COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Stanway v. Wyeth Pharmaceuticals Inc.,* 2009 BCCA 592

Date: 20100208
Docket: CA036317

Between:

Dianna Louise Stanway

Respondent
(Plaintiff)

And

Wyeth Pharmaceuticals Inc., Wyeth-Ayerst International Inc. and Wyeth

Appellants
(Defendants)

And

Wyeth Canada Inc., Wyeth Holdings Canada Inc. and Wyeth Canada

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraph 72 where a change was made on February 8, 2010.

Before: The Honourable Madam Justice Rowles
The Honourable Mr. Justice Smith
The Honourable Mr. Justice Chiasson

On appeal from: Supreme Court of British Columbia, September 20, 21, 2007 (*Stanway v. Wyeth Canada Inc.*, 2008 BCSC 847, Docket S87156)

Counsel for the Appellant:	K.I. Chalmers and D.F. Harrison
Counsel for the Respondent:	D.A. Klein and S.J. Tucker
Place and Date of Hearing:	Vancouver, British Columbia May 11 and 12, 2009
Place and Date of Judgment:	Vancouver, British Columbia December 21, 2009

Written Reasons by:
The Honourable Mr. Justice Smith

Concurred in by:
The Honourable Madam Justice Rowles
The Honourable Mr. Justice Chiasson

Reasons for Judgment of the Honourable Mr. Justice Smith:

Introduction

[1] The appellants, to whom I will refer collectively as the “US defendants”, appeal from the dismissal by Madam Justice Gropper of their chambers application for an order dismissing the underlying action against them on the basis the Supreme Court of British Columbia does not have “territorial competence” over them under the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*]. The reasons of the chambers judge are indexed as 2008 BCSC 847.

[2] The other defendants (the “Canadian defendants”) do not dispute the court’s jurisdiction.

[3] The chambers judge held there was a “real and substantial connection between British Columbia and the facts on which the proceeding against [the US defendants] is based”, a sufficient condition to invest the court with jurisdiction by virtue of s. 3(e) of the *CJPTA*, and that the court therefore has territorial competence over the US defendants. The central issue in this appeal is whether she erred in reaching that conclusion.

[4] In my view, the approach taken by the chambers judge was incorrect and, as a result, her analysis was flawed. Nevertheless, her conclusion was correct. For the following reasons, I would dismiss the appeal.

The Law Governing Jurisdiction

The law before enactment of the *CJPTA*

[5] Until 1990, the Supreme Court of British Columbia exercised *in personam* jurisdiction over foreign defendants only if they were within British Columbia at the time of the action, if they submitted to the court’s jurisdiction by agreement or attornment, or if they were served *ex juris* pursuant to Rule 13(1) of the *Rules of Court*, B.C. Reg. 221/90, which listed the grounds upon which service *ex juris* could be effected. Such procedure-based rules were considered in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, a case dealing with the enforcement of *in personam* judgments between provinces. La Forest J., writing for the court, said, “[T]he rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner” (at 1096) and added, “[W]hat must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice” (at 1097). Accordingly, he reasoned, the principle of comity, by which states give deference and respect to the legislative, executive, and judicial actions of other states legitimately taken within their territory, had to be molded to fit the modern world (at 1097). He observed that fairness of process would not be an issue within Canada but, since the rules for service *ex juris* varied from province to province, reasonable limits must be placed on the exercise of jurisdiction against defendants served outside a province if the courts of other provinces were to be expected to recognize each other’s judgments (at 1103-04). Noting that the principles of order and fairness require consideration of the interests of the parties, he concluded, “It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties” (at 1108).

[6] Mr. Justice La Forest did not define “real and substantial connection” with any precision in *Morguard*. Rather, as he later said, again writing for the court, in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289 at 325, 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." He added, at 326, "[T]he 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."

[7] The Supreme Court extended the real and substantial connection test to the international sphere in *Beals v. Saldhana*, 2003 SCC 72, [2003] 3 S.C.R. 416, where Major J., writing for the majority, described the nature of a real and substantial connection in this way, at para. 32:

> [32] The "real and substantial connection" test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.

The Enactment of the *CJPTA*

[8] *Morguard* marked a significant change in the common law and it generated much discussion amongst academic commentators, some of whom expressed the view that the real and substantial connection test failed to bring any order or certainty to the determination of whether jurisdiction should be assumed in particular cases: for example, see Joost Blom, Q.C. and Elizabeth Edinger, "The Chimera of the Real and Substantial Connection Test", (2005) 38 U.B.C. L. Rev. 373 where, at 380, the authors stated,

> *Morguard* was rife with ambiguity and uncertainty. Two main problems were related to the concept of a real and substantial connection. First, the traditional common law rules for recognition and enforcement of foreign judgments were expressly preserved and no attempt was made to integrate the concept of a real and substantial connection into either the existing framework of those rules or into the framework for the assumption and exercise of jurisdiction. Second, and flowing from the first problem, with respect to the concept of a real and substantial connection, the question left unaddressed and so unanswered was where, on the continuum between minimal and maximal connections, the Court thought the concept should rest.

[9] These difficulties and others were addressed by the Uniform Law Conference of Canada in the *Uniform Court Jurisdiction and Proceedings Transfer Act* [*Uniform Act*], which was adopted by the British Columbia Legislature and enacted as the *CJPTA*. In its introductory comments to the *Uniform Act*, the Conference set out four "main purposes", of which two are relevant to this appeal:

> (1) to replace the widely different jurisdictional rules currently used in Canadian courts with a uniform set of standards for determining jurisdiction;
>
> (2) to bring Canadian jurisdictional rules into line with the principles laid down by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077....

[10] The Conference added that, to achieve these purposes,

> ... this Act would, for the first time in common law Canada, give the substantive rules of jurisdiction an express statutory form instead of leaving them implicit in each province's rules for service of process. In the vast majority of cases this Act would give the same result as existing law, but the principles are expressed in different terms. Jurisdiction is not established by the availability of service of process,

> but by the existence of defined connections between the territory or legal system of the enacting jurisdiction, and a party to the proceeding or the facts on which the proceeding is based. The term "territorial competence" has been chosen to refer to this aspect of jurisdiction ....

[11] Thus, "territorial competence", formerly described as "jurisdiction *simpliciter"*, is defined in s. 1 of the *CJPTA* to mean,

> the aspects of a court's jurisdiction that depend on a connection between,
>
> (a) the territory or legal system of the state in which the court is established; and
>
> (b) a party to a proceeding in the court or the facts on which the proceeding is based.

[12] Now, rather than jurisdiction *simpliciter* depending on the procedural rules for service of process as before, territorial competence is to be determined exclusively by the substantive rules set out in the *CJPTA*. Thus, s. 2 provides,

> (1) In this Part, "court" means a court of British Columbia.
>
> (2) The territorial competence of a court is to be determined solely by reference to this Part.

[13] The substantive rules for determining territorial competence are set out in s. 3, which provides so far as it is relevant for present purposes,

> A court has territorial competence in a proceeding that is brought against a person only if:
>
> ...
>
> (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

[14] In its commentary, the Conference noted that the intent of s. 3(e) was to ensure that all judgments would be based on the exercise of the "properly restrained jurisdiction" that would warrant their recognition in other Canadian jurisdictions, stating,

> 3.3 Paragraph (e) replaces the existing rules, in the common law provinces, relating to service ex juris. Territorial competence will depend, not on whether a defendant can be served ex juris under rules of court, but on whether there is, substantively, a real and substantial connection between the enacting jurisdiction and the facts on which the proceeding in question is based. This provision would bring the law on jurisdiction into line with the concept of "properly restrained jurisdiction" that the Supreme Court of Canada, in *Morguard Investments Ltd. v. De Savoye* (1990), held was a precondition for the recognition and enforcement of a default judgment throughout Canada. The "real and substantial connection" criterion is therefore an essential complement to the uniform Enforcement of Canadian Judgments Act, which requires all Canadian judgments to be enforced without recourse to any jurisdictional test. The present Act, if adopted, will ensure that all judgments will satisfy the Supreme Court's criterion of "properly restrained" jurisdiction, which the court laid down as the indispensable requirement for a judgment to be entitled to recognition at common law throughout Canada.

[15] Although the nature and extent of connection necessary to effect a "real and substantial connection" is not spelled out in the *CJPTA*, s. 10 lends a degree of order and certainty for practical purposes by enacting a

presumption that a real and substantial connection exists in certain specified circumstances. It provides, in its relevant parts,

> 10 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding
>
> ...
>
> (g) concerns a tort committed in British Columbia,
>
> (h) concerns a business carried on in British Columbia....

[16] The Conference's commentary on s. 10 includes the following remarks:

> 10.1 The purpose of section 10 is to provide guidance to the meaning of "real and substantial connection" in paragraph 3(e). Instead of having to show in each case that a real and substantial connection exists, plaintiffs will be able, in the great majority of cases, to rely on one of the presumptions in section 10. These are based on the grounds for service ex juris in the rules of court of many provinces. If the defined connection with the enacting jurisdiction exists, it is presumed to be sufficient to establish territorial competence under paragraph 3(e).
>
> 10.2 A defendant will still have the right to rebut the presumption by showing that, in the facts of the particular case, the defined connection is not real and substantial.

[17] Concurrently with the enactment of the *CJPTA*, the Rules of Court were amended. Rule 13(1), which formerly specified the grounds upon which service *ex juris* could be effected without leave was replaced by a new rule:

> 13 (1) Service of an originating process or other document on a person outside British Columbia may be effected without leave in any of the circumstances enumerated in section 10 of the *Court Jurisdiction and Proceedings Transfer Act*.

[18] Thus, the procedure-based rules governing jurisdiction *simpliciter* have been replaced by the substantive rules governing territorial competence set out in the *CJPTA*.

[19] Before enactment of the *CJPTA*, questions of jurisdiction *simpliciter* were normally decided solely on the basis of the material facts alleged in the plaintiff's pleading. The pleading was examined to determine whether it alleged "jurisdictional" facts sufficient to establish a real and substantial connection to the defendant or to the cause of action and, if it did, that was sufficient: *Furlan v. Shell Oil Co.*, 2000 BCCA 404, 77 B.C.L.R. (3d) 35 at paras. 13-14, leave to appeal ref'd [2000] S.C.C.A. No. 476.

[20] However, the pleaded allegations did not suffice when the foreign defendant contradicted them with evidence. As Mackenzie J.A. said, writing for the Court in *AG Armeno Mines and Minerals Inc. v. PT Pukuafu Indah*, 2000 BCCA 405, 77 B.C.L.R. (3d) 1, at para. 19,

> [19] ... Normally, issues of jurisdiction *simpliciter* fall to be decided on the sufficiency of the pleadings alone but as we have observed in *Furlan v. Shell Oil Co.*, 2000 BCCA 404, there is an exception where the material before the court establishes that the plaintiff's claim is tenuous. A tenuous claim is one where evidence introduced by the foreign defendant contradicts material facts pleaded by the plaintiff or otherwise proves facts fatal to the plaintiff's claim.

He described the respective evidentiary and persuasive burdens in such a contest in para. 26, where he said,

> [26] I think that an evidentiary issue only arises if the defendant applicant tenders evidence that puts in question facts essential to the plaintiff's case. In that sense, the applicant has the initial burden of introducing evidence that challenges the plaintiff's allegations in the writ or statement of claim.... Once the defendant has discharged its initial burden, I think that the plaintiff is required to tender evidence that satisfies the judge that the plaintiff has a good arguable case in the sense of a triable issue on the facts put in issue by the defendant's evidence.

[21] In my view, this approach has been eclipsed by the enactment of the *CJPTA*, which signals a legislative intention to settle the law on territorial competence and by Rule 14 of the Rules of Court, proclaimed in force at the same time, which sets out the procedure for challenging territorial competence. When a challenge is made to territorial competence, the presumption in s. 10 of the *CJPTA* comes into play. In *R. v. Oakes*, [1986] 1 S.C.R. 103 at 115-16, the Court discussed the nature of presumptions in this passage:

> Presumptions can be classified into two general categories: presumptions without basic facts and presumptions with basic facts. A presumption without a basic fact is simply a conclusion which is to be drawn until the contrary is proved. A presumption with a basic fact entails a conclusion to be drawn upon proof of the basic fact (see Cross On Evidence, 5th ed., at pp. 122-23).
>
> Basic fact presumptions can be further categorized into permissive and mandatory presumptions. A permissive presumption leaves it optional as to whether the inference of the presumed fact is drawn following proof of the basic fact. A mandatory presumption requires that the inference be made.
>
> Presumptions may also be either rebuttable or irrebuttable. If a presumption is rebuttable, there are three potential ways the presumed fact can be rebutted. First, the accused may be required merely to raise a reasonable doubt as to its existence. Secondly, the accused may have an evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact. Thirdly, the accused may have a legal or persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact.

[22] The presumption of a real and substantial connection in s. 10 is a mandatory presumption with basic facts. The basic facts are those set out in s. 10(a) through (l), which are taken to be proven if they are pleaded. While the presumption is rebuttable, it is likely to be determinative in almost all cases.

[23] The procedure for challenging territorial competence is set out in Rule 14(6):

> (6) A party who has been served with an originating process in a proceeding, whether served with the originating process in that proceeding in or outside of British Columbia, may, after entering an appearance,
>
> (a) apply to strike out a pleading or to dismiss or stay the proceeding on the ground that the originating process or other pleading does not allege facts that, if true, would establish that the court has jurisdiction over that party in respect of the claim made against that party in the proceeding,
>
> (b) apply to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding, or
>
> (c) allege in a pleading that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding.

[24] Rule 14(6.3) sets out the powers of the court when an application is made under subrule (6)(a) or (b) and permits the court to give directions as it appears necessary:

> (6.3) If an application is brought under subrule (6) (a) or (b) or (6.2) or an issue is raised by an allegation in a pleading referred to in subrule (6) (c), the court may, on the application of a party of record, before deciding the first-mentioned application or issue,
>
> (a) stay the proceeding,
>
> (b) give directions for the conduct of the first-mentioned application,
>
> (c) give directions for the conduct of the proceeding, and
>
> (d) discharge any order previously made in the proceeding.

[25] As explained below, the chambers judge erred in not correctly applying the provisions of sections 3 and 10 of the *CJPTA* but the result she reached is nevertheless supportable.

The Facts

The pleaded "jurisdictional" facts

[26] In this case, "the facts on which the proceeding against [the defendants] is based" are set out in the amended statement of claim. They may be summarized as follows.

[27] The plaintiff is a resident of British Columbia. She developed breast cancer as a result of taking Progestin in combination with the defendants' hormone therapy drug Premarin, which she purchased and used in British Columbia. She brings the action on her own behalf and on behalf of a class of similarly situated persons resident in British Columbia and elsewhere in Canada.

[28] The defendants Wyeth Canada Inc. (WCI) and Wyeth Holdings Canada Inc. (Wyeth Holdings) are Canadian corporations that carry on business in Canada through a general partnership known as Wyeth Canada. Each of these business entities has a registered office in British Columbia. Wyeth Canada is a pharmaceutical business which markets the prescription drugs Premarin, which contains estrogen, and Premplus, which contains both estrogen and progestin, in British Columbia and elsewhere in Canada. The defendants WCI, Wyeth Holdings, Wyeth Pharmaceuticals Inc. (WPI), and Wyeth-Ayerst International Inc. (WAI) are wholly owned subsidiaries of the defendant Wyeth.

[29] The defendants individually and jointly manufactured, tested, marketed, labelled, distributed, promoted, and sold Premarin and Premplus in British Columbia and elsewhere. They engaged in a joint enterprise for the promotion and sale of Premarin and Premplus in British Columbia and elsewhere.

[30] Premarin and Premplus were prescribed to women to treat them for the symptoms of menopause and to post-menopausal women for the improvement of their general health and well being. They cause a number of serious and potentially life-threatening adverse effects, including breast cancer, ovarian cancer, lupus, blood clots, coronary heart disease, stroke, dementia, arthritis, gall bladder disease, asthma, irritable bowel syndrome, and hearing loss. For most women, the risks of using the products outweigh the limited benefits. Menopause can be alleviated with other, safer therapies.

[31] The defendants negligently marketed, tested, manufactured, labelled, distributed, promoted, sold, and otherwise placed Premarin and Premplus into the stream of commerce in British Columbia and elsewhere in Canada when they knew or ought to have known the products were of limited efficacy and were unsafe. They were negligent in doing these things without sufficient testing and medical evidence as to the efficacy and safety of the products.

[32] Further, the defendants negligently failed to adequately inform the plaintiff and other class members that there had been insufficient testing and scientific evidence as to the efficacy and safety of these drugs and of the risks of using them.

[33] The defendants' conduct was also in breach of the provisions of the *Trade Practices Act*, R.S.B.C. 1996, c. 457 and its successor statute, the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2. (These consumer-protection statutes prohibit "deceptive acts and practices" which, by definition, are deceiving or misleading representations or conduct.)

[34] As a result of the defendants' negligence and breach of statutory duties the plaintiff and other class members have suffered damage.

The evidentiary facts

[35] The defendants filed an affidavit, the plaintiff filed a responding affidavit, and the defendants filed a second affidavit in reply. From these affidavits, evidence of the following facts, among others, emerged.

[36] The defendant Wyeth is incorporated in the State of Delaware, USA. It is a public company listed on the New York Stock Exchange and has its head office in Madison, New Jersey, USA. All other defendants are wholly-owned subsidiaries of Wyeth. Wyeth Pharmaceuticals Inc. is incorporated in the State of Delaware and WAI is incorporated in the State of New York. Wyeth Canada Inc., WCI, and Wyeth Holdings are incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 [*CBCA*] and have head offices in Quebec and Ontario. They carry on business in partnership as Wyeth Canada, an Ontario general partnership with its head office in Markham, Ontario.

[37] The US defendants

a) do not maintain an office in British Columbia;

b) are not now, nor have they ever been, registered or licensed to carry on business in British Columbia;

c) do not have any offices or employees situated in British Columbia;

d) do not have any manufacturing or distribution facilities in British Columbia;

e) do not maintain any bank accounts in British Columbia;

f) do not have a mailing address or telephone listing in British Columbia;

g) are not required to, nor do they pay, any sales, property or other taxes in British Columbia; and

h) do not hold, nor have they held, any notices of compliance from the Health Protection Branch of Health Canada to manufacture, distribute or sell any pharmaceutical products in Canada.

[38] The US defendants are also defendants in related litigation in the US Federal Court.

[39] Wyeth Canada developed Premarin and Premplus after conducting extensive clinical research and conducting or sponsoring numerous trials. The US defendants have also conducted clinical research and trials of these products and have shared the resulting information with Wyeth Canada. However, it is Wyeth Canada that decides what products are made available to consumers in Canada.

[40] Wyeth Canada owns the Canadian patents and trademarks for Premarin and holds various approvals for Premarin from the Health Protection Branch (now known as the Health Products and Food Branch) of Health Canada. The Canadian trademark for Premplus is owned by Wyeth and licensed to Wyeth Canada and, prior to its expiry, Wyeth Canada sublicensed the patent for Premplus from Wyeth, which in turn licensed it from two Ontario companies. Only Wyeth Canada and its predecessor Canadian corporations have held the Drug Identification Numbers issued by Health Canada for Premarin and Premplus, which is a requirement for the sale, distribution and marketing of these products in Canada.

[41] The only Premarin and Premplus sold in Canada during the time the plaintiff alleges she used hormone replacement therapy were manufactured in Canada by WCI or by Wyeth Canada after the partnership assumed the business operations. At no time have any packages of Premarin or Premplus sold in Canada identified any association with Wyeth.

[42] Wyeth provides certain treasury, tax and legal services to Wyeth Canada. It also holds certain assets and liabilities, receives income and incurs expenses, and absorbs gains and losses of its subsidiaries where these things are related to the overall management of Wyeth.

[43] Wyeth Canada coordinates its operations with Wyeth to ensure that Wyeth Canada's disclosure of information and its representations made about the products are consistent with the information disclosed and representations made by Wyeth and its other subsidiaries. Product information, such as adverse-event reports, is shared globally among Wyeth and its subsidiaries.

[44] The business of Wyeth Pharmaceuticals is to coordinate regulatory affairs globally for companies in the Wyeth group in order to ensure harmonization and consistency for particular products with regulators in various countries. One of Wyeth Pharmaceuticals' functions is to coordinate core requirements for all product monographs and labelling in the Wyeth Group. However, Wyeth Canada develops its own labels and Health Canada makes the final decision on the content. The global adverse-event reporting section of Wyeth Pharmaceuticals is the central repository and coordinator of adverse-event reports for all Wyeth affiliates worldwide. Wyeth Canada submits reports of adverse events it receives to this section and also receives information that the section disseminates to affiliates. Wyeth Canada is responsible for reporting all Wyeth worldwide adverse-events reports to Health Canada.

The Position of the US Defendants

[45] Before the chambers judge, the US defendants argued that they do not market Premarin or Premplus in Canada or put them into the Canadian market and that they do not test, market, label, distribute, promote or sell these products. They also argued that they were not "suppliers" within the meaning of the BC

consumer protection legislation so as to ground the plaintiff's statutory cause of action: they do not supply and have not supplied goods or services to consumers in B.C. or elsewhere in Canada; they do not solicit, offer, advertise or promote goods and services to consumers in B.C. or elsewhere in Canada; and they have never done so. Accordingly, they submitted, they have no real and substantial connection with British Columbia and the court does not have territorial competence to deal with the action against them.

The Reasons of the Chambers Judge

[46] The chambers judge began her analysis by stating,

> [76] The *CJPTA* codifies the law regarding jurisdiction. However, it is crucial to understand the common law because jurisdiction *simpliciter* still depends on the existence of the common law concept of a real and substantial connection.

[47] She observed that s. 10 of the *CJPTA* lists a number of circumstances in which a real and substantial connection will be presumed, including s. 10(g) (a tort committed in British Columbia) and s. 10(h) (a business carried on in British Columbia). Then, she referred to *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.) for the approach to the real and substantial connection test:

> [80] As stated by Sharpe J.A. in *Muscutt* at para. 75:
>
> ... 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.

[48] Next, she quoted the factors identified in *Muscutt* as relevant:

> [81] At ¶77 to 102 in *Muscutt*, Sharpe J.A. describes eight factors which are relevant in assessing whether the court should assume jurisdiction:
>
> *1. The connection between the forum and the plaintiff's claim.*
>
> The forum has an interest in protecting the legal rights of its residents and affording injured plaintiffs generous access for litigating claims against tortfeasors.
>
> …
>
> *2. The connection between the forum and the defendant*
>
> 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.
>
> …
>
> *3. Unfairness to the defendant in assuming 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.
>
> …
>
> *4. Unfairness to the plaintiff in not assuming jurisdiction*
>
> The principles of order and fairness should be considered in relation to the plaintiff as well as the defendant.

> …
>
> *5. The involvement of other parties to the suit*
>
> … The twin goals of avoiding a multiplicity of proceedings and avoiding the risk of inconsistent results are relevant considerations.
>
> …
>
> *6. The court's willingness to recognize and enforce an extra provincial judgment rendered on the same jurisdictional basis*
>
> … 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.
>
> …
>
> *7. Whether the case is interprovincial or international in nature*
>
> … [T]he assumption of jurisdiction is more easily justified in interprovincial cases than in international cases.
>
> …
>
> *8. Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere*
>
> … One aspect of comity is that in fashioning jurisdictional rules, courts should consider the standards of jurisdiction, recognition and enforcement that prevail elsewhere.

[49] She decided the first five factors favoured the assumption of jurisdiction.

[50] As for the first factor, she concluded the allegation that the plaintiff suffered damage in British Columbia triggered this forum's interest in protecting the legal rights of its residents.

[51] On the second factor, she rejected the US defendants' submission that they did not engage in any activities in British Columbia that would attract jurisdiction. Rather, she said,

> [84] ... I find that the plaintiff has met the low onus of establishing that the defendants engage in "harmonization" and "coordination" of matters involving core monograph and labelling requirements, the efficacy of the products, and the collecting and sharing of other clinical research or trial information. Wyeth Pharmaceuticals' role of a central repository and coordinator for adverse event reporting for all the Wyeth affiliates worldwide demonstrates a sufficient involvement of the US defendants in promoting the efficacy of the drug and its safety. In my view litigation in this forum and jurisdiction is a foreseeable risk of that activity.

[52] Next, she concluded the assumption of jurisdiction would not be significantly unfair to the US defendants. She said,

> [85] ... The activity engaged in by the defendants involves an inherent risk of harm to extra-provincial parties, such that the unfairness in assuming jurisdiction is mitigated.
>
> [86] The plaintiff's case against the Canadian defendants will proceed in this jurisdiction. To also require the US defendants to participate in proceedings in British Columbia, does not, in my view, create unfairness to them.

[53] Then, she considered fairness to the plaintiff:

> [87] The principles of order and fairness must be considered in relation to the plaintiff as well as the defendant. As pointed out in *Muscutt* at para. 89: "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".
>
> [88] If jurisdiction is refused, the plaintiff would be compelled to litigate in the United States. Clearly this would be inconvenient to the plaintiff. Consideration of unfairness favours the plaintiff in my view.

[54] Considering the involvement of other parties to the action, she said,

> [89] The Canadian defendants are involved in this suit and the plaintiff says that the matter will proceed against them whether or not I exercise jurisdiction over the US defendants. The action involves the domestic defendants and thus the case for assuming jurisdiction over the US defendants is strong.

[55] As for the remaining *Muscutt* factors, she said,

> [90] I need not discuss factors 6, 7 and 8 in great detail. While it is a very serious consideration to involve an international defendant, I have not been provided with any international standards or the standards applied in the US defendants' jurisdiction to determine whether the real and substantial connection test has been met on the basis of damage sustained within the jurisdiction.

[56] She stated her conclusion as follows:

> [91] In weighing all the factors, I find that the US defendants' admitted engagement in activities in relation to the Canadian companies and to consumers in Canada is sufficient to establish a real and substantial connection. In particular, these activities consist of "harmonization" and "coordination" of matters involving core monograph and labelling requirements, the efficacy of the products, and the collecting and sharing of other clinical research or trial information. The US defendants have failed to rebut the presumption in s. 10 of the *CJPTA*. In the result, the plaintiff has brought her case within s. 10 of the *CJPTA*.

[57] As a result, she decided it was not necessary to discuss the US defendants' submission that they were not "suppliers" within in the meaning of that term in the B.C. consumer protection legislation and that the legislation was therefore not applicable to them. She said, "I leave it to the trial judge to determine if [the legislation] applies and whether the US defendants are liable under its provisions."

Discussion

[58] The tort of negligent manufacture will be taken to have occurred in the place where the damage was suffered regardless of where the wrongful conduct elements of the tort took place if the wrongdoer knew or ought to have known the defective product would be used in the place where the damage took place: *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393. As the Court said,

> If the essence of a tort is the injury or wrong, a paramount factor in determining *situs* must be the place of the invasion of one's right to bodily security. … The jurisdictional act can well be regarded, in an appropriate case, as the infliction of injury and not the fault in manufacture. (405)
>
> …
>
> Applying this test to the 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. (409)

[59] Although *Moran* concerned the enforcement of a provincial judgment in another province, the Court found this reasoning "equally compelling with respect to foreign jurisdictions" (*Beals* at para. 25).

[60] As well, a failure to warn British Columbia consumers of a hazardous product is a tort committed in British Columbia, regardless of where the omission took place, if the defendant knew or ought to have known the product would be used in British Columbia – the duty to warn is a duty to warn the consumer in this jurisdiction: *G.W.L. Properties Ltd. v. Grace & Co.-Conn* (1990), 50 B.C.L.R. (2d) 260 at 264 (C.A.).

[61] The plaintiff pleaded the defendants (including the US defendants) manufactured unsafe products and that they jointly "marketed, tested, manufactured, labelled, distributed, promoted, sold, and otherwise placed" the products into the stream of commerce in British Columbia when they knew or ought to have known the products were unsafe. She also pleaded the defendants failed to warn her of the risks of using the products. Further, she pleaded she suffered damage in British Columbia as a result of the defendants' wrongful acts and omissions.

[62] Thus, s. 10(g) of the *CJPTA* was satisfied on the plaintiff's pleading and there was a presumed real and substantial connection between British Columbia and the facts on which the proceeding against the defendants was based on the basis that the proceeding concerns torts committed in British Columbia.

[63] Further, the plea that the defendants jointly "marketed, tested, manufactured, labelled, distributed, promoted, sold, and otherwise placed" the products into the stream of commerce in British Columbia is in effect a plea that the defendants (including the US defendants) carried on business in British Columbia. Thus, s. 10(h) of the *CJPTA* was also satisfied and a presumption of territorial competence was raised.

[64] The question then for the chambers judge was whether the US defendants rebutted the presumption of real and substantial connections on these grounds.

[65] As I have noted, the chambers judge concluded

> [91] ... that the US defendants' admitted engagement in activities in relation to the Canadian companies and to consumers in Canada is sufficient to establish a real and substantial connection. In particular, these activities consist of "harmonization" and "coordination" of matters involving core monograph and labelling requirements, the efficacy of the products, and the collecting and sharing of other clinical research or trial information.

[66] The US defendants do not challenge these findings and properly so, since they are supported by the evidence led by the US defendants themselves. Rather, they contend that these connections are "tenuous or relatively insignificant" and that the chambers judge erred in concluding they established a real and substantial connection. They submit that their evidence that they do not carry on business in British

Columbia was not contradicted; that a parent company is not liable for the actions of its subsidiary unless the subsidiary does not function independently and is used as a shield for improper conduct; that the evidence establishes that the Canadian defendants manufactured and sold the products in British Columbia independently of them and that, if any misrepresentations were made to British Columbia consumers, they were made by the Canadian defendants; that there was insufficient proximity between the plaintiff and the US defendants to support a duty of care; and that there was no evidence that the defendants engaged in a joint enterprise.

[67] I would not accede to these submissions.

[68] The plaintiff pleaded the defendants' wrongful acts and omissions were committed jointly, that they were "engaged in a joint enterprise for the promotion and sale of Premarin and Premplus in British Columbia and elsewhere", and that their wrongful conduct caused her damage. This is a pleading that the defendants, including the US defendants, were joint tortfeasors: see *The Koursk*, [1924] P. 140 (C.A.), where Scrutton L.J. said, at 155,

> The substantial question in the present case is: What is meant by "joint tortfeasors"? and one way of answering it is: "Is the cause of action against them the same?" Certain classes of persons seem clearly to be "joint tortfeasors": The agent who commits a tort within the scope of his employment for his principal, and the principal; the servant who commits a tort in the course of his employment, and his master; two persons who agree on common action, in the course of, and to further which, one of them commits a tort. These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of, or in concert with another.
>
> [Emphasis added.]

See also Glanville Williams, *Joint Torts and Contributory Negligence* (London: Stevens & Sons Ltd., 1951) at 9-10 and David Cheifetz, *Apportionment of Fault in Tort* (Aurora, Ontario: Canada Law Book Ltd., 1981) at 6.

[69] The plea that the US defendants were parties to torts committed in British Columbia presumptively establishes direct and significant connections between British Columbia and the facts on which the proceeding against the US defendants is based. In other words, it establishes a sufficient real and substantial connection to clothe the British Columbia Supreme Court with jurisdiction over the US defendants: *Moran G.W.L. Properties*.

[70] It was not necessary for the plaintiff to support these allegations with evidence except to the extent their truth was challenged by the evidence of the US defendants. Far from falsifying the pleading that the US and Canadian defendants were joint tortfeasors, the evidence led by the US defendants supports it – as the chambers judge found on their evidence, the US defendants engaged in activities consisting of "'harmonization' and 'coordination' of matters involving core monograph and labelling requirements, the efficacy of the products, and the collecting and sharing of other clinical research or trial information" with the Canadian defendants. This was concerted conduct to the common end of the worldwide promotion and sale of Premarin and Premplus for the collective benefit of Wyeth and its subsidiaries, and torts committed by one in the course of that joint enterprise would be torts committed on behalf of or in concert with other participants in the enterprise.

[71] The chambers judge had to go no further to conclude that the US defendants' application should be dismissed. Her reliance on the *Muscutt* factors was misplaced. The validity of the approach used in *Muscutt* to determine jurisdiction was doubted in *Coutu v. Gauthier (Estate)*, 2006 NBCA 16, 264 D.L.R. (4th) 319 at paras 66-75. Chief Justice Drapeau, writing for the court, summarized his view at para. 67:

> [67] In my respectful judgment, factor (1) is the essence of the "real and substantial connection" test and factors (2)-(8) invite the courts to go beyond that standard (see Walker, "Beyond Real and Substantial Connection: The Muscutt Quintet"). Indeed, the last seven factors, while differently formulated, appear to match, in substance and effect, the *forum conveniens* factors enumerated in *Spar Aerospace*. Recall that those factors include the interest of justice, the interest of the parties, any advantages conferred upon the plaintiff by his or her choice of forum, the existence of proceedings pending between the parties in another jurisdiction and the need to have the judgment recognized in another jurisdiction.

[72] The *Muscutt* approach has also been criticized in some of the academic literature: see Blom & Edinger, "The Chimera of the Real and Substantial Connection Test" (2005) 38 U.B.C. L. Rev. 373 at paras. 36-40 and Tanya J. Monestier, "A Real and Substantial Mess: The Law of Jurisdiction in Canada" (2007) 33 Queen's L.J. 179.

[73] In my view, any reliance on the *Muscutt* factors as a guide to determining the question of jurisdiction came to an end in British Columbia with the coming into force of the *CJPTA*.

[74] One submission of the US defendants relating to the *Muscutt* factors deserves further comment. They submit, as stated in their factum,

> As noted above, Sharpe J.A. of the Ontario Court of Appeal stated in *Muscutt* ... at para. 105, that:
>
> > … 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.

[75] Accordingly, based on *Muscutt* factors 6 to 8, they contend that territorial competence was not established because the activities found by the chambers judge to constitute a real and substantial connection do not amount to personal subjection to the jurisdiction and would therefore not be sufficient in their own jurisdiction, the United States. Thus, they contend, the taking of jurisdiction in this case would offend the policy of comity and the principles of order and fairness.

[76] The principles of order and fairness are subsumed in the real and substantial connection test and it is not necessary to consider them independently of that test. However, this submission must be rejected in any event.

[77] The concept of "personal subjection" was explained in *Muscutt* at para. 57, as follows:

> [57] ... 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.

[78] As I have explained, the connections between British Columbia and the subject matter of the proceeding against the US defendants as pleaded and as shown on the evidence are real and substantial.

The pleading alleges the US defendants jointly with the Canadian defendants placed the products into the stream of commerce in British Columbia and failed to warn the plaintiff of the risks of using the products when they knew or ought to have known that they were unsafe for use and that they jointly carried on the business of promoting and selling the products in British Columbia. Under the "personal subjection" approach, it was therefore reasonable for them to contemplate they might be sued in British Columbia. Thus, their conduct amounts to personal subjection to the jurisdiction and the requirements of comity and its underlying principles of order and fairness are satisfied.

[79] The US defendants submit finally that the chambers judge erred in refusing to rule on their submission that the court does not have territorial competence to hear the statutory actions. I agree with the conclusions of the chambers judge that it was not necessary to address that submission in view of her conclusion that the court has territorial competence to hear the tort claims and that it is therefore for the trial judge to determine if the statutes are applicable and if the US defendants are liable pursuant to their provisions.

[80] For those reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Smith"

I agree:

"The Honourable Madam Justice Rowles"

I agree:

"The Honourable Mr. Justice Chiasson"