DATE: 20020529
DOCKET: C35934

COURT OF APPEAL FOR ONTARIO

ROSENBERG, FELDMAN and SHARPE JJ.A.

B E T W E E N :	)	
	)	
CHRIS MUSCUTT and DAISY JOHNSTON	)	Malcolm N. Ruby for the appellants
	)	Timothy Robert Simpson and John Paul Ducharme-Gullins
Plaintiffs (Respondents)	)	
- and -	)	Leonard P. Collier for the appellants
	)	Andrew Courcelles and Guardian Ambulance
DANIEL ANDREW COURCELLES, TIMOTHY ROBERT SIMPSON, JOHN PAUL DUCHARME-GULLINS and GUARDIAN AMBULANCE	)	Stephen R. Schenke and Julie Lee for the respondents
	)	Michel Y. Hélie for the intervener Attorney General of Ontario
Defendants (Appellants)	)	**Heard:** February 7, 2002

On appeal from the orders of Justice Peter B. Hockin dated January 30, 2001 and June 20, 2001, reasons reported at (2001), 5 C.P.C. (5th) 353 (S.C.J.).

SHARPE J.A.:

[1] This appeal, argued together with four other appeals,[1] involves the important issue whether the Ontario courts should assume jurisdiction over out-of-province defendants in claims for damage sustained in Ontario as a result of a tort committed elsewhere.

[2] The fact situation common to these appeals is as follows. An Ontario resident suffers serious personal injury in another province or in another country. The injured party returns home to Ontario, endures pain and suffering, receives medical treatment,

1 *Sinclair v. Cracker Barrel Old Country Store Inc*. (C35699); *Leufkens v. Alba Tours International Inc.* (C36006); *Lemmex v. Sunflight Holidays Inc. et al.* (C37455); *Gajraj v. DeBernardo* (C36992)

and suffers loss of income and amenities of life, all as a result of the injury sustained outside the province. The question is whether the courts of Ontario should entertain the injured party's suit against the out-of-province defendants who are alleged to be liable in tort for damages.

RELEVANT LEGISLATION

[3] The following are the relevant *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194:

> 17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,
>
> …
>
> (h) *Damage sustained in Ontario* – in respect of damage sustained in Ontario arising from a tort, breach of contract, breach of fiduciary duty or breach of confidence, wherever committed.
>
> …
>
> 17.06 (1) A party who has been served with an originating process outside Ontario may move, before delivering a defence, notice of intent to defend or notice of appearance,
>
> (a) for an order setting aside the service and any order that authorized the service; or
> (b) for an order staying the proceeding.
>
> (2) The court may make an order under subrule (1) or such other order as is just where it is satisfied that,
>
> (a) service outside Ontario is not authorized by these rules;
> (b) an order granting leave to serve outside Ontario should be set aside; or
> (c) Ontario is not a convenient forum for the hearing of the proceeding.
>
> (3) Where on a motion under subrule (1) the court concludes that service outside Ontario is not authorized by these rules, but the case is one in which it would have been appropriate to grant leave to serve outside Ontario under rule 17.03, the court may make an order validating the service.

> (4) The making of a motion under subrule (1) is not in itself a submission to the jurisdiction of the court over the moving party.

BACKGROUND

[4] On November 27, 1999, the plaintiff, Chris Muscutt, was a passenger in a motor vehicle that was involved in an accident in Cochrane, Alberta. The vehicle was owned by the defendant Simpson and was being driven by the defendant Ducharme-Gullins. The vehicle was struck by an ambulance driven by the defendant Courcelles and owned by the defendant Guardian Ambulance. Muscutt suffered a serious spinal process fracture as a result of the accident.

[5] Three weeks prior to the accident, Muscutt had moved to Alberta from London, Ontario. He had gone to Alberta to work on a contract for his Ontario-based employer. While in Alberta, he accepted his employer's offer to work at a new Alberta office and would have moved to Alberta to take that job if not for the accident. However, when he was released from a Calgary hospital soon after the accident, he returned to London, Ontario to live with his mother. He has required extensive on-going medical care in Ontario. At the time of the accident, all of the defendants were resident in Alberta. Following the accident, the defendant Ducharme-Gullins moved to Ontario.

[6] Muscutt brought this action in Ontario, claiming damages for pain and suffering, loss of income and loss of business opportunity. His statement of claim was served on the defendants in Alberta without leave under Rule 17.02(h), which provides that an originating process may be served outside Ontario where there is a claim in respect of damage sustained in Ontario arising from a tort.

[7] The defendants Simpson and Durcharme-Gullins moved pursuant to Rule 17.06 and s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 to set aside service out of the jurisdiction and to stay the action. They argued that the action should be stayed for want of jurisdiction, since the plaintiff's expenses, loss of income and pain and suffering in Ontario did not amount to a "real and substantial connection" with Ontario. They also argued that the Ontario Superior Court should decline jurisdiction on the ground that Ontario is not the convenient forum for the action.

[8] After providing a thorough review of the authorities, the motions court judge dismissed the motion. He found that for Ontario to assume jurisdiction, there must be a real and substantial connection between the forum and "the transaction or subject matter which gives rise to the action or the parties". The motions court judge noted that "it is important to recognize the interest a state has in injuries suffered by persons within its territory" and that a modern approach to jurisdiction within Canada must recognize the mobility of citizens. Quoting from Dickson J.'s judgment in *Moran v. Pyle National*

(Canada) Ltd., [1975] 1 S.C.R. 393 at 409, the motions court judge stated that "the court must recognize that "the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered"." The motions court judge found that since Muscutt was a passenger, the issue at trial would be damages rather than liability. He also found that the plaintiff's medical evidence would come almost entirely from medical experts in London, Ontario. He dismissed the defendants' motion, holding that the real and substantial connection test for jurisdiction had been satisfied and that Ontario was the most appropriate forum.

[9] Part way through the proceedings, the moving parties gave notice of their intention to challenge the constitutional validity of Rule 17.02(h). They argued that Rule 17.02(h) was *ultra vires* the province of Ontario, since the Rule has extra-territorial effect. In a subsequent endorsement, the motions court judge dismissed the motion. He noted that the Supreme Court of Canada's decisions in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 and *Hunt v. T&N plc.*, [1993] 4 S.C.R. 289 mandate constitutional requirements of a "real and substantial connection" and respect for the principles of "order and fairness". He held that these requirements were met. In his view, Rule 17.02 is procedural and "does not by itself confer jurisdiction". If there is an issue as to jurisdiction, Rule 17.06 explicitly provides for a review of the issue, including an assessment of the applicability of any constitutional limits on jurisdiction.

ISSUES

[10] This appeal raises three issues:

(1) Is Rule 17.02(h) *ultra vires* the province?

(2) Did the motions court judge err in finding that the Ontario Superior Court could assume jurisdiction against the out-of-province defendants?

(3) Did the motions court judge err in refusing to exercise his discretion to decline jurisdiction on the ground that Ontario is not the *forum conveniens*?

ANALYSIS

[11] It is important to place the issues raised by this appeal in their proper legal context.

[12] The jurisdictional issues that arise on this appeal emerge from a rapidly evolving area of law. Until the early 1990s, this area was governed by a set of rigid common law rules developed in England in the nineteenth century. These rules, discussed below,were shaped by the sovereignty concerns of a dominant nineteenth century world power anxious to safeguard its territorial sovereignty and jealous of any attempt by foreign states to intrude.

[13] Towards the end of the twentieth century, it became increasingly apparent that these rules were out of keeping with the reality of modern interprovincial and

international commerce and the frequent and rapid movement of people, goods and services across borders. The rules were especially ill-suited for resolving issues of jurisdiction, enforcement and choice of law between the interdependent sister provinces of Canada.

[14] In four seminal decisions between 1990 and 1994, the Supreme Court of Canada radically changed the entire area of law. The decisions recognized that a new approach was necessary for a modern federal state with integrated national markets and a justice system that featured closely-shared values, a common appointment process for judges and a single final court of appeal for all courts.

[15] *Morguard* and *Hunt* rewrote the law of jurisdiction and enforcement. For the first time, jurisdiction and enforcement were recognized as being governed by common values. The Supreme Court held that the principles of "order and fairness" require limits on the reach of provincial jurisdiction against out-of-province defendants and that jurisdiction can only be asserted against an out-of-province defendant on the basis of a "real and substantial connection". However, the Court also held that the courts of a province must give "full faith and credit" to the judgments of the courts of a sister province where the real and substantial connection test is satisfied..

[16] In *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022, the Supreme Court of Canada dramatically altered choice of law in tort cases. The Court overruled the common law rule that gave the law of the forum prominence and introduced the rule that tort cases should be governed by the law of the place where the tort was committed.

[17] In *Amchem Products Inc. v. British Columbia (Workers' Compensation Board),* [1993] 1 S.C.R. 897, the Supreme Court of Canada elaborated the doctrine of *forum non conveniens*, the discretionary power of the courts to decline to exercise jurisdiction where the case is more appropriately dealt with in another jurisdiction.

[18] I will return to the import of these cases below. Before doing so, it is helpful to consider the following: (a) the development of assumed jurisdiction, which allows plaintiffs to serve out-of-province defendants with claims for damage sustained in Ontario; (b) the evolution of the law relating to recognition and enforcement; (c) the relationship between assumed jurisdiction and recognition and enforcement; and (d) the distinction between assumed jurisdiction and *forum non conveniens*.

(a) The development of assumed jurisdiction

[19] There are three ways in which jurisdiction may be asserted against an out-of-province defendant: (1) presence-based jurisdiction; (2) consent-based jurisdiction; and (3) assumed jurisdiction. Presence-based jurisdiction permits jurisdiction over an extra-provincial defendant who is physically present within the territory of the court. Consent-

based jurisdiction permits jurisdiction over an extra-provincial defendant who consents, whether by voluntary submission, attornment by appearance and defence, or prior agreement to submit disputes to the jurisdiction of the domestic court. Both bases of jurisdiction also provide bases for the recognition and enforcement of extra-provincial judgments.

[20] This appeal raises the issue of assumed jurisdiction. Assumed jurisdiction is initiated by service of the court's process out of the jurisdiction pursuant to Rule 17.02. Unlike presence-based jurisdiction and consent-based jurisdiction, prior to *Morguard* and *Hunt*, assumed jurisdiction did not provide a basis for recognition and enforcement.

[21] Service of process out of the jurisdiction (service *ex juris*) was originally introduced by statute in mid-nineteenth century England and was gradually but cautiously introduced in Canada by rules of court. The traditional approach was concerned with a state's interference with the territorial sovereignty of another state. See *e.g. Hewitson and Milner v. Fabre* (1888), 21 Q.B.D. 6 at 8 and *Vaudrey et al. v. Nathan*, [1928] W.N. 154 at 155 (C.A.).

[22] Concern over territorial sovereignty and foreign sensibilities was reflected in the text and interpretation of service *ex juris* rules. Until 1975 in Ontario, the plaintiff was required to obtain leave of the court by *ex parte* motion before serving process outside the jurisdiction. Further, an established body of case law mandated a cautious approach that narrowly interpreted the rules and resolved any doubt in favour of the foreign defendant: see *Jenner v. Sun Oil Co. Ltd*., [1952] O.R. 240 at 246 (H.C.J.). In tort cases, judicial interpretation favoured a strict "place of acting" theory that forced domestic plaintiffs to sue foreign tortfeasors elsewhere: see *e.g*. *Abbott-Smith v. Governors of University of Toronto* (1964), 45 D.L.R. (2d) 672 (N.S. S.C.).

[23] Courts also had an overriding discretion to refuse leave even where the plaintiff satisfied the black letter of the rules: *The Hagen,* [1908] P. 189. In addition, courts had a discretion to decline jurisdiction on the basis of *forum non conveniens*, which applies where jurisdiction is inconvenient in light of all of the circumstances. This traditional approach to service out of the jurisdiction was protective of foreign defendants and made it relatively difficult for domestic plaintiffs to sue foreign defendants in domestic courts.

[24] However, by the mid-1970s, this approach came to be perceived as out of keeping with modern patterns of commerce, travel and trade and with modern values of comity between cooperating interdependent states. In *Jannock Corp. Ltd. v. R.T. Tamblyn & Partners Ltd. et al*. (1975), 8 O.R. (2d) 622 at 632 (C.A.), leave to appeal to S.C.C. dismissed, *ibid*. 622n, this court held that it was "quite unrealistic to treat as a foreigner one who lives in a Province of this country and does business in his own and other Provinces". Concern for the rights of domestic plaintiffs who sought justice in the courts of their home province began to prevail over concern for the sovereignty of other states.

[25] The first significant step in judicial law reform came in *Moran v. Pyle, supra*, a product liability case. The Supreme Court of Canada transformed the law by providing a modern liberal interpretation that focused on fairness to plaintiffs and defendants. At pp. 408-9, the Court held:

> Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules. The place of acting and the place of harm theories are too arbitrary and inflexible to be recognized in contemporary jurisprudence. … [It has been suggested that] it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties. Applying this test to a case of careless manufacture, the following rule can be formulated: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant. This rule recognizes the important interest a state has in injuries suffered by persons within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered. By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce.

[26] In 1975, the rules governing service out of the jurisdiction were amended and many of the traditional constraints were removed. In *Singh v. Howden Petroleum Ltd*. (1979), 24 O.R. (2d) 769 (C.A.), this court reviewed the nature, purpose and effect of these changes. Arnup J.A. held that as a result of the changes, if the case fell within an

enumerated category, plaintiffs were no longer required to seek leave of the court before serving an out-of-province defendant. A subsequent change (now Rule 17.03) allowed plaintiffs to obtain leave to serve an out-of-province defendant in cases not specifically mentioned in the rule. In other provinces, the changes were even more dramatic. Nova Scotia and Prince Edward Island allow a plaintiff to serve an out-of-province defendant in any case anywhere in Canada or the United States.

[27] Rule 17.02(h) was enacted in 1975. As mentioned above, this Rule allows for service out of the jurisdiction in respect of a claim for damage sustained in Ontario arising from a tort committed elsewhere. This "damage sustained" rule represented a legislative response to the type of problem confronted by the Supreme Court of Canada in *Moran v. Pyle*.

[28] Courts have given the "damage sustained" rule a generous and liberal interpretation. The rule has been applied to a plaintiff who undergoes medical treatment and endures pain and suffering in Ontario as a result of a tort committed elsewhere. In *Vile v. Von Wendt* (1979), 26 O.R. (2d) 513 at 517 (Div. Ct.), the court held that the rule was intended "to enable the people of Ontario to use their own Courts more easily" and to overcome decisions under the old rule, which had required Ontario residents to pursue foreign tortfeasors elsewhere. In *Poirier v. Williston* (1980), 31 O.R. (2d) 320 (C.A.), this court affirmed the Divisional Court's decision ((1980), 29 O.R (2d) 303 at 304), that, subject to *forum non conveniens*, "it was quite right, proper, and just" for the injured party to bring the action in Ontario.

[29] As will be explained below, the "damage sustained" rule is now subject to the principles articulated in *Morguard* regarding the need for a real and substantial connection and the need for order, fairness and jurisdictional restraint.

(b) The law relating to recognition and enforcement of extra-provincial judgments

[30] Initially, the reforms that expanded the rules governing service out of the jurisdiction had no immediate impact on the recognition and enforcement of extra-provincial judgments. Despite courts' willingness to assume jurisdiction against extra-provincial defendants, courts refused to recognize and enforce extra-provincial judgments against domestic defendants rendered on a similar basis. Instead, courts applied the traditional nineteenth century common law rules governing jurisdiction for recognition and enforcement purposes. An extra-provincial judgment was recognized and enforced only if the defendant was physically present within the rendering jurisdiction when the action was commenced, or if the defendant had consented to the jurisdiction. Courts applied this approach even to judgments by courts of sister provinces. This approach is also reflected in the *Reciprocal Enforcement of Judgments Act*, R.S.O. 1990, c. R.5.

[31] In *Morguard*, La Forest J. identified the need for fundamental change. La Forest J. held that the traditional preoccupation with the notion of sovereignty and the desire to protect nationals from unfair treatment by foreign courts were out of keeping with modern social and economic reality. At pp. 1095, 1097 and 1098, he stated that "[m]odern states … cannot live in splendid isolation", that the law had to be "adjusted in the light of a changing world order", and that "[a]ccommodating the flow of wealth, skills and people across state lines has now become imperative".

[32] Further, La Forest J. held that the application of the traditional approach to the judgments of the courts of sister provinces failed to reflect the values of Canadian confederation, seemed "to fly in the face of the obvious intention of the Constitution to create a single country", and was inconsistent with the common citizenship of the residents of all provinces and with mobility rights, economic integration and a common market for goods, services and capital. In La Forest J.'s view, Canada's integrated system of justice, under which superior court judges are appointed by the federal government and their judgments are subject to review by a single Supreme Court, minimized the risk of unfairness.

[33] La Forest J. concluded that although Canada's constitution does not include a "full faith and credit" clause such as those of the United States or Australia, where a court in one province has properly exercised jurisdiction in an action, the courts of another province should accord the judgment full faith and credit.

[34] *Morguard* establishes that the proper exercise of jurisdiction depends upon two principles. First, there is a need for "order and fairness" and jurisdictional restraint. Second, there must be a "real and substantial connection". This test was mentioned as a basis for assumed jurisdiction by Dickson J. in *Moran v. Pyle* and was derived from *Indyka v. Indyka*, [1969] 1 A.C. 33 at 105 (H.L.), where the court held that a foreign divorce decree should be recognized where a "real and substantial connection is shown between the petitioner and the country, or territory, exercising jurisdiction".

[35] *Morguard* did not deal explicitly with constitutional limits on the reach of provincial laws. In *Hunt*, the Court considered a constitutional challenge to the operation of a Quebec statute that purported to forbid removing certain corporate records from Quebec to British Columbia for production in litigation. The Supreme Court of Canada found that by frustrating the normal discovery process in British Columbia, the Quebec statute failed to respect the "full faith and credit" principles established in *Morguard*. The Court gave the principles from *Morguard* constitutional force, holding that these principles are "constitutional imperatives" that apply to the legislatures as well as the courts. At pp. 324 and 328, the Court held that provinces are required to "respect the minimum standards of order and fairness addressed in *Morguard*" and that "courts are required, by constitutional restraints, to assume jurisdiction only where there are real and substantial connections to that place".

[36] The language that the Supreme Court has used to describe the real and substantial connection test is deliberately general to allow for flexibility in the application of the test. In *Morguard*, at pp. 1104-1109, the Court variously described a real and substantial connection as a connection "between the *subject-matter of the action* and the territory where the action is brought", "between the jurisdiction and the *wrongdoing*", "between the *damages suffered* and the jurisdiction", "between the *defendant* and the forum province", "with the *transaction or the parties*", and "with the *action*" [Emphasis added]. In *Tolofson*, at p. 1049, the Court described a real and substantial connection as "a term not yet fully defined".

[37] In *Hunt*, at p. 325, the Court held:

> The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined [in *Morguard*], and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these.

The Court also held that the real and substantial connection test "was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction" and that "the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections". This plea for flexibility echoes Dickson J.'s comments in *Moran v. Pyle* that it would be "unnecessary, and unwise, to have resort to any arbitrary set of rules" for jurisdiction and that an "arbitrary and inflexible" approach is to be avoided.

(c) The relationship between assumed jurisdiction and recognition and enforcement

[38] Although *Morguard* dealt with the proper exercise of jurisdiction from the perspective of recognition and enforcement, La Forest J. made it clear that precisely the same real and substantial connection test applies to the assumption of jurisdiction against an out-of-province defendant. As La Forest J. held at p. 1103, "the taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives". Likewise, La Forest J. made it clear that the need for order, fairness and jurisdictional restraint also applies to assumed jurisdiction. At pp. 1103-1104, La Forest J. wrote:

> [I]t hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit … Thus, fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction.

> …
>
> … [I]f the courts of one province are to be expected to give effect to judgments given in another province, there must be some limits to the exercise of jurisdiction against persons outside the province.

[39] In *Tolofson*, the Supreme Court reaffirmed that the same test and the same need for restraint apply to both assumed jurisdiction and jurisdiction for recognition and enforcement purposes. Further, at p. 1049, La Forest J. held that it is the real and substantial connection test that prevents jurisdictional overreaching: "This test has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest".

(d) The distinction between assumed jurisdiction and *forum non conveniens*

[40] Very often there is more than one forum capable of assuming jurisdiction and it is necessary to determine where the action should be litigated. As Sopinka J. explained in *Amchem, supra*, at p. 912, "[f]requently there is no single forum that is clearly the most convenient or appropriate for the trial of the action but rather several which are equally suitable alternatives". Where more than one forum is capable of assuming jurisdiction, the most appropriate forum is determined through the *forum non conveniens* doctrine, which allows a court to decline to exercise its jurisdiction on the ground that there is another forum more appropriate to entertain the action.

[41] Courts have developed a list of several factors that may be considered in determining the most appropriate forum for the action, including the following:

- the location of the majority of the parties
- the location of key witnesses and evidence
- contractual provisions that specify applicable law or accord jurisdiction
- the avoidance of a multiplicity of proceedings
- the applicable law and its weight in comparison to the factual questions to be decided
- geographical factors suggesting the natural forum
- whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court

[42] It is important to distinguish the real and substantial connection test from the discretionary *forum non conveniens* doctrine. In *Tolofson*, at p. 1049, La Forest J. explained the distinction as follows:

> [The real and substantial connection] test has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest. *In addition*, through the doctrine of *forum non conveniens* a court may refuse to exercise jurisdiction where, under the rule elaborated in *Amchem* … there is a more convenient or appropriate forum elsewhere. [Emphasis added]

[43] In "*Morguard v. De Savoye*: Subsequent Developments" (1993) 22 C.B.L.J. 29 at 33, Professor Elizabeth Edinger explains that "[j]urisdictional decisions are comprised of two elements: rules and discretion". While the real and substantial connection test is a legal rule, the *forum non conveniens* test is discretionary. The real and substantial connection test involves a fact-specific inquiry, but the test ultimately rests upon legal principles of general application. The question is whether the forum can assume jurisdiction over the claims of plaintiffs in general against defendants in general given the sort of relationship between the case, the parties and the forum. By contrast, the *forum non conveniens* test is a discretionary test that focuses upon the particular facts of the parties and the case. The question is whether the forum should assert jurisdiction at the suit of this particular plaintiff against this particular defendant. See J. Blom, "The Enforcement of Foreign Judgments: *Morguard* Goes Forth into the World" (1997) 28 C.B.L.J. 373 at 377-78. See also *Lemmex v. Bernard* (2000), 51 O.R. (3d) 164 at 172 (Div. Ct.):

> [T]he *question* of whether Ontario has jurisdiction to hear these actions is a different question from whether this court should decline to exercise its jurisdiction because another forum is the more convenient forum. Using other terminology, the concept of jurisdiction *simpliciter* is different from that of *forum non conveniens*. The second question of whether Ontario should decline to exercise jurisdiction because another forum is the more convenient forum only needs to be considered once an Ontario court has determined that it has jurisdiction to hear the action. [Emphasis in original]

[44] In G.D. Watson and F. Au, "Constitutional Limits on Service *Ex Juris*: Unanswered Questions from *Morguard*" (2000) 23 Adv. Q. 167 at 211-14, the authors explain the implications of a two-stage approach that first considers assumed jurisdiction and then considers *forum non conveniens*. I agree with their analysis of this issue. The residual discretion to decline jurisdiction where the real and substantial connection test is

met assumes that the forum in question is not the only one that has jurisdiction over the case. The real and substantial connection test requires only *a* real and substantial connection, not *the most* real and substantial connection. See also J.-G. Castel & J. Walker, *Canadian Conflict of Laws*, 5th ed. (Markham: Butterworths, 2002) at 1.40. Further, the residual discretion to decline jurisdiction also suggests that the consideration of fairness and efficiency is not exhausted at the stage of assumed jurisdiction and that there is scope for considering these factors at the *forum non conveniens* stage. The residual discretion therefore provides both a significant control on assumed jurisdiction and a rationale for lowering the threshold required for the real and substantial connection test.

[45] Having provided the background necessary to consider the issues in this appeal, it is now possible to turn to those issues.

Issue 1: Is Rule 17.02(h) *ultra vires* the province?

[46] The appellants submit that Rule 17.02(h) should be struck down as *ultra vires* the province of Ontario. They submit that Rule 17.02(h) asserts jurisdiction against extra-provincial defendants on a basis that exceeds the limits of the principles of order and fairness and the real and substantial connection test articulated in *Morguard* and *Hunt*.

[47] The motions court judge dismissed the constitutional challenge on the basis that Rule 17.02(h) is purely procedural and does not confer jurisdiction on the court. By contrast, in *Duncan (Litigation guardian of) v. Neptunia Corp.* (2001), 53 O.R. (3d) 754 (S.C.J.), the court held that Rule 17.02(h) does confer jurisdiction on the court.

[48] For the reasons that follow, I agree with the motions court judge that Rule 17.02(h) is procedural in nature and does not by itself confer jurisdiction. I would therefore dismiss this ground of appeal and hold that Rule 17.02(h) is not *ultra vires* the province.

[49] It is clear that *Morguard* and *Hunt* together impose constitutional limits on the assumption of jurisdiction against extra-provincial defendants. As P.W. Hogg states in *Constitutional Law in Canada*, looseleaf (Toronto: Carswell, 2000) at 13-15, "the constitutional rule of extraterritoriality requires that the only causes of action in respect of which service *ex juris* is available are those in which there is a substantial connection between the defendant and the forum province". It follows that provincial rules of court allowing for service out of the jurisdiction, including Rule 17.02(h), must now be read in the light of the constitutional principles of "order and fairness" and "real and substantial connection".

[50] In fact, it has long been accepted that service in accordance with the rules of court does not determine the issue of jurisdiction: see *Singh v. Howden Petroleum*, *supra*.

Service merely ensures that the parties to an action receive timely notice of the proceeding so that they have an opportunity to participate. Moreover, the constitutional validity of Rule 17.02(h) cannot be determined by reading the Rule in isolation. Rule 17.02(h) is part of a procedural scheme that operates within the limits of the real and substantial connection test.

[51] In G.D. Watson & L. Jeffrey, *Holmested and Watson: Ontario Civil Procedure* (Carswell: Toronto, 2001) at p. 17-9, the authors explain that the grounds outlined in Rule 17.02 "provide a rough guide to the kinds of cases in which persons outside Ontario will be regarded as subject to the jurisdiction of the Ontario courts"." However, these grounds do not determine the issue of jurisdiction.

[52] Several subsections of Rule 17.02 indicate that the Rule was not intended as a complete description of the requirements for assumed jurisdiction. For example, Rules 17.02(j), (k), and (l) provide for service outside Ontario for support claims, claims for custody of or access to a minor, and claims to declare the invalidity of a marriage. Each of these claims has well-established legal standards governing jurisdiction that must be satisfied notwithstanding the fact that the defendant has been served in accordance with the Rule. In my view, the same conclusion follows for Rule 17.02(h), which must now be read as being subject to the real and substantial connection requirement.

[53] A party who is served in accordance with Rule 17.02(h) has several means of challenging the jurisdiction of the court on the basis that the real and substantial connection test has not been met. First, Rule 17.06(1) allows a party who has been served outside Ontario to move for an order setting aside the service or staying the proceeding. Second, s. 106 of the *Courts of Justice Act* provides for a stay of proceedings, and it is well established that a defendant may move for a stay on the ground that the court lacks jurisdiction. Third, Rule 21.01(3)(a) allows a defendant to move to have the action stayed or dismissed on the ground that "the court has no jurisdiction over the subject matter of the action". Together, this procedural scheme adequately allows for jurisdictional challenges to ensure that the interpretation and application of Rule 17.02(h) will comply with the constitutional standards prescribed by *Morguard* and *Hunt*.

Issue 2: Did the motions court judge err in finding that the Ontario Superior Court could assume jurisdiction against the out-of-province defendants?

[54] The appellants urge us to adopt an interpretation of the real and substantial connection test that focuses on the nature and extent of the defendant's contacts with the jurisdiction. The appellants submit that a court can only assume jurisdiction against an extra-provincial defendant where it is reasonable to infer that the defendant has voluntarily submitted to Ontario's jurisdiction or where it was reasonably within the

defendant's contemplation that his or her conduct could cause an injury in Ontario and give rise to a claim in Ontario courts.

[55] The respondents contend that an approach that focuses solely upon the nature and extent of the defendant's contacts with the jurisdiction would be unduly restrictive and would fail to pay adequate heed to the interests of the injured plaintiff. They submit that the connection between the forum and the subject matter of the action and the connection between the forum and the damages suffered by the plaintiff are equally relevant in determining whether there is a real and substantial connection.

[56] The Supreme Court of Canada has insisted that the real and substantial connection test must be flexible. The Court has not attempted to define the precise nature of the connection to the jurisdiction that is required, and the Court's language is ambiguous. While certain passages in *Morguard* suggest that the connection must be with the defendant, others suggest that the connection must be with the subject matter of the action or with the damages suffered by the plaintiff.

[57] In his comment on *Morguard*, (1991) 70 Can. Bar. Rev. 733 at 741, Professor Joost Blom observes that the Court's language lends itself to two possible approaches: the "personal subjection" approach, and the "administration of justice" approach. Under the personal subjection approach, jurisdiction is legitimate if the defendant regularly lived or carried on business in the province, or if the defendant voluntarily did something that related to the province so as to make it reasonable to contemplate that he or she might be sued in the province. By contrast, under the administration of justice approach, the basis for assuming jurisdiction is broader than personal subjection. The forum need only meet a minimum standard of suitability, under which it must be fair for the case to be heard in the province because the province is a "reasonable place for the action to take place".

[58] These two approaches provide a useful way of analyzing the case law. In the discussion that follows, I outline the cases that have emphasized personal subjection as a basis for assumed jurisdiction as well as the cases that have followed a broader approach. I then explain why I consider the broader approach to be supportable and outline several factors relevant to assumed jurisdiction under this broader approach.

(a) The personal subjection approach

[59] The personal subjection approach has been followed in the United States and in several Canadian decisions at the trial level.

[60] Under American law, state courts are obliged under Article IV of the Constitution to give "full faith and credit" to the judgments of sister states. However, when exercising jurisdiction against an out-of-state defendant, a court must observe the due process guarantee, which stems from the Fifth and Fourteenth Amendments to the Constitution.

The United States Supreme Court has held that the due process guarantee means that a state can only exercise jurisdiction over a defendant from another state where the defendant has "minimum contacts" with the state purporting to exercise jurisdiction. In *International Shoe Co. v. State of Washington*, 326 U.S. 310 at 316 (1945), the Court held:

> … [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

[61] In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the Court held at pp. 291-92:

> The concept of minimum contacts … can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

The Court rejected the argument that jurisdiction could be assumed on the basis that it was foreseeable that a product would arrive and cause injury in the forum. At p. 297, the Court held that under due process analysis, "the mere likelihood that a product will find its way into the forum State" does not suffice. Rather, "it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there".

[62] Although Canadian decisions do not use the term "minimum contacts", several trial level decisions have adopted a similar personal subjection approach, under which a significant degree of contact between the defendant and the forum is a pre-requisite for the assumption of jurisdiction. For example, in *Long v. Citi Club*, [1995] O.J. No. 1411 at para. 7 (Gen. Div.), Binks J. held:

> The plaintiff must do more than allege that he has suffered damage in the forum province (Ontario). In order for Ontario to assume jurisdiction over this defendant, there must exist a substantial connection *between Ontario and the defendant*, such that it makes it reasonable to infer that *the defendant has*

> *voluntarily submitted himself or herself to the risk of litigation in the courts of the forum province.* [Emphasis added]

See also *MacDonald v. Lasnier* (1994), 21 O.R. (3d) 177 (Gen. Div.); *Jean-Jacques v. Jarjoura*, [1996] O.J. No. 5174 (Gen. Div.); *Brookville Transport Ltd. v. Maine (Department of Transportation)* (1997), 189 N.B.R. (2d) 142 (Q.B.); and *Negrych v. Campbell's Cabins (1987) Ltd.*, [1997] 8 W.W.R. 270 (Man. Q.B.).

(b) An approach broader than personal subjection

[63] The weight of post-*Morguard* appellate authority holds that a real and substantial connection may be found on a broader basis than personal subjection. One of the leading authorities is the Nova Scotia Court of Appeal's decision in *Oakley v. Barry* (1998), 158 D.L.R. (4th) 679. The plaintiff, at the time a resident of New Brunswick, received treatment from the defendant physicians and hospital in New Brunswick. The defendant physicians performed a liver biopsy and told the plaintiff that she suffered from infectious hepatitis "B". The plaintiff then moved to Nova Scotia, where physicians advised her that she did not suffer from that illness. The plaintiff was in poor health, lacked financial resources and was unable to travel. She brought her action against the New Brunswick defendants in Nova Scotia.

[64] Pugsley J.A. dismissed the defendants' appeal from an order refusing to stay the action. Acknowledging the ambiguity in *Morguard*'s articulation of the real and substantial connection test, Pugsley J.A. held at p. 691 that there was "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". [Emphasis added]. In support of this finding, he noted that the plaintiff's cause of action did not accrue until she was advised in Nova Scotia of the problems with the diagnosis she had been given in New Brunswick and that, since the plaintiff was being treated in Nova Scotia, that province had a significant financial interest in her well-being.

[65] Pugsley J.A. pointed out at p. 692 that the "[i]nterprovincial mobility of Canadian citizens was specifically noted by Justice La Forest in both *Morguard*, and *Hunt*, as one of the factors supporting a more cooperative spirit in recognizing and enforcing judgments in a sister province". He added at pp. 695-96 that:

> Whether the decision in *Morguard* which involved a fact situation that was entirely Canadian, and depended to a significant extent on the "essentially unitary structure of our

> judicial system with the Supreme Court of Canada at its apex" … should be applied to cases in the international sphere is an interesting question that does not require our consideration.

Pugsley J.A. also held that the requirements of fairness emphasized in *Morguard* and *Hunt* concerned not only the interests of the defendant but also the interests of the plaintiff. Since the plaintiff was unable to travel and financially incapable of proceeding with litigation outside Nova Scotia, fairness to the plaintiff favoured jurisdiction.

[66] *Oakley v. Barry* was followed in *O'Brien v. Canada (Attorney General)*, [2002] N.S.J. No. 57, which also involved a medical malpractice claim against out-of-province doctors following further treatment in Nova Scotia. At para. 20, Hallett J.A. held:

> The concept of order and fairness is integral to the question of determining whether there is a real and substantial connection between the cause of action and the forum province. This Court has held in *Oakley* that it is not inappropriate for a court to consider as a component of the test, the fairness to the parties in determining if there is a real and substantial connection between the cause of action and the forum province that warrants a finding that the court has jurisdiction *simpliciter*.

[67] This court's decision in *McNichol Estate v. Woldnik* (2001), 13 C.P.C. (5th) 61 also supports the argument that the real and substantial connection test may be satisfied despite a lack of contact or connection that amounts to personal subjection by the defendant. In *McNichol*, an Ontario resident with a lengthy and complicated medical history suffered a fatal heart attack in Florida, one day after being treated by the appellant, a Florida chiropractor. The Ontario resident's estate sued several Ontario defendants involved in his medical care as well as the appellant, alleging negligence. The appellant was served out of the jurisdiction. He moved to stay the action on the grounds of a lack of a real and substantial connection and *forum non conveniens*.

[68] Goudge J.A. rejected the argument that the real and substantial connection test should be applied to the claim against the appellant as if it were a separate lawsuit from the claims against the Ontario defendants. At paras. 12-13, he held:

> I do not agree that where an action has some claims with an extra-territorial dimension, and others which have none, the former must be separated and tested in isolation. To do so

> would, in my opinion, be contrary to the direction set by *Morguard* and *Hunt*. It would be a step backwards, towards a focus on territoriality and away from the recognition of the increasingly complex and interdependent nature of the modern world community which lies at the heart of La Forest J.'s reasoning. Moreover, it would introduce a rigidity to a test clearly designed to be flexible. Finally, it would mute the influence of the underlying requirements of order and fairness by preventing an assessment of the entire action against these requirements to determine whether they made it proper to take jurisdiction over the action as framed by the plaintiffs, including the extraterritorial claim.
>
> Rather, I think that the approach prescribed by *Morguard* and *Hunt* requires the court to evaluate the connection with Ontario of the subject matter of the litigation framed as it is to include both the claim against the foreign defendant and the claims against the domestic defendants. In doing so, the courts must be guided by these requirements of order and fairness. If it serves these requirements to try the foreign claim together with the claims that are clearly rooted in Ontario, then the foreign claim meets the "real and substantial connection" test. This is so even if that claim would fail the test if it were constituted as a separate action. This approach goes beyond showing that the foreign defendant is a proper party to the litigation. It rests on those values, namely order and fairness, that properly inform the real and substantial connection test and allows the court the flexibility to balance the globalization of litigation against the problems for a defendant who is sued in a foreign jurisdiction.

[69] The British Columbia Court of Appeal's approach is also not limited to considering personal subjection by the defendant. In claims for damages arising from motor vehicle accidents in another province, the Court has held that jurisdiction cannot be assumed against an out-of-province defendant where the plaintiff's residence is the only link to the forum. See *Ell v. Con-Pro Industries Ltd*. (1992), 11 B.C.A.C. 174 and *Jordan v. Schatz* (2000), 77 B.C.L.R. (3d) 134 (C.A.). However, in *Pacific International Securities Inc. v. Drake Capital Securities Inc.* (2000), 194 D.L.R. (4th) 716 at 722, the Court held that it was appropriate to consider damage sustained in the jurisdiction and that prior decisions did not preclude "the British Columbia Courts from taking *jurisdiction simpliciter* where the damages, either in contract or tort, are sustained in

British Columbia". Further, in *Cook v. Parcel, Mauro, Hultin & Spaanstra, P.C.* (1997), 143 D.L.R. (4th) 213 at 219, the Court accepted that a real and substantial connection could be based on a connection either with the defendant or with the subject matter of the litigation:

> It is common ground that the test to be applied in determining whether the B.C. Supreme Court has jurisdiction over these proceedings is whether there is a real and substantial connection between the court and either the defendant … or the subject-matter of the litigation (occasionally referred to in the authorities as the "transaction" or the "cause of action").

[70] Similarly, in *Duncan v. Neptunia*, *supra*, at p. 768, the court held that the real and substantial connection test should be interpreted in a flexible manner and that "it is clear that a real and substantial connection *between the forum province and the subject matter of the litigation, not necessarily the defendant*, is sufficient to meet the test". [Emphasis added].

[71] Finally, I note that in *Spar Aerospace Ltd. c. American Mobile Satellite Corp*., [2000] J.Q. no 1717 (C.A.), leave to appeal granted [2000] S.C.C.A. No. 397, the Quebec Court of Appeal implicitly rejected a personal subjection approach. Although the case appears to have been argued primarily in terms of *forum non conveniens*, the Court upheld the trial judge's order finding a real and substantial connection and dismissing a challenge to the jurisdiction of the Quebec Superior Court.

(c) The preferability of a broader approach

[72] In "Constitutional Limits on Service *Ex Juris*: Unanswered Questions from *Morguard*", *supra*, Watson and Au argue that Canadian courts should not adopt a personal subjection approach that requires "minimum contacts" between the defendant and the forum. At pp. 198-211, they outline several objections to the adoption of this American approach:

- In the United States, the Constitution's due process guarantee explicitly protects property rights, and due process jurisprudence focuses on the defendant's liberty interest. By contrast, s. 7 of the *Canadian Charter of Rights and Freedoms* does not protect property rights, and the Canadian approach to jurisdiction does not rest on constitutionally-entrenched individual rights but on the territorial concerns of a federal state.
- Insisting on a substantial connection between the defendant and the forum may result in multiple actions and inconsistent judgments in complex litigation involving several defendants in different jurisdictions.

- In the United States, the personal subjection approach to jurisdiction has led to practical uncertainty and frequent preliminary challenges to jurisdiction, which are often used strategically to prolong litigation. Watson and Au argue that "courts should exercise care in interpreting rules and developing legal principles so as not to encourage unnecessary motions". To this end, they suggest that Canadian courts should show greater deference to the policy underlying provincial service *ex juris* rules than American courts do.
- A narrow focus on the defendant's connection with the forum could lead to decisions that are contrary to "common sense and practicability". Watson and Au argue that "cases should be allowed to be heard in a forum which, having regard to *all relevant circumstances*, is one appropriate to hear the dispute. The defendant's interest should be *among* the factors to be weighed, and should not itself be determinative of the choice of forum". [Emphasis in original]
- Deciding jurisdictional questions primarily on the basis of the defendant's connection with the forum may pay insufficient attention to the fairness component of the *forum non conveniens* analysis. The threshold of the jurisdiction test should be sufficiently low as to allow for the more detailed weighing of factors that occurs under the *forum non conveniens* test.

[73] On the basis of these objections, Watson and Au conclude that the real and substantial connection test should be interpreted as requiring a connection either between the forum and the defendant or between the forum and the subject matter of the action. In their view, the defendant's connection with the forum should not determine the choice of forum. Rather, the defendant's connection should simply be a relevant factor to be weighed together with other factors.

[74] I find these arguments to be persuasive. While the defendant's contact with the jurisdiction is an *important* factor, it is not a *necessary* factor. In my view, to hold otherwise would be contrary to the Supreme Court of Canada's direction that the real and substantial connection test is flexible. It would also be contrary to the weight of Canadian appellate authority outlined above.

(d) The relevant factors under the broader approach

[75] It is apparent from *Morguard*, *Hunt* and subsequent case law that it is not possible to reduce the real and substantial connection test to a fixed formula. 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.

[76] But clarity and certainty are also important. As such, it is useful to identify the factors emerging from the case law that are relevant in assessing whether a court should assume jurisdiction against an out-of-province defendant on the basis of damage sustained in Ontario as a result of a tort committed elsewhere. No factor is determinative. Rather, all relevant factors should be considered and weighed together. In my view, a

weighing of the factors in the present case favours the assumption of jurisdiction against the out-of-province defendants in this case.

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

[77] The forum has an interest in protecting the legal rights of its residents and affording injured plaintiffs generous access for litigating claims against tortfeasors. In *Moran v. Pyle* at p. 409, Dickson J. spoke of "the important interest a state has in injuries suffered by persons within its territory". The *Moran* decision and the introduction of the "damage sustained" rule in 1975 were both motivated by the perception that the interests of justice required a more generous approach to assumed jurisdiction. The connection between the forum and the plaintiff's claim is therefore relevant.

[78] This factor was important in *Oakely*, where the Nova Scotia Court of Appeal took into account the significant connection that arose from the extensive medical attention the plaintiff had received in Nova Scotia.

[79] On the other hand, if the plaintiff lacks a significant connection with the forum, the case for assuming jurisdiction on the basis of damage sustained within the jurisdiction is weaker. If the connection is tenuous, courts should be wary of assuming jurisdiction. Mere residence in the jurisdiction does not constitute a sufficient basis for assuming jurisdiction. See V. Black, "Territorial Jurisdiction Based on the Plaintiff's Residence: *Dennis v. Salvation Army Grace General Hospital*" (1998), 14 C.P.C. (4th) 222 at 232, where the author writes:

> 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.

[80] As with all of the following factors, the nature of the connection between the forum and the plaintiff is only one factor to consider. As La Forest J. explained in *Hunt* at p. 327, while "a province undoubtedly has an interest in protecting the property of its residents within the province … it cannot do so by unconstitutional means". Similarly, in

Tolofson, at p. 1055, La Forest J. stated that "the mere fact that another state (or province) has an interest in a wrong committed in a foreign state (or province) is not enough to warrant its exercising jurisdiction over that activity in the foreign state for a wrong in one state will often have an impact in another".

[81] In the present case, the plaintiff has required extensive medical attention in Ontario. His claim is, *inter alia*, for pain and suffering in Ontario. These damages represent a significant connection with Ontario.

2) The connection between the forum and the defendant

[82] If the defendant has done anything within the jurisdiction that bears upon the claim advanced by the plaintiff, the case for assuming jurisdiction is strengthened.

[83] *Moran v. Pyle* holds that conduct outside the territory may render the defendant subject to the jurisdiction of the forum where it was reasonably foreseeable that the defendant's conduct would result in harm within the jurisdiction. This forseeability should be distinguished from a situation in which the wrongful act and injury occur outside the jurisdiction and the plaintiff returns and suffers consequential damage. It seems to me that in the latter situation, the fact that it was foreseeable that the plaintiff would return home does not bring the case within the *Moran* principle.

[84] In this case, the defendants did not have any connection with Ontario that would justify the assumption of jurisdiction. Although the defendants were engaged in an activity that carried with it an inherent risk of an accident with an out-of-province party, their conduct fell well short of what might constitute personal subjection or submission to the jurisdiction of the Ontario courts.

[85] While conduct of the defendant amounting to personal subjection provides a strong basis for assumed jurisdiction, such conduct is not necessary in all cases. Even if there is no act or conduct by the defendant that amounts to personal subjection or makes litigation in the forum a foreseeable risk, it is still necessary to consider other factors to determine whether or not the real and substantial connection test has been met.

3) Unfairness to the defendant in assuming jurisdiction

[86] The consideration of the defendant's position should not end with an inquiry as to acts or conduct that would render the defendant subject to the jurisdiction. The principles of order and fairness require further consideration, because acts 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.

[87] In my view, in the present case, the assumption of jurisdiction would not result in any significant unfairness to the defendants. The defendants were engaged in an activity that involves an inherent risk of harm to extra-provincial parties. Mandatory motor vehicle insurance requirements across Canada reflect the reciprocal risk of harm caused and faced by all motorists. There was evidence that the defendants are insured and that the terms of their insurance clearly contemplate and provide coverage for suits in other Canadian provinces, which would include a suit involving an accident with an out-of-province defendant. The standard form Power of Attorney and Undertaking requires motor vehicle insurers to appear and defend claims brought in any Canadian province or territory. These insurance arrangements reflect the reasonable expectations of the motoring public. The burden of defending the suit will fall on the defendants' insurer and not on the defendants themselves. I would give no weight to the argument that the assumption of jurisdiction would be unfair to the defendants.

4) Unfairness to the plaintiff in not assuming jurisdiction

[88] The principles of order and fairness should be considered in relation to the plaintiff as well as the defendant. In *Morguard*, La Forest J. recognized the need to consider the plaintiff's interest in access to the courts of his or her home jurisdiction. At p. 1108, he stated that "permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties".

[89] *Morguard* and *Moran* both hold that given the realities of modern commerce and the free flow of goods and people across borders, plaintiffs should not be saddled with the anachronistic "power theory" that focuses exclusively on subjection and territorial sovereignty. Although *Tolofson* dealt with choice of law, at pp. 1071-72, the court also speaks of the need to balance the interests of the plaintiff and defendant. Further, in *Oakley v. Barry*, Pugsley J.A. held at p. 699 that "[t]he concept of fairness in determining jurisdiction should be considered from the point of view of both the respondent [plaintiff], as well as the appellants [defendants]". I agree that it is important to consider fairness to the plaintiff and to balance this against fairness to the defendant.

[90] In this case, if jurisdiction were refused, the plaintiff would be compelled to litigate in Alberta. This would undoubtedly be inconvenient to the plaintiff, especially given the injuries he has sustained. Further, unlike the defendant, the plaintiff does not have the benefit of an insurer to cover the cost of litigation. While the unfairness to the plaintiff of having to litigate in Alberta may not be as strong as it was in *Oakely v. Barry*, on balance, a consideration of unfairness favours the plaintiff.

5) The involvement of other parties to the suit

[91] The decision in *McNichol, supra* indicates that the involvement of other parties bears upon the real and substantial connection test. The twin goals of avoiding a multiplicity of proceedings and avoiding the risk of inconsistent results are relevant considerations. Where the core of the action involves domestic defendants, as in *McNichol*, the case for assuming jurisdiction against a defendant who might not otherwise be subject to the jurisdiction of Ontario courts is strong. By contrast, where the core of the action involves other foreign defendants, courts should be more wary of assuming jurisdiction simply because there is a claim against a domestic defendant.

[92] In this case, the involvement of other parties to the suit is not a significant factor.

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

[93] In considering whether to assume jurisdiction against an extra-provincial defendant, the court must consider whether it would recognize and enforce an extra-provincial judgment against a domestic defendant rendered on the same jurisdictional basis, whether pursuant to common law principles or any applicable legislation. Every time a court assumes jurisdiction in favour of a domestic plaintiff, the court establishes a standard that will be used to force domestic defendants who are sued elsewhere to attorn to the jurisdiction of the foreign court or face enforcement of a default judgment against them. This principle is fundamental to the approach in *Morguard* and *Hunt* and may be seen as a self-imposed constraint inherent in the real and substantial connection test. It follows that where a court would not be willing to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis, the court cannot assume jurisdiction, because the real and substantial connection test has not been met.

[94] In my view, it is appropriate for Ontario courts to recognize and enforce judgments from the courts of sister provinces rendered on the same jurisdictional basis as in the case at bar. *Morguard* and *Hunt* recognize the modern reality of rapid and frequent movement by Canadian citizens across provincial borders. Further, the risk of accidents with and injury to the residents of another province is inherent in motor vehicle travel, and insurance arrangements reflecting this risk are common across Canada. The spirit of *Morguard* and *Hunt* favours recognition and enforcement of the judgments of the courts of sister provinces where jurisdiction has been assumed on the basis that serious damages have been suffered within the province as a result of a motor vehicle accident in another province.

7) Whether the case is interprovincial or international in nature

[95] The decisions in *Morguard*, *Tolofson* and *Hunt* suggest that the assumption of jurisdiction is more easily justified in interprovincial cases than in international cases. The jurisdictional standards developed in *Morguard* and *Hunt* were strongly influenced by the need to adapt the rules of private international law to the demands of the Canadian federation.

[96] In *Morguard* at pp. 1098 and 1101, La Forest J. held that the "considerations underlying the rules of comity apply with much greater force between the units of a federal state", that a federation "implies a fuller and more generous acceptance of the judgments of the courts of other constituent units of the federation", and that "the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution". At pp. 1099-1100, La Forest J. mentioned several features that foster consistency and uniformity between provinces and thereby minimize the risk of unfairness within Canada:

> The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior court judges – who also have superintending control over other provincial courts and tribunals – are appointed and paid by the federal authorities. And all are subject to final review by the Supreme Court of Canada, which can determine when the courts of one province have appropriately exercised jurisdiction in an action and the circumstances under which the courts of another province should recognize such judgments. Any danger resulting from unfair procedure is further avoided by sub-constitutional factors, such as for example the fact that Canadian lawyers adhere to the same code of ethics throughout Canada.

Further, while La Forest J. held at p. 1103 that "fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction", he also held that "fair process is not an issue within the Canadian federation".

[97] In *Tolofson* at p. 1048, La Forest J. noted that the Supreme Court of Canada's superintending role over the interpretation of all laws is capable of ensuring "the harmony that can only be achieved on the international level in the exercise of comity". He also drew a distinction between interprovincial and international cases with respect to choice of law, holding that there is less need to worry about sovereignty or the difficulty

of applying "foreign" law where the act in question occurs in another province rather than another country.

[98] Similarly, in *Hunt* at p. 323, La Forest J. referred to the distinction drawn in *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 at 34-35 between interprovincial and international cases for the purpose of *Mareva* injunctions. He then held: "I do not think litigation engendered against a corporate citizen located in one province by its trading and commercial activities in another province should necessarily be subject to the same rules as those applicable to international commerce".

[99] Finally, I note that there is also support in academic writing for a more lenient approach to assumed jurisdiction in interprovincial cases. See J. Blom, "The Enforcement of Foreign Judgments: *Morguard* Goes Forth into the World", *supra*, at 375-76; V. Black, "The Other Side of *Morguard*: New Limits on Judicial Jurisdiction" (1993) 22 C.B.L.J. 4 at 21-22; and S. Coakeley, P. Finkle & L. Barrington, "*Morguard Investments Ltd.*: Emerging International Implications" (1992) 15 Dal. L.J. 537.

[100] The fact that this is an interprovincial case clearly weighs in favour of assuming jurisdiction.

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

[101] In *Morguard* at p. 1096, La Forest J. adopted the following formulation of comity expressed in *Hilton v. Guyot*, 159 U.S. 113 at 163-64 (1895):

> [T]he recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws …

[102] One aspect of comity is that in fashioning jurisdictional rules, courts should consider the standards of jurisdiction, recognition and enforcement that prevail elsewhere. In interprovincial cases, this consideration is unnecessary, since the same standard necessarily applies to assumed jurisdiction, recognition and enforcement within Canada. However, in international cases, it may be helpful to consider international standards, particularly the rules governing assumed jurisdiction and the recognition and enforcement of judgments in the location in which the defendant is situated.

[103] Obviously, reference must be had to any agreements to which Canada is a party. See the *Convention Between Canada and the United Kingdom of Great Britain and*

Northern Ireland Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, incorporated into Ontario law by the *Reciprocal Enforcement of Judgments (U.K.) Act*, R.S.O. 1990, c. R.6.

[104] In New South Wales, service out of the jurisdiction is permitted for claims for "damage suffered wholly or partly in the State caused by a tortious act or omission wherever occurring". In *Flaherty v. Girgis* (1985), 4 NSWLR 248 at 266 (C.A.), aff'd. on other grounds (1987), F.C. 87/017 (H.C.A.), the New South Wales Court of Appeal held that "damage" included "all the detriment, physical, financial and social which the plaintiff suffers as a result of the tortious conduct of the defendant".

[105] By contrast, in other countries, it appears that damage sustained within the jurisdiction is only accepted as a basis for assumed jurisdiction in certain limited circumstances. As discussed above, in the United States, the minimum contacts doctrine requires an act or conduct on the part of the defendant that amounts to personal subjection to the jurisdiction. Without more, damage sustained in the jurisdiction does not satisfy the doctrine.

[106] In the United Kingdom, the *Civil Jurisdiction and Judgments Act 1982* and the *Civil Jurisdiction and Judgments Act 1991* respectively implement the European Economic Community Brussels *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* and the parallel Lugano *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.* Under these Conventions, a plaintiff may bring a tort action "in the courts for the place where the harmful event occurred". Courts have interpreted "the place where the harmful event occurred" as including the place where the wrongful act is committed and, in certain cases, the place where damage is suffered. See *e.g. Shevill v. Presse Alliance S.A.*, [1995] 2 A.C. 18 (E.C.J.) and [1996] A.C. 959 (H.L.), and *Handelskwerkerij G.J. Bier BV v. Mines de potasse d'Alsace SA*, [1976] E.C.R. 1735. But these cases appear to involve circumstances in which the actual injury that results from the wrongful act is suffered within the forum. The cases therefore do not necessarily provide a broader basis for assuming jurisdiction than the Supreme Court of Canada's decision in *Moran v. Pyle*.

[107] Finally, Article 10 of the Hague Conference on Private International Law *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* suggests the following bases for assuming jurisdiction in tort cases:

> *Article 10 Torts or delicts*
>
> 1. A plaintiff may bring an action in tort or delict in the courts of the State –
>
> a) in which the act or omission that caused injury occurred, or

> b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.
>
> 2. Paragraph 1 b) shall not apply to injury caused by anti-trust violations, in particular price-fixing or monopolisation, or conspiracy to inflict economic loss.
>
> 3. A plaintiff may also bring an action in accordance with paragraph 1 when the act or omission, or the injury may occur.
>
> 4. If an action is brought in the courts of a State only on the basis that the injury arose or may occur there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State, unless the injured person has his or her habitual residence in that State.

[108] However, there are indications that these provisions, like the *Moran* test, are aimed at situating jurisdiction in the place in which the injury actually occurs. The provisions refer to "injury" rather than "damage", and the background papers prepared in connection with the draft support this interpretation.

[109] In my view, in cases involving international defendants, international standards and the standards applied in the defendant's jurisdiction are helpful in determining whether the real and substantial connection test has been met on the basis of damage sustained within the jurisdiction.

[110] As this is an interprovincial case, this factor is not applicable.

(e) Conclusion

[111] In my view, a fair weighing of the factors I have outlined clearly favours assumed jurisdiction in the present case. Accordingly, I would affirm the finding of the motions court judge that the real and substantial connection test has been met.

[112] Since the motions court judge did not err in finding that the Ontario Superior Court could assume jurisdiction against the out-of-province defendants, the only issue that remains is whether he erred in refusing to exercise his discretion to decline jurisdiction on the ground that Ontario is not the *forum conveniens*.

Issue 3: Did the motions court judge err in refusing to exercise his discretion to decline jurisdiction on the ground that Ontario is not the *forum conveniens*?

[113] The motions court judge found that Ontario is the most convenient forum for the action. In his view, the inconvenience that would result to the plaintiff if he were required to bring the action in Alberta outweighed the defendants' inconvenience of defending the action in Ontario. In particular, he found that for the plaintiff to bring the action in Alberta would require significant effort and expense, since the plaintiff is a resident of Ontario and all of the plaintiff's medical witnesses are from the London, Ontario area. By contrast, for the defendants to defend the action in Ontario involves minimal inconvenience. Since the action involves an assessment of damages rather than a dispute as to liability and since the defendants are insured, it is unlikely that the defendants will need to participate in the trial.

[114] In *Amchem, supra*, at p. 919, the Supreme Court of Canada quoted with approval the following formulation of the *forum non conveniens* doctrine from *Antares Shipping Corp. v. The Ship "Capricorn"*, [1977] 2 S.C.R. 422 at 448:

> [T]he overriding consideration which must guide the Court in exercising its discretion by refusing to grant [an application to stay an action on the ground of *forum non conveniens*] must … be the existence of some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice.

[115] I would not interfere with the motions court judge's finding that Ontario is the most convenient forum for the action. In my view, the motions court judge properly took into account the factors relevant to this case, including the location of the parties, the location of key witnesses and evidence, and the applicable law. On the basis of these factors, the motions court judge was entitled to conclude that Ontario is the most convenient forum for the action. I would therefore reject the argument that he erred in not exercising his discretion to decline jurisdiction on the basis of *forum non conveniens*.

DISPOSITION

[116] I would dismiss the appeal and affirm the motions court judge's dismissal of the motion to stay the action on the ground that the Ontario Superior Court lacks jurisdiction or that jurisdiction should be declined on the basis of *forum non conveniens*. In order to fix costs of the appeal, the court will entertain brief written submissions dealing with all aspects of the award of costs. Counsel for the respondents shall deliver submissions and

a bill of costs no later than 7 days from the date of this judgment. Counsel for the appellants may deliver a response, if any, within 7 days thereafter.

"Robert J. Sharpe J.A."
"I agree M. Rosenberg J.A."
"I agree K. Feldman J.A."

Released: May 29, 2002