

E News

March 2007

ARTICLE

- 1 Interjurisdictional
Lawsuits: Accidents
on Vacation

EVENTS

- 5 Upcoming
Conferences
- 5 New Office Suite
- 5 Radio 640AM
Talk Shows



Not so much Fun in the Sun:

Accidents on Vacation

A Brief Overview of Interjurisdictional Lawsuits
Involving Automobile Accidents

It's that dreary part of mid-winter and you're packing for a well-deserved vacation to sunnier parts.

Chances are your biggest concerns are finding sunscreen, filling suitcases and dusting off sandals . . . **the last thing on your mind is probably your legal rights to sue in tort for injuries sustained in a foreign jurisdiction.**

Even as a lawyer practicing personal injury, I fully admit that, once I'm in vacation mode, I've a tendency to park my legal mind at the office before

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injury on vacation



Not a pleasant
topic to think
about, but it does
happen.

departing for the airport. While injury on vacation is not a pleasant topic to think about, it does indeed happen, and there is much to consider with regard to one's legal rights for injuries sustained while outside of Ontario. This article will briefly cover some issues relating to personal injuries and interjurisdictional law.

Let us imagine an unfortunate scenario...

You reside in Ontario and you are driving a car that is licensed and insured under an Ontario policy. You've been wintering down south and you're now making the trip back to Canada for the summer months. Somewhere between Orlando and Toronto you get into a car accident — let's say the accident occurs in Pennsylvania — you sustain serious injuries in this accident, but you do eventually return to your home in Toronto. You find yourself back in Toronto and you are wondering what to do next. The following will provide a brief overview of the issues that you will need to consider and the avenues of compensation that may be available to you.

Immediate Concerns: Accident Benefits

If you have just been injured in the hypothetical accident above, there are a number of things that you will need immediately to be able to deal with your injuries. These might include such things as medications, physiotherapy, housekeeping help, attendant care assistance and if you cannot return to work, you will require some sort of income replacement. All of these types of assistance will be available through your own Ontario automobile insurance — even though the accident occurred outside of your home province. This is true for all accidents occurring in Canada and the United States. The legislation provides an option for individuals to claim accident benefits at either the scale provided for under the Ontario scheme or at the scale provided for

in the jurisdiction where the accident occurred. Whichever system you opt into you are bound by the rules and regulations of that jurisdiction.¹

Long Term Concerns: Can I start a lawsuit and where do I do it?

If the individual injured in the hypothetical Pennsylvania accident chooses to sue the individual responsible for causing the accident, the next question that arises is where would they bring their action? There are two possible options in this scenario:

- Ontario, where the Plaintiff resides;
- or Pennsylvania, where the accident occurred.

Choosing between the different locations requires a balancing act to conclude whether the most appropriate or convenient forum is chosen. The courts have developed a test to help determine whether the chosen forum is the most appropriate. Essentially one needs to demonstrate that the forum chosen has a real and substantial connection with the litigation before it. The sorts of factors that are examined include:

- the Plaintiff's connection to the forum;
- the Defendant's connection to the forum;
- the advantages and disadvantages to either of the litigants in relation to the chosen forum;
- the willingness of the foreign court to respect and enforce an Order made by the Ontario court;
- and, whether or not it is an international or inter-provincial matter.

The court will weigh all these factors and determine whether or not the chosen forum is appropriate.² The outcome of this exercise will depend heavily on the particular factors of the case at bar.

Once a forum is chosen, the next task is to query what law will be applied. In terms of deciding the applicable law, one needs to go back to the general principles established by the Supreme

insufficient insurance



The OPCF-44R endorsement protects you if you are injured by a motorist who does not have sufficient insurance to cover the damages claimed.

Court of Canada in a case called *Tolofson v. Jensen*³. In this case, the court decided that it is the law of the place where the incident occurred that will govern the liability and other questions of substantive law; and, the law of the place where the action was heard that will govern the procedural aspects of the case. Therefore, in the example above, when one gets into a car accident in Pennsylvania the laws of Pennsylvania will apply in determining who is in law responsible for the accident, if the action for the Pennsylvania accident is heard in Ontario, the laws of the Ontario courts will apply to govern the procedure of the Courts. Depending on where the accident occurred the application of this rule can either be a blessing or a curse for your lawsuit. For example for accidents that occur in the province of Quebec, there is no option for an individual to sue for damages after the fact in any jurisdiction. See for example the case of *Soriano (Litigation Guardian of) v. Palacios*.⁴

However, on the flip side, Ontario residents injured in jurisdictions outside of Ontario may be able to bring a claim in Ontario for injuries that otherwise would not meet the Ontario threshold of "permanent and serious" if the foreign jurisdiction permits such cases in their courts. See for example the case of *Chomos v. Economical Mutual Insurance*.⁵

Vacationing in the Islands: Insufficient Insurance Limits

As mentioned above, the Statutory Accident Benefit Protection will only cover you in Canada and the United States. If you are injured outside of these jurisdictions, you will need to look elsewhere for that primary coverage. The other problem with accidents that occur outside of Canada and the United States is that often the resident driver who causes the accident is inadequately insured. In these cases you may be able to look to the optional underinsured provisions in your automobile policy. The OPCF-44R endorsement protects you if you are injured by a motorist who does not have sufficient

insurance to cover the damages claimed. Recently the courts have determined that this endorsement is applicable to accidents that occur outside of Canada and the United States. The case of *Sutherland v. Pilot Insurance*⁶ addressed this issue.

Very briefly, this case involved a Plaintiff, Mr. Sutherland, who was severely injured in a motor vehicle accident that occurred in Jamaica. He was a passenger at the time of the accident. Mr. Sutherland resided in Ontario and was insured under the Standard Ontario Automobile Policy. His insurance coverage included the optional OPCF-44R underinsurance protection coverage. There were two vehicles involved in the accident, both of which were insured under Jamaican insurance policies. The policy limits of these policies were roughly equivalent to \$18,400.00 Cdn.

Given that Mr. Sutherland became a quadriplegic as a result of this accident, it was clear that the amount of compensation available under the Jamaican policies would not be sufficient to cover his damages. Mr. Sutherland then looked to the underinsured provisions of his own automobile insurance policy here in Ontario.

The insurer initially denied this claim on the basis that the OPCF-44R was not applicable to accidents occurring in Jamaica. The matter ended up before the Ontario Courts with the primary question being whether or not there were territorial limits to the OPCF-44R endorsement. The Court found that the OPCF-44R was to be considered separate and apart from the rest of the standard policy, and therefore the territorial limits from the main policy were not imported. This conclusion is based on the fact that OPCF-44R is a separate document for which an insured pays a separate premium apart from the standard policy and it deals with an entity known as the "underinsured" which is addressed separately from other concepts that are dealt with under the standard policy.

The court stated that if outside limitations and exclusions are to be imported,

Accident on vacation?



Consult a lawyer soon after the incident to determine your legal rights.

they must be done so expressly and without ambiguity. This statement is congruent with the general principles of drafting and interpretation that exclusions are to be read narrowly.

It is understood that the Defendant Insurer in this matter is appealing the decision.

A more detailed analysis of the Court's reasoning can be found in the paper referenced above on our website.

More on Vacationing in the Islands: Claims Against Tour Promoters

As mentioned above, generally before a court will entertain a suit, it must be satisfied that there is some real and substantial connection that links the parties or the event to the chosen jurisdiction. The Court recently addressed this issue in the matter of *Eid v. Hola Sun Holidays et al.*⁷ This case involved a claim arising out of injury which occurred at a resort in Cuba. The resort was owned by a Spanish hotel chain. The injured plaintiff was an Ontario resident. She chose to bring a claim in Ontario. She sued both the Spanish hotel chain and the Ontario company who was responsible for the promotion and marketing of the hotel chain in Canada. The Spanish hotel chain brought a motion to have the action dismissed on the basis that Ontario did not have jurisdiction and/or it was not the proper forum. The Court dismissed the Defendant's motion.

Justice Conway used the principles enunciated in the case of *Muscutt v. Courcelles* to justify Ontario as the proper forum. Among the factors that she considered were that the Ontario promotional company advertised for the resort in Ontario with sole purpose of bringing Ontario residents to Cuba. The promotional company promoted the specific activities that the plaintiff was involved in when she was injured, the Court found that it would be unfair for the Defendant to promote dangerous activities in Ontario and then expect not to be accountable for them. Furthermore she found that Cuba, where the injury occurred, would not have been any more of an appropriate forum because the head office of the

resort chain was not located there and it had no assets in Cuba. Additionally she noted that the plaintiff resided in Ontario and received most of her medical attention here and there was another Ontario defendant; these were factors that tipped the balance in favour of Ontario being a forum with a real and substantial connection to the claim.

Conclusion

If you encounter this unfortunate accident on vacation situation, it is best to consult a lawyer soon after the incident so that you can determine what your legal rights are. Important considerations, such as a limitation period, is considered substantive law, and as such, is governed by the law of the place where the accident occurred. Therefore, you will want to obtain this information as soon as possible to ensure that you do not lose your right of action to a limitation period. Generally, if you contact an Ontario lawyer with questions about a foreign accident, they will either be able to refer you to a lawyer in the jurisdiction in question or make inquiries on your behalf.

This article is written for general information purposes only and should not be taken as legal advice. Each and every case has unique factors and as such it is best to speak to a lawyer directly to ensure that the advice you get is appropriate to your specific situation.

FOOTNOTES

- ¹ SAB Schedule, s. 57
- ² These factors are outlined in the Court of Appeal decision of *Muscutt v. Courcelles* (2002) 60 OR (3d) 20, C.A.
- ³ 1994 CarswellBC 1
- ⁴ 2005 CarswellOnt 2218
- ⁵ 2002 CarswellOnt 2692 C.A.
- ⁶ 2006 CarswellOnt 4090
- ⁷ 2006 CarswellOnt 8583

EDITOR'S NOTE:

A fuller discussion on the topic can be found in an article written by Angela L. Currie and Charles Gluckstein of Gluckstein & Associates LLP. Please visit www.gluckstein.com.

Upcoming Events 2007

Full details on upcoming events can be found at www.gluckstein.com in **What's New**.

Conferences

Brain Injury Awareness Month: Is Coma Treatable?

31 May — Toronto

1 June — St. Catharines

SPEAKERS: **Dr. Mihai Dimancescu** and **Dr. John Connolly**

SPONSOR: Gluckstein & Associates LLP

CONTACT: Melany 416.408.4252

or, call toll-free 1.866.308.7722

EMAIL: info@gluckstein.com

REGISTRATION + INFORMATION:

<http://www.gluckstein.com/WhatsNew1.html>

15th Interurban Spinal Cord Injury Conference

"Research To Reality"

Hamilton, Ontario

25, 26 October 2007

TOPICS: Living with Chronic Health Issues, Neurological Repair and Recovery, Motivating Clients, Alternative Health Modalities, and more.

INFORMATION:

<http://www.spinalcordinterurban.org>

Coming Together: Quilting the Pieces After Brain Injury

Provincial A.B.I Conference

25, 26 October 2007

Kitchener, Ontario

TOPIC: Providing the many and diverse

pieces which together can have a significant role in the recovery and living with an ABI.

WEB SITE:

<http://www.obia.on.ca>

Gluckstein NEWS

26 March 2007

We will be moving into our **new office suite** on March 26, 2007.

Please note our new office address:

Gluckstein & Associates LLP

595 Bay Street,

P.O. Box 53, Suite 301

Toronto, Ontario M5G 2C2

Our phone numbers remain:

T 416.408.4252 F 416.408.4235

640AM Radio

21 April Experts' Hour

Talk shows aries @ **11:00 am**

featuring **Charles Gluckstein**

and **Dianne Henderson**

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