability as a result of the respondents' negligence, and that she endured pain and suffering. It is a fair inference that the pain and suffering continued in Ontario. The difference between this case and *Muscutt* is that in this case, the extensive medical attention in the aftermath of the original operation was in Québec. In *Muscutt* at para. 79, in discussing the application of the factor concerning the connection between the forum and the plaintiff's claim, Sharpe J.A. referred to the following passages from a case comment by V. Black:

> Permitting a plaintiff to assume a new residence and sue a defendant there in respect of events that occurred elsewhere seems to be harsh to defendants, and this is particularly so when those events comprise a completed tort.

> Even if the connection is significant, however, the case for assuming jurisdiction is proportional to the degree of damage sustained within the jurisdiction. *It is difficult to justify assuming jurisdiction against an out-of-province defendant unless the plaintiff has suffered significant damage within the jurisdiction.* [Emphasis added.]

The record in this case does not support the suggestion that Nivekha suffered significant damage within Ontario.

[20] In my view, this first factor does not favour the Ontario courts assuming jurisdiction.

(2) The connection between the forum and the defendant

[21] There is no connection between Ontario and the respondents, and the appellants concede that this factor favours the respondents' position.

(3) Unfairness to the defendant in assuming jurisdiction

[22] An underlying theme in applying the real and substantial connection test is order and fairness. Thus, as Sharpe J.A. explained at para. 86 of *Muscutt*:

> [A]cts or conduct that are insufficient to render the defendant subject to the jurisdiction may still have a bearing on the fairness of assumed jurisdiction. Some activities, by their very nature, involve a sufficient risk of harm to extra-provincial parties that any unfairness in assuming jurisdiction is mitigated or eliminated.

In *Muscutt,* the court found that assumption of jurisdiction by the Ontario courts would not result in any significant unfairness to the defendants; the defendants had been engaged in an activity that involved an inherent risk of harm to extra-provincial parties. As well, as a result of mandatory motor vehicle insurance requirements, the defendants' insurers would bear the burden of the defence since the insurers were required to defend claims brought in any province. Sharpe J.A. looked at these arrangements as reflecting "the reasonable expectations of the motoring public" (para. 87).

[23] The appellants submit that here as well, the burden of defending this suit would likely fall on an insurer. They point out that Dr. Benaroch has acknowledged that he is a

member of the Canadian Medical Protective Association. There is no evidence that the Hospital carries insurance or what that insurance might be.

[24] Unlike the activity in *Muscutt*, which involved a significant risk of harm to extra-provincial parties, in this case the respondents were providing services to a Québec resident in a Québec hospital. This was not emergency surgery. It was not an activity fraught with risk to extra-provincial parties. A trial in Ontario will involve a disruption to the practice of the various physicians, nurses and other hospital employees that may be called to testify. That disruption will not simply be to the lives of the witnesses but to their patients as well.

[25] This factor is against a finding of a real and substantial connection.

(4) Unfairness to the plaintiff in not assuming jurisdiction

[26] There would be some unfairness to the appellants if Ontario were not to assume jurisdiction. The appellants are persons of very modest means with no family in Québec. It would be difficult for them to prosecute a prolonged trial in Québec as well as care for their three children. Further, Nivekha's father is going to suffer some financial difficulty whether the trial is in Ontario or Québec if he has to take time off work for any long period of time; however, he could more easily make up lost work time if the trial were to be held in Ontario by, for example, working during evenings and on weekends. The appellants also submit that a trial in Québec would be very costly because of the number of Ontario witnesses that would have to attend. That is no doubt true; however, if the action were to be tried in Ontario, the appellants would still likely have to shoulder the costs of bringing Québec residents to Ontario to make out their case on liability.

[27] The appellants submit that a trial in Québec will be very disruptive to Nivekha because she attends school in Ontario and receives home therapy from her parents. In my view, this claim is exaggerated. I do not think that Nivekha's parents would take her out of school for any long period of time, whether the trial was held in Québec or Ontario. I do not think that Nivekha will have to attend much of the trial. It seems unlikely that both her parents would go to Québec to attend throughout the trial. This situation is not like *Oakley*, where the plaintiff was unable to travel to the other jurisdiction for trial.

[28] On balance, however, this factor favours the assumption of jurisdiction by Ontario.

(5) The involvement of other parties to the suit

[29] At this time, there is no involvement of other parties that could create the risk of inconsistent results, although it is true that the appellants have not yet identified the other physicians and nurses who might be parties to this action. At this time, this factor is neutral on the question of jurisdiction.

(6) The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis

[30] It seems to me that *Oakley* and *Muscutt* demonstrate that Ontario would recognize an extra-provincial judgment rendered on the same jurisdictional basis as in this case.

(7) Whether the case is interprovincial or international in nature

[31] The assumption of jurisdiction is more easily justified in interprovincial cases than international cases and thus this factor favours Ontario assuming jurisdiction.

(8) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere

[32] As this is an inter-provincial issue, this factor is not applicable.

Conclusion on jurisdiction

[33] A weighing of the various factors does not show a real and substantial connection between this action and Ontario. Most of the factors are either neutral or favour the Ontario courts not assuming jurisdiction. The factors concerning the connection between the forum and the claim, the connection between the forum and the respondents and unfairness to the respondents demonstrate that there is not a real and substantial connection.

[34] In my view, Ontario courts do not have jurisdiction over this claim.

Convenient forum

[35] In light of my conclusion on jurisdiction, it is not strictly necessary to consider the question of convenient forum. In any event, I am satisfied that the respondents have met the test of clearly establishing that Québec is the more appropriate forum. There is considerable overlap between the real and substantial connection test and the convenient forum test. The factors to be considered in determining the convenient forum, in a contract case, were summarized by MacPherson J.A. in *Eastern Power Ltd. v. Azienda*

Comunale Energia & Ambiente (1999), 178 D.L.R. (4th) 409 (Ont. C.A.), (application for leave to appeal to the Supreme Court of Canada dismissed [1999] S.C.C.A. No. 542), at paras. 19 and 20 as follows:

(a) the location where the contract in dispute was signed;

(b) the applicable law of the contract;

(c) the location in which the majority of witnesses reside;

(d) the location of key witnesses;

(e) the location where the bulk of the evidence will come from;

(f) the jurisdiction in which the factual matters arose;

(g) the residence of place of business of the parties; and

(h) loss of juridical advantage.

[36] An adoption and application of these factors to this negligence action demonstrates that Québec is clearly the more convenient forum. The surgery and treatment alleged to have caused the injuries to Nivekha occurred in Québec. The action will be tried in accordance with Québec law. There are witnesses from both Québec and Ontario. Many of the key witnesses on liability and damages are residents of Québec. Nivekha's parents, Dr. Hahn and some of the damages witnesses will no doubt be key witnesses and they reside in Ontario. However, it seems to me that the bulk of the evidence will come from Québec. This is where the critical medical records are located. The factual matters arose in Québec. The appellants do not contend that they would lose any juridical advantage if the case were to be tried in Québec. Thus, the factors either favour Québec as the place of trial or are neutral.

DISPOSITION

[37] Accordingly, I would dismiss the appeal. The respondent Dr. Benaroch is entitled to his costs fixed at $6,000 inclusive of disbursements and GST. The respondent Hospital is entitled to its costs fixed at $3,000 inclusive of disbursements and GST.

Signed: "M. Rosenberg J.A."
"I agree K.M. Weiler J.A."
"I agree R.A. Blair J.A.

Released: "MR" June 21, 2004