Leufkens et al. v. Alba Tours International Inc. et al.

[Indexed as: Leufkens v. Alba Tours International Inc.]

53 O.R. (3d) 112
[2001] O.J. No. 644
Docket No. 98-CV-157984

Ontario Superior Court of Justice
Swinton J.
February 23, 2001

Conflict of laws--Forum conveniens--Plaintiff brought action in Ontario against Costa Rican company for damages for injuries suffered while on holiday in Costa Rica--Plaintiff resided in Ontario--Ontario non convenient forum--Action against Costa Rican company stayed on ground of forum non conveniens.

Conflict of laws--Jurisdiction--Real and substantial connection--Plaintiff brought action in Ontario against Costa Rican company for damages for injuries suffered while on holiday in Costa Rica--Alleged negligence and damage occurred in Costa Rica--Plaintiff resided in Ontario--Mere fact that plaintiff continued to suffer damages in Ontario after sustaining injury as result of tort committed outside jurisdiction did not create real and substantial connection between Ontario and action--No real and substantial connection existed between subject matter of action against Costa Rican company and Ontario--Action stayed on ground that Ontario court lacked jurisdiction.

The plaintiff, an Ontario resident, purchased a package vacation for airfare and accommodation from companies which carried on business in Ontario. Those companies had arranged for the defendant Swiss Travel, a company incorporated in

Costa Rica, to provide ground transportation in Costa Rica and to make arrangements for optional local excursions. While on one such excursion, the plaintiff fell and suffered serious neck and back injuries. He brought an action against the Canadian tour companies from which he purchased the vacation travel package. He also joined Swiss Travel, alleging that Swiss Travel operated in partnership with the Canadian companies and, as such, these parties were jointly negligent in failing to ensure that the excursion was safe and that the tour guides were properly trained. The plaintiff also alleged that the Canadian companies and Swiss Travel were jointly negligent in failing to provide medical attention at the site of the accident and failing to provide proper information to the hospital at which the plaintiff was treated. Swiss Travel was served in Costa Rica after the plaintiff obtained letters rogatory to allow him to do so, relying on rule 17.02(h) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 on the basis that damage was sustained in Ontario arising from a tort. Swiss Travel brought a motion for an order staying or dismissing the action on the ground that the Ontario court had no jurisdiction over the subject matter of the action. Alternatively, Swiss Travel sought to have the action against it stayed on the basis that Ontario was not the convenient forum.

Held, the motion should be granted.

Swiss Travel did not carry on business in Ontario, and the evidence did not substantiate the plaintiff's allegation that it operated in partnership with one of the Canadian companies. Any arrangement between Swiss Travel and the Canadian companies appeared to be a contractual one, based in Costa Rica. Therefore, the Ontario courts could only claim jurisdiction if there was a real and substantial connection between Ontario and the subject matter of the action. The subject matter of this litigation was the alleged negligence which occurred in Costa Rica. The plaintiff purchased his ticket for the excursion from Swiss Travel in Costa Rica, and all the allegations of negligence arose out of events during the excursion or immediately following the fall, because of the quality of the emergency care provided and the quality of

the medical care before the plaintiff was evacuated. The proper question was not whether it was reasonably foreseeable to the Costa Rican defendants that they would be sued in Ontario, should an Ontario resident with whom they had dealings in Costa Rica be injured there. Rather, the proper inquiry was whether it was reasonably foreseeable that the services provided would cause an injury in Ontario. Clearly, it was not, as the injury occurred in Costa Rica. The mere fact that the plaintiff continued to suffer damages in Ontario after sustaining an injury as a result of a tort committed outside the jurisdiction did not create a real and substantial connection between Ontario and the action. In addition to the fact that the alleged acts of negligence and the damage caused thereby occurred in Costa Rica, it was clear that a number of key witnesses with respect to liability were in Costa Rica, including employees of Swiss Travel, the Red Cross and the hospital where the plaintiff was treated. The proper law to be applied would be the law of Costa Rica, as the tort was committed there. There was not a real and substantial connection between the subject matter of the action against Swiss Travel and Ontario. Therefore, the action against Swiss Travel should be stayed on the ground that the Ontario court lacked jurisdiction.

The action should also be stayed on the ground that Ontario was forum non conveniens. As stated above, many of the key witnesses on the issue of liability were in Costa Rica. Swiss Travel had indicated that it would cross-claim against the other Costa Rican defendants, and the evidence of the witnesses in Costa Rica was key to the determination of the cross-claim. Swiss Travel would suffer a significant juridical disadvantage if it had to litigate in Ontario, since the Red Cross and other medical defendants had indicated that they did not intend to defend here. Therefore, Swiss Travel was likely to face serious obstacles in obtaining evidence from key witnesses in an Ontario proceeding. As well, Swiss Travel's insurer had indicated that it would not defend the action in Ontario. This constituted a further juridical disadvantage for Swiss Travel. The plaintiff would not suffer a juridical disadvantage beyond the costs of litigating in Costa Rica. Costa Rica was clearly the more appropriate forum in which to

determine the action.

Moran v. Pyle National (Canada) Ltd. (1974), [1975] 1 S.C.R. 393, 43 D.L.R. (3d) 239, [1974] 2 W.W.R. 586, 1 N.R. 122; Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, 52 B.C.L.R. (2d) 160, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, apld

Lemmex v. Bernard (2000), 49 O.R. (3d) 598 (S.C.J.) [Leave to appeal to Div. Ct. granted (2000), 51 O.R. (3d) 164, not folld

Jean-Jacques v. Jarjoura, [1996] O.J. No. 5174 (Gen. Div.); Long v. Citi Club, [1995] O.J. No. 1411 (Gen. Div.); MacDonald v. Lasnier (1994), 21 O.R. (3d) 177 (Gen. Div.), consd

Other cases referred to

Amchem Products Inc. v. British Columbia (Workers' Compensation Board), [1993] 1 S.C.R. 897, 77 B.C.L.R. (2d) 62, 102 D.L.R. (4th) 96, 150 N.R. 321, [1993] 3 W.W.R. 441, 14 C.P.C. (3d) 1; Canadian International Marketing Distributing Ltd. v. Nitsuko Ltd. (1990), 56 B.C.L.R. (2d) 130, 68 D.L.R. (4th) 318 (C.A.); de Vlas v. Bruce (1994), 18 O.R. (3d) 493, 1 L.W.R. 542, 25 C.P.C. (3d) 140, 3 M.V.R. (3d) 115 (Gen. Div.); Dunlop v. Connecticut College (1996), 50 C.P.C. (3d) 109 (Ont. Gen. Div.); Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente (1999), 178 D.L.R. (4th) 409, 50 B.L.R. (2d) 33, 39 C.P.C. (4th) 160 (Ont. C.A.) [Leave to appeal to S.C.C. denied (2000), 259 N.R. 198n]; Ell v. Con-Pro Industries Ltd. (1992), 11 B.C.A.C. 174, [1992] B.C.J. No. 513 (C.A.); Frymer v. Brettschneider (1994), 19 O.R. (3d) 60, 115 D.L.R. (4th) 744, 28 C.P.C. (3d) 84 (C.A.), affg 10 O.R. (3d) 157, 9 C.P.C. (3d) 264 (Gen. Div.); Hunt v . T & N plc, [1993] 4 S.C.R. 289, 85 B.C.L.R. (2d) 1, 109 D.L.R. (4th) 16, [1994] 1 W.W.R. 129, 21 C.P.C. (3d) 269; Jordan v. Schatz (2000), 77 B.C.L.R. (3d) 134, 189 D.L.R. (4th) 62, [2000] 7 W.W.R. 442 (C.A.); Ontario New Home Warranty Program v. General Electric Co. (1998), 36 O.R. (3d) 787, 17 C.P.C. (4th) 183 (Gen. Div.); Tolofson v. Jensen, [1994] 3 S.C.R. 1022, 100 B.C.L.R. (2d) 1, 120 D.L.R.

(4th) 289, 175 N.R. 161, [1995] 1 W.W.R. 609, 22 C.C.L.T. (2d) 173, 32 C.P.C. (3d) 141, 7 M.V.R. (3d) 202; Trepanier (Litigation guardian of) v. Kloster Cruise Ltd. (1995), 23 O.R. (3d) 398 (Gen. Div.); Vile v. Von Wendt (1979), 26 O.R. (2d) 513, 103 D.L.R. (3d) 356, 14 C.P.C. 121 (Div. Ct.)

Statutes referred to

Family Law Act, R.S.O. 1990, c. F.3

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 17.02(h), 17.06(2)(c), 21.01(3)

MOTION for an order staying an action.

Tricia J. McAvoy, for plaintiffs/responding parties.
Lise G. Favreau, for defendant/moving party Swiss Travel Service.
Heather Kawaguchi, for defendants Alba Tours, Sunquest Vacations and Canadian Leisure Group.

[1] SWINTON J.:-- The defendant, Swiss Travel Service, has brought this motion for an order staying this action on the grounds that the Ontario court does not have jurisdiction over the action or, alternatively, setting aside service of the Statement of Claim on Swiss Travel on the grounds that Ontario is not the convenient forum for this action.

Facts

[2] The plaintiffs seek damages of approximately $650,000 as a result of an accident in which Michael Leufkens was injured in Costa Rica. Mr. and Mrs. Leufkens and their two sons, who are residents of Pickering, Ontario, went to Costa Rica on a vacation that was to take place from January 26, 1998 to February 2, 1998. They purchased a package vacation for

airfare and accommodation from Alba/Sunquest in Ontario. Alba Tours and 1997, and there is no question that they carry on business in Ontario.

[3] Alba and Sunquest had arranged for the defendant, Swiss Travel, a company incorporated in Costa Rica, to provide ground transportation in Costa Rica and to make arrangements for optional local excursions. Swiss Travel is in the business of providing a variety of excursions to tourists. These are primarily in Costa Rica, but some take place in Nicaragua as well. Swiss Travel operated some of the tours itself and, in other cases, arranged for tickets with other tour operators.

[4] While the Leufkens were in Costa Rica, they made arrangements to participate in an optional excursion referred to as the "Tree Top Trail". They bought their tickets at their hotel from a representative of Swiss Travel. Transportation to the tour site was provided by Swiss Travel, and one of the employees went on the bus to the site as a guide. According to the affidavit evidence of Emilia Gamboa of Swiss Travel, the tour was owned and operated by the defendant Rincon and takes place on a farm in Guanacaste. Swiss Travel has a contract with Rincon pursuant to which Swiss Travel acts as an intermediary between the excursion participants and Rincon, making bookings with Rincon and providing transportation to the site of the excursion.

[5] This tour required participants to mount to the canopy of the trees by means of a harness and guide wires and to move from platform to platform at tree top level, using the cables. At the end of the tour, the participants had to rappel down to the ground from a platform about 50 feet above the ground. One of the guides is alleged to have offered to modify Michael Leufkens' safety harness to allow a quick descent, and Mr. Leufkens, a fire fighter in Toronto, agreed. Tragically, Mr. Leufkens fell while descending and suffered serious neck and back injuries and struck his head.

[6] The plaintiffs have brought this action against the Canadian tour companies from which they purchased their vacation travel package, Alba Tours/Sunquest/Canadian Leisure

Group. These defendants have filed a Statement of Defence and do not contest the jurisdiction of the Ontario court.

[7] The plaintiffs have also joined Swiss Travel, a Costa Rican company. The plaintiffs claim that Swiss Travel operates in partnership with Alba Tours and Sunquest, and, as such, these parties were jointly negligent in failing to ensure that the excursion was safe, and that the tour guides were properly trained. The plaintiffs also allege that Alba, Sunquest and Swiss Travel were jointly negligent in failing to provide medical attention at the site of the accident and failing to provide proper information to the hospital where Mr. Leufkens was treated.

[8] The Leufkens have also brought this action against Rincon, the tour operator, as well as the Red Cross of Costa Rica, which provided ambulance services at the site. Finally, they also allege negligence by the medical professionals of the defendant hospital in Costa Rica, who treated Mr. Leufkens until he was transported back to Canada, less than 12 hours after the accident. None of these defendants have defended the action in Ontario. Indeed, Rincon had yet to be served at the time this motion was argued.

[9] In essence, the plaintiffs allege that Michael Leufkens has suffered a permanent injury to his back and a possible head injury as a consequence of the fall and the inadequate medical treatment in Costa Rica. The damages claimed include loss of income and future loss of income in his occupation as a fire fighter, as well as general damages on behalf of Michael and each of the other three family members. The claims of the family members are brought pursuant to the Family Law Act, R.S.O. 1990, c. F.3.

[10] With the exception of the Canadian Leisure Group, none of the defendants have a presence in Ontario. In the affidavits filed, Swiss Travel has denied that it acted in partnership with Alba and Sunquest, and stated that it does not carry on business nor advertise in Ontario. The plaintiffs' only evidence of the alleged partnership is a letter they received on arriving in Costa Rica stating, "In

Costa Rica, Sunquest and Alba have partnered with Swiss Travel Service, a local tour company, to provide you with transportation and optional tours during your stay." However, an affidavit filed by Frank Devito, counsel for the Canadian Leisure defendants, denies any partnership or joint venture with Swiss Travel or Rincon. In my view, the plaintiffs' evidence is not sufficient to show that there is an arguable case that there is a partnership involving Swiss Travel and the Canadian Leisure defendants in Ontario. While the plaintiffs attempted to serve Swiss Travel through service on the law firm of Osler, Hoskin, & Harcourt in Toronto, it is apparent that the service was ineffective. Given that Swiss Travel is not carrying on business in Ontario, nor does it have a presence here, it had to be served outside the jurisdiction.

[11] As a result, the defendant Swiss Travel was served in Costa Rica after the plaintiffs obtained letters rogatory to allow them to do so, relying on rule 17.02(h) [Rules of Civil Procedure, R.R.O. 1990, Reg. 194], on the basis that damage was sustained in Ontario arising from a tort.

Jurisdiction

[12] Swiss Travel has brought this motion, first, under rule 21.01(3) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 which provides,

> 21.01(3) A defendant may move before a judge to have an action stayed or dismissed on the grounds that
>
> (a) the court has no jurisdiction over the subject matter of the action;
>
> . . . . .

[13] A number of cases from British Columbia have made it clear that there are two separate issues to consider when a foreign defendant has been served with a proceeding: first, the defendant can argue that the domestic court has no jurisdiction over the matter, and secondly, that the domestic forum is not the convenient forum (Canadian International

Marketing Distributing Ltd. v. Nitsuko Ltd. (1990), 68 D.L.R. (4th) 318, 56 B.C.L.R. (2d) 130 at p. 132 (C.A.); Ell v. Con-Pro Industries Ltd. (1992), 11 B.C.A.C. 174, [1992] B.C.J. No. 513 (C.A.) at p. 13; Jordan v. Schatz (2000), 189 D.L.R. (4th) 62, 77 B.C.L.R. (3d) 134 at pp. 141-42 (C.A.)).

[14] In contrast, courts in Ontario have often failed to isolate the issue of jurisdiction in a case such as this. Instead, the courts have either focused only on the issue of forum non conveniens (see, for example, Frymer v. Brettschneider (1994), 19 O.R. (3d) 60, 115 D.L.R. (4th) 744 (C.A.); de Vlas v. Bruce (1994), 18 O.R. (3d) 493, 25 C.P.C. (3d) 140 (Gen. Div.); Dunlop v. Connecticut College (1996), 50 C.P.C. (3d) 109 (Ont. Gen. Div.); Trepanier (Litigation guardian of) v. Kloster Cruise Ltd. (1995), 23 O.R. (3d) 398 (Gen. Div.)), or have mixed the two issues of jurisdiction and forum non conveniens (Ontario New Home Warranty Program v. General Electric Co. (1998), 36 O.R. (3d) 787, 17 C.P.C. (4th) 183 (Gen. Div.); Lemmex v. Bernard (2000), 49 O.R. (3d) 598 (S.C.J.), leave to appeal to Div. Ct. granted (2000), 51 O.R. (3d) 164).

[15] Nevertheless, the distinction between these two lines of inquiry is consistent with the jurisprudence of the Supreme Court of Canada in a number of cases dealing with conflict of laws that were decided in 1990 and subsequent years. In Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 at pp. 1103-04, 76 D.L.R. (4th) 256, La Forest J. emphasized that a province should enforce a judgment given by a court in another province, provided the court giving judgment had appropriately exercised jurisdiction. Unless the defendant was within the jurisdiction at the time of the action or had attorned to the jurisdiction of the court, a court can be said to have appropriately exercised jurisdiction when there was a "real and substantial connection" between the forum and the subject matter of the litigation.

[16] In his reasons in Morguard, La Forest J. made reference to Moran v. Pyle National (Canada) Ltd. (1974), [1975] 1 S.C.R. 393, 43 D.L.R. (3d) 239, where the Supreme Court had held that the Saskatchewan courts had jurisdiction over a tort

action in which an individual was fatally injured in that province by a light bulb manufactured in Ontario by a business that did not operate in Saskatchewan. In that case, the court refused to adopt a rigid or mechanical approach to the determination of the situs of a tort. Rather, Dickson J., writing for the court, inquired whether it was "inherently reasonable" for the action to be brought in the particular jurisdiction, stating [at p. 409 S.C.R.],

> 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.

[17] Subsequently, in Tolofson v. Jensen, [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289, the Supreme Court affirmed the view that, "In Canada, a court may exercise jurisdiction only if it has a 'real and substantial connection' (a term not yet fully defined) with the subject matter of the litigation" (at p. 1049 S.C.R., p. 304 D.L.R.). La Forest J. reiterated his views in Hunt v. T & N plc, [1993] 4 S.C.R. 289, 109 D.L.R. (4th) 16 at p. 326 S.C.R., pp. 41-42 D.L.R., noting that "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." Throughout all these decisions, the court drew a distinction between jurisdiction and the doctrine of forum non conveniens.

[18] While jurisdiction is to be determined on the basis of the real and substantial connection test, the Supreme Court indicated that the term is not yet fully defined. However, the British Columbia Court of Appeal has held, in Jordan v. Schatz, supra, [at pp. 140-41 B.C.L.R.] that to satisfy this test, there must be something more than the residency of the plaintiff in the jurisdiction:

> There must be some other or further sufficient connecting factor or "contacts" to this province. Clear examples of connecting factors include the residency of the defendant in

the jurisdiction or the fact that the tortious act was committed or damages suffered here.

[19] In this case, the plaintiffs argue that there is jurisdiction in the Ontario court, because Mr. Leufkens and his family have suffered damage here. Although the accident occurred in Costa Rica, and the injury suffered was allegedly further aggravated by the medical care provided at the scene and at the hospital there, the plaintiffs argue that Michael Leufkens has received most of his medical treatment in Ontario. It is here that he has experienced pain and suffering and is likely to experience a loss of future income. Therefore, they rely on Vile v. Von Wendt (1979), 26 O.R. (2d) 513 at p. 517, 103 D.L.R. (3d) 356 (Div. Ct.), which held that "damage" in [what is now] rule 17.02(h) of the Rules of Civil Procedure encompassed pain and suffering and injury experienced in Ontario. However, that case did not address the issue of jurisdiction simpliciter and was decided before the decisions in Morguard, Tolofson and Hunt, supra.

[20] A number of Ontario cases, in which the facts are similar to those in the case before me, have concluded that the Ontario court lacked jurisdiction when a tort was committed outside Ontario. For example, Cunningham J. in MacDonald v. Lasnier (1994), 21 O.R. (3d) 177 (Gen. Div.) concluded that he had no jurisdiction over a tort action in which an Ontario resident sought damages against a treating physician and hospital in Quebec, following a single car accident in that province. Although the plaintiff suffered damage and received medical treatment in Ontario, Cunningham J. held that there was not a real and substantial connection between the action and Ontario (at pp. 182-83).

[21] A similar approach was adopted by Binks J. in Long v. Citi Club, [1995] O.J. No. 1411 (Gen. Div.) at paras. 5-7, who held that the Ontario Court had no jurisdiction with respect to a tort committed in Quebec by a defendant resident there, despite the fact that the plaintiff was an Ontario resident who alleged that he suffered damage in Ontario. See, also, Jean- Jacques v. Jarjoura, [1996] O.J. No. 5174 (Gen. Div.) at paras. 13-15.

[22] The plaintiffs rely on Lemmex v. Bernard, supra, in which McKinnon J. held that the Ontario court had jurisdiction over a tort action arising from alleged injury to an Ontario resident during a tour in Grenada, for which he had contracted while on a cruise of the Caribbean. The plaintiff had also brought proceedings against the company that sold him the tour and the cruise operator in contract and tort. Leave to appeal to the Divisional Court was granted by Aitken J. for a number of reasons, including the fact that McKinnon J. had failed to distinguish between the issues of jurisdiction and forum non conveniens, and that there was conflicting jurisprudence with respect to whether the Ontario courts could take jurisdiction because the plaintiff is resident in Ontario and suffers damage here. As well, she concluded that there was good reason to doubt the correctness of the decision with respect to the issue of jurisdiction.

[23] In the present action, Swiss Travel does not have a presence in Ontario, as the affidavit material before me is uncontradicted that Swiss Travel does not carry on business in Ontario, nor does it operate in partnership with the Canadian Leisure Group. Any arrangement between Swiss Travel and Alba/ Sunquest appears to be a contractual one, based in Costa Rica. Therefore, the Ontario courts can only claim jurisdiction if there is a real and substantial connection between Ontario and the subject matter of the action.

[24] In my view, the subject matter of the litigation is the alleged negligence which occurred in Costa Rica. Even if the claims against Alba/Sunquest have a basis in contract, this is essentially a tort action, because the allegations are of a lack of due care and attention and negligence. The accident giving rise to the litigation occurred in Costa Rica, where Swiss Travel carries on its business. The plaintiffs purchased their tickets for the excursion from Swiss Travel there, and all the allegations of negligence arise out [of] events during the Tree Top Trail tour or immediately following the fall, because of the quality of the emergency care provided and the quality of the medical care before Mr. Leufkens was evacuated.

[25] In Moran v. Pyle, supra, the Supreme Court of Canada looked to the reasonable expectations of the defendant in determining whether there was jurisdiction in the domestic forum to deal with a tort action involving defective products used in that jurisdiction, which caused injury there. In Lemmex, McKinnon J. applied the same reasoning to the provision of services. He held that it was reasonable for a tour operator in Grenada to expect that a foreign tourist would want to bring a claim in her or his home jurisdiction if injured while on vacation. Reliance was placed on the passage in Moran quoted earlier in these reasons, where Dickson J. spoke of the reasonable expectations of a manufacturer, in a products liability suit, with respect to products distributed in another jurisdiction that caused a tort there. McKinnon J. likened the provision of services to foreign tourists to the distribution of consumer products in the channels of commerce, and concluded that the provider could reasonably foresee that the foreign tourist might wish to sue in his or her home jurisdiction (supra, at p. 604).

[26] With all due respect to McKinnon J., I do not see the reasoning in Moran to be applicable here, so as to justify an Ontario court assuming jurisdiction. It is significant, in Moran, that the defendant had manufactured and sold a deficient product, which then caused an injury in Saskatchewan. It was foreseeable to the manufacturer, having put the defective product into the marketplace, that an accident might occur in the place in which the product was consumed. On facts such as those, the province in which the accident occurred was held to have a real and substantial connection with the tort action.

[27] Here, we are dealing with the provision of services in Costa Rica which allegedly caused injury there -- not goods sent into Ontario, which caused injury in Ontario. This is a case where the plaintiffs travelled to Costa Rica for a vacation. The accident and the negligent actions which allegedly aggravated the initial injury all occurred in Costa Rica. All the defendants except the Canadian Leisure Group defendants are in Costa Rica. In my view, the proper question is not whether it was reasonably foreseeable to the Costa

Rican defendants that they would be sued in Ontario, should an Ontario resident with whom they had dealings in Costa Rica be injured there. Rather, the proper inquiry is whether it was reasonably foreseeable that the services provided would cause an injury in Ontario. Clearly, it was not, as the injury occurred in Costa Rica.

[28] In addition to the fact that the alleged acts of negligence and the damage caused thereby occurred in Costa Rica, it is clear that a number of the key witnesses with respect to liability are in Costa Rica, including employees of Swiss Travel, Rincon, the Red Cross and the hospital. It is not disputed that the proper law to be applied will be the law of Costa Rica, as the tort was committed there.

[29] Clearly, the plaintiffs have a connection with Ontario, and have suffered damage here. The medical evidence with respect to the injuries is predominantly here. However, cases such as MacDonald v. Lasnier, Long and Jean-Jacques, referred to above, have held that the mere fact that the plaintiff continues to suffer damages in Ontario after sustaining an injury as a result of a tort committed outside the jurisdiction does not create a real and substantial connection between Ontario and the action. In my view, this is a case where there is not a real and substantial connection between the subject matter of the action against Swiss Travel and Ontario; rather, it is Costa Rica which has the real and substantial connection with the subject matter of the litigation. Therefore, this action should be stayed against Swiss Travel on the ground that this court lacks jurisdiction.
Forum Non Conveniens

[30] In the alternative, the defendant argues that this action should be stayed on the basis that Ontario is not the convenient forum for the hearing of this proceeding. Rule 17.06(2)(c) provides that a party may move to set aside service outside Ontario or seek a stay of proceedings in Ontario where "Ontario is not a convenient forum for the hearing of the proceeding." In Frymer, supra, Arbour J.A. stated that the appropriate remedy, when Ontario was held not to be the convenient forum, was to order a stay of

proceedings, rather than set aside service of the Statement of Claim (at p. 83).

[31] In deciding whether Ontario is the convenient forum, the test is whether there is a clearly more appropriate forum than the domestic forum in which the case should be tried (Amchem Products Inc. v. British Columbia (Workers' Compensation Board), [1993] 1 S.C.R. 897 at p. 921, 102 D.L.R. (4th) 96).

[32] Clearly, there is significant overlap between the factors considered with respect to jurisdiction simpliciter and forum non conveniens. Among the factors that the courts consider in determining the appropriate forum are the residence or place of business of the parties, the jurisdiction in which the factual matters arose, the location from which the bulk of the evidence will come, the location in which the bulk of the witnesses reside, the location of key witnesses, the governing law, the location where relevant agreements are made, and any juridical advantage or disadvantage to a party (Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente (1999), 178 D.L.R. (4th) 409 at pp. 414-15, 39 C.P.C. (4th) 160 (Ont. C.A.)). As stated in Frymer, supra, at p. 79:

> The choice of the appropriate forum is designed to ensure that the action is tried in the jurisdiction that has the closest connection with the action and the parties. All factors pertinent to making this determination must be considered.

[33] In this case, the four plaintiffs are in Ontario. As well, the Canadian Leisure defendants are here. While they are technically three defendants, they are, in practical terms, one defendant. All of the other defendants reside in Costa Rica, and Alba and Sunquest have a permanent presence there.

[34] The dispute centres around events which occurred in Costa Rica, since the particulars of negligence relate to the operation of the Tree Top Tour, the emergency medical treatment at the site, the ambulance service, and the medical

treatment at the hospital in Costa Rica. In this case, the law of Costa Rica will apply to the tort claims, and if the action were to proceed in Ontario, would require expert witnesses on the law of Costa Rica, who would very likely come from Costa Rica.

[35] Swiss Travel's key witnesses on the issue of liability, including those who can testify as to the safety of the tour and the medical attention provided after the accident, are in Costa Rica. As well, Swiss Travel has indicated that it will cross-claim against Rincon and the other Costa Rican defendants, and the evidence of the witnesses in Costa Rica is key to the determination of a cross-claim. These witnesses include some of its own employees, but also employees of Alba/ Sunquest in Costa Rica, Rincon, and the Red Cross, and the treating doctors at the hospital.

[36] The plaintiffs claim that they may call some 27 witnesses, of whom 20 are in Ontario. It appears that there is overlap between these witnesses, and I doubt that all would be called, either with respect to liability or damages. Clearly, Michael and Elaine Leufkens are key witnesses, and they reside in Ontario. The plaintiffs' witnesses with respect to his medical condition after he arrived in Ontario and the loss of future income are also in Ontario.

[37] Wherever the action is tried, one issue will be the quality of the medical care provided in Costa Rica, which will require expert witnesses on the standard of care with respect to medical treatment in that country.

[38] Swiss Travel also alleges that it will suffer a significant juridical disadvantage if it has to litigate in Ontario, since the Red Cross and other medical defendants have indicated that they do not intend to defend here. Rincon has not yet been served, but it is unlikely that it will defend here. Therefore, Swiss Travel is likely to face serious obstacles in obtaining evidence from key witnesses in an Ontario proceeding. As well, Swiss Travel's insurer has indicated that it will not defend an action in Ontario, other than the current motion. This constitutes a further juridical

disadvantage for Swiss Travel.

[39] The plaintiffs have not indicated that they will suffer a juridical disadvantage beyond the costs of litigating in Costa Rica. There is no indication that they face a limitation period if they have to proceed in Costa Rica.

[40] One of the considerations, in determining the appropriate forum, is the avoidance of a multiplicity of proceedings. It is apparent that if Swiss Travel is required to continue these proceedings in Ontario and a finding of liability is made, it will have to implement proceedings in Costa Rica as well, in order to seek indemnity from the other defendants. This raises the risk of inconsistency in the

[41] Having considered all the factors, I conclude that Costa Rica is clearly the more appropriate forum in which to determine this action, which is in essence a claim for damages arising from events in Costa Rica to be decided under Costa Rican law, and in which many of the key witnesses are in Costa Rica and not easily compellable in an Ontario proceeding. I am satisfied that Swiss Travel will face a juridical disadvantage if it has to proceed here. Therefore, I would stay the action against Swiss Travel on the ground of forum non conveniens as well as lack of jurisdiction. Conclusion

[42] The Canadian Leisure defendants made oral submissions with respect to this motion, arguing that I should find that the Ontario court has jurisdiction or, in the alternative, that the action should be stayed on the grounds of forum non conveniens. However, they filed no notice of motion with respect to the forum non conveniens issue. As of yet, they have served no cross-claim against Swiss Travel or the other defendants. As the basis for the claim against them is different from Swiss Travel, including a claim in contract, I make no order affecting the proceedings against them at this time.

[43] For the reasons given, the action against Swiss Travel is stayed. If the parties wish to speak to costs, they may make written submissions or make an appointment with my

secretary.

Motion granted.