Whether a UMP Defendant is a Presumptive Factor Under *Van Breda*

A Commentary on *Taminga v. Taminga*

*** Update - In *Forsythe v. Westfall*, 2015 ONCA 810, released Nov. 24, 2015, the appellant took the position that *Taminga* was wrongly decided. A five-member panel of the Ontario Court of Appeal dismissed Forsythe's appeal, upholding the reasoning in *Taminga*. The Court also held that the doctrine of "forum of necessity" was not applicable in the circumstances. ***

On June 18, 2014, in *Tamminga v. Tamminga*, 2014 ONCA 478 the Ontario Court of Appeal addressed the issue of whether the fact that an insurer has been added as a defendant pursuant to underinsured or uninsured motorist coverage is a presumptive factor giving an Ontario court jurisdiction over foreign tortfeasors with respect to a foreign tort.

Although there were a number of lower court decisions holding that it was not a presumptive factor, the issue was still up in the air as a result of *Cesario v. Gondek et al.*, 2012 ONSC 4563 (CanLII), (see our Commentary #8 at http://strung.me) as well as two contradictory Court of Appeal decisions, *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68 (C.A.) and *Doiron v. Bugge*, 2005 CanLII 36252 (ON CA) which predated *Club Resorts v. Van Breda*, 2012 SCC 17 (see our Commentary #1).

In *Taminga*, the Ontario Court of Appeal finally put this matter to rest (subject, of course, to any further appeal).

The plaintiff in *Taminga*, who was an Ontario resident, was injured when she fell a truck in Alberta. She brought an action in Ontario against the owner and operator of the truck, both of which were Alberta residents. She also included as a defendant her own insurer, State Farm, claiming for uninsured and underinsured coverage.

The Alberta resident defendants moved to have the action against them stayed on the basis that the Ontario courts had no jurisdiction, pursuant to the tests set out in *Van Breda* (*supra*).

The plaintiff conceded that absent her insurance contract with State Farm, *Van Breda* did not support jurisdiction in this case. (*Van Breda* states that an Ontario court does not have jurisdiction over non-resident defendants with respect to a tort in another jurisdiction unless there exists a recognized "presumptive factor".) However, the plaintiff submitted that State Farm's insurance policy was a "contract connected with the dispute" and thus a presumptive connecting factor under *Van Breda*.

The Ontario Court of Appeal rejected that argument on the basis that unlike the contract in *Van Breda*, there was nothing that connected the plaintiff's insurance contract to the Alberta defendants. The Alberta defendants were not parties to or beneficiaries of the contract.

The Court held, "The connection between the insurance policy and the dispute only arises in the aftermath of the tort and its application is conditional on the outcome of the appellant's claim against the tortfeasors…. In a word, there is no nexus between the insurance contract and the respondents."

The court cited *Gajraj* (*supra*), for the proposition that "the inclusion of a claim against the plaintiff's automobile insurer did not serve to 'bootstrap' jurisdiction over the non-resident defendants", but made no mention of the subsequent Court of Appeal decision in *Doiron* (*supra*) in which the court allowed precisely that.

Arguably, neither *Gajraj* nor *Doiron*, would be persuasive now in any event since they both predated *Van Breda* and the pre-*Van Breda* test was very different.

The court distinguished *Cesario* (*supra*) on the basis that it involved multiple motor vehicle accidents and the result did not therefore turn on the existence of a claim for uninsured and underinsured motorist coverage. For reasons we set out in our commentary on *Cesario* (Commentary #8 on our website), we are still of the opinion that *Cesario* is wrongly decided but that issue will have to await another day when it can be addressed directly by the Court of Appeal.

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