Case and Comment

SERVICE OUT OF THE JURISDICTION IN TORT ACTIONS— LOCUS OF TORT — SPECIAL RULE IN NEW BRUNSWICK— EXERCISE OF DISCRETION

Applications for an order for service out of the jurisdiction in a tort case can present vexing problems. This is especially true in federal countries such as Canada and the United States where there are many "law districts". The decision of McRuer C.J.H.C. in *Jenner v. Sun Oil Co. Ltd.*[1] may serve as a focal point for a discussion of some of these problems. In that case allegedly defamatory radio broadcasts emanating from New York were heard in Ontario.[2] The plaintiff, an Ontario resident, brought an action in defamation in Ontario against a number of defendants. These defendants, individuals and limited companies, were resident in Ontario, New York, Pennsylvania, Maryland and the District of Columbia. An order for service out of the jurisdiction was sought on the grounds that the action was a tort committed within Ontario and that a person out of Ontario was a necessary or proper party to the action properly brought against another person duly served within Ontario. The above are grounds *inter alia* under which the Ontario Rules of Court permit service out of the jurisdiction. There are identical provisions in the Rules of the Supreme Court of New Brunswick.[3]

The granting of the order on the ground that a party defendant properly served within the jurisdiction was a necessary or proper party was not considered, as the matter was disposed of on the ground that this was a tort committed within Ontario.[4]

An obstacle in the way of finding that there was a tort committed within the jurisdiction was *George Monro Ltd. v. American Cyanamid and Chemical Corp.*,[5] a decision of the English Court of Appeal. There a negligent act was committed in the State of New York in the manufacturing process with the resulting damage occurring in England. It was held that the tort was not committed in England when damage and nothing more occurs there. The judgment did not go so far as to say that the tort must be **wholly** committed within the jurisdiction and in fact Scott L. J., expressly left that question open:

> I express no opinion whether, if an act were committed out of the jurisdiction which did not give rise to a cause of action in tort until something further had happened within the jurisdiction, the resultant damage could properly be regarded

1. [1952] 2 D.L.R. 526 (Ont.).
2. An interesting discussion of this type of tort based on U. S. authorities appears in Harper, "Tort Cases in the Conflict of Laws," (1955) 33 Can. B. Rev. 1155, at p 1169 et seq.
3. O. 11, r. 1 (1) (e) and (g) of the Rules of the Supreme Court of New Brunswick.
4. On this ground of service out of the jurisdiction see **The Brabo**, [1949] A. C. 326 and **Paul v. Chandler & Fisher Ltd.**, [1924] 2 D.L.R. 479 (Ont.).
5. [1944] K. B. 432 (C. A.).

> as flowing from a tort taking place within the jurisdiction. It is not necessary to decide that question in the present case.[6]

Thus the first obstacle to finding that there was a tort committed in Ontario is disposed of quite easily. A number of other cases[7] go as far as the *Mo.* case in holding that damage alone within the jurisdiction is not enough.

In *Johnson v. Taylor Brothers*[8] where the House of Lords had to decide, on an application for external service, whether a breach of contract occurred within England they said the test is whether it was "substantially" committed within the judisdiction rather than "wholly" or "solely". While their Lordships were not directing their minds to torts it is submitted that the rules relating to breach of contract are identical in principle.

A leading authority for holding that the tort in the *Jenner* case was a tort committed within Ontario is *Bata v. Bata*[9], a decision of the English Court of Appeal; Lord Justice Scott answered the question which he did not decide in the *Monro* case. A letter mailed from Switzerland to England containing defamatory statements was held to be a tort committed within England on the ground that the material part of the cause of action in libel is not the writing but the publication. Unfortunately this case is not fully reported, appearing only as a headnote in the *Weekly Notes*. The facts in *Bata v. Bata* would appear to be on all fours with those in the *Jenner* case. The only discernible difference, which seems immaterial in deciding where a tort is committed, being between the written and the spoken word.

Publication in defamation appears to be analogous to the negligent act or omission in negligence and publication occurs not on the speaking of the defamatory words but on the hearing of them. This is not to say that speaking is not a part of publication; it may be that publication consists of both the speaking and hearing. However it would not follow that the facts in the *Jenner* case did not amount to a tort committed within Ontario for the following reasons: (1) the hearing of the defamatory statements occurred there; (2) the hearing would appear to be a "substantial" commission of the tort; (3) there is no requirement that the tort be "wholly" or "solely" committed within Ontario; and (4) *Bata v. Bata* being in point there appears to be no reason for departing from that authority. The learned Chief Justice's finding that the tort was committed in Ontario therefore seems amply warranted.

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6. **Ibid.**, at p. 437.
7. **Paul v. Chandler & Fisher Ltd.**, [1924] 2 D.L.R. 479 (Ont.); **Beck v. Willard Chocolate Co.**, [1924] 2 D.L.R. 1140 (N. S. Sup. Ct.); **Anderson v. Nobels Explosive Co.**, (1906) 12 O.L.R. 644 (Ont. Div. Ct.).
8. [1920] A. C. 144.
9. [1948] W. N. 366 (C. A.).

In New Brunswick, in addition to the enumerated grounds which include the two referred to above, it is provided:

> Service may also be allowed where the action is for any other matter and it appears to the satisfaction of the Court or a Judge that the plaintiff has any good cause of action against the defendant and that it is in the interest of justice that the same should be tried in this jurisdiction; . . . [10]

This provision was interpreted by the Court of Appeal in *Roy v. Saint John Lumber Company*.[11] White J., speaking for the majority (Grimmer J., concurring without reasons; Crockett J., dissenting), said "any other matter" included those matters over which the Court had jurisdiction to order service *ex juris* before the coming into force of the Judicature Act and which were not specifically included in the enumeration of matters in the new Order 11. Since contracts made in the Province the breach of which occurred outside had formerly been a ground for service abroad,[12] service out of the jurisdiction was granted. However before the coming into force of the Judicature Act service out of the jurisdiction was not permitted in the case of torts committed without the Province. There is however a very recent New Brunswick case,[13] decided this year by Michaud C.J.Q.B.D., in which he found that an automobile accident in Quebec is a proper subject to be brought within 0. 11, r. 1 (2). It is understood that this case is on appeal; for that reason no comment will be made here.

Service out of the jurisdiction was unknown at common law; it is statutory in origin. It is *prima facie* an interference with the jurisdiction of a foreign power; the rules which provide for such service use the permissive "may" rather than the mandatory "shall". A discretion is given which must be exercised judicially. This is the spirit of the law referred to in the *Monro* case where it was said that the facts must come within the "spirit" as well as the "letter" of the rule. In the *Jenner* case the learned Chief Justice having found that the facts came within the "letter" of the rule was required to examine its "spirit" to determine whether the discretion had been exercised accordingly.

It is said that if there is any doubt whether the discretion should be exercised it should be resolved in favour of the foreigner.[14] The circumstances surrounding the action must be viewed to determine whether any doubt exists.

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10. 0. 11, r. 1 (2) of the Rules of the Supreme Court of New Brunswick. Formerly 0. 11, r. 1 (h).
11. (1916) 44 N.B.R. 88 (C. A.).
12. S. 52 of the Supreme Court Act, Chapter 110, Consolidated Statutes of New Brunswick 1903. The grounds under which service out of the jurisdiction might be granted were where "a cause of action which arose within the jurisdiction, or in respect of a breach of a contract made wholly or in part within the jurisdiction, or in respect of any contract executed, or to be executed, in whole or in part within the jurisdiction."
13. King v. Paradis [1956] N. B., Q.B.D. (Unreported).
14. The "Hagen", [1908] P. 189 (C. A.).

Examination of the cases discloses no analysis of the basis for exercising the discretion. The learned Chief Justice speaks only of the *forum conveniens* as an important element. Slesser L. J., said in *Kroch v. Rossell et cie* [15]:

> But the fact that the case might be tried in this country, and might be within the jurisdiction, is not necessarily a sufficient reason for allowing leave to be given to serve out of the jurisdiction. The various matters which have to be considered have been constantly before the courts, the question of the convenenience of the forum, the question of under which laws, such questions as the place where the evidence may more regularly be obtained, where the case may more conveniently be heard, and a number of other considerations, which it is perhaps unwise to attempt to define in any particular manner.[16]

The above quotation hardly indicates a real attempt to analyze the constituent elements of the discretion. Indeed all the various matters referred to would seem to be contained in the term *forum conveniens* .

As regards the *forum conveniens* it is of importance that the plaintiff in the *Jenner* case sought vindication of his reputation and the trying of the cause in Ontario would give him the widest publicity in the area where his reputation may be said to be located. In the *Kroch* case a French resident sought to sue in England because of certain defamatory statements contained in a Belgian and a French newspaper which had been circulated in a small number in England. Slesser L. J. said:

> I quite agree with Mr. Slade that, if there were evidence in a particular case that a person had a reputation in this country to be defamed, or was known here, or traded here, or had professional or social connections, it might be that the circulation of a very few copies might do him very serious or irreparable harm. It is certainly an element to be taken into consideration.[17]

The material for the broadcasts was apparently gathered in Ontario. The hearing of the case in Ontario would facilitate the presenting of evidence should the defendants seek to justify. Also the witnesses who heard the publications complained of would be best able to testify in Ontario.

Lord Justice Slesser alluded to the choice of law as a matter to be considered in the exercise of the discretion. Since the finding is that the facts constituted a tort committed within the jurisdiction, the *lex loci delicti commissi* and the *lex fori* coincide if the case is tried in Ontario.

15. [1937] 1 All E.R. 725 (C. A.).
16. Ibid., at p. 727.
17. Ibid., at p. 729.

The possibility of realizing on a judgment obtained might be a factor in the exercise of the discretion since a judgment would be an empty one could no assets be reached either directly or indirectly. Certain English legislation provides for the setting aside of a service out of the jurisdiction under such circumstances.[18] However this was not material in the *Jenner* case because one of the defendants was resident in Ontario.

Another factor which seems worthy of consideration is the lack of an alternative *forum conveniens*. Of the parties only one resided in New York from whence the defamatory broadcasts originated and the matter might be said to be not one of "substance" in New York. The tort seemed most intimately connected with Ontario: the statements were heard there, the material for the broadcasts was gathered there, the reputation sought to be vindicated was located there and two of the parties resided there. It is difficult to conclude other than that the discretion was properly exercised.

The applicability of the above principles to the law of New Brunswick should be examined. In the *Roy* case Barry J., from whose decision an appeal was taken, expressed some doubt whether he should exercise his discretion. In the light of *The "Hagen"* case one would have thought doubt should be resolved in favour of the foreigner. The headnote to the *Roy* case reads in part:

> *Per curiam*, where under clause (h) a judge in the exercise of his discretion on the facts decides that it is in the interest of justice that jurisdiction should be exercised and service abroad authorized, the Court on appeal will not interfere with the exercise of such discretion.[19]

The reporter must have based this comment on the argument of counsel for the plaintiff as it nowhere appears in the judgments in the Court of Appeal. In fact White J., speaking for the majority, said:

> The decision of the question we are called upon to determine in this matter depends upon the extent of the power conferred upon the Court or a judge by clause (h) of O. 11, r. 1, and not upon any consideration as to whether, assuming the learned judge had a discretionary power to make the order appealed from, he exercised that discretion just as we would have done upon the same facts.[20]

In the *Roy* appeal there was no consideration in the judgments of the circumstances under which the discretion ought to be exercised except that Mr. Justice White expressed the opinion that stricter limits should be observed under clause (h) than under the specific clauses (a) to (g). The proper manner of dealing with an exercised discretion on an appeal would seem to be as stated by Fullerton J. A. in *Nemerovsky v. McBride*.

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18. See **Goff v. Goff**, [1934] P. 107.
19. (1916) 44 N.B.R. 88.
20. **Ibid.**, at p. 116.

> The rule, as I understand it, is that the Court of Appeal will not interfere with an order made by a Judge in the exercise of his discretion unless he has proceeded on some wrong principle, which is not the case here.[21]

It should be noted that this statement is quite different from the portion of the headnote quoted above.

In *King v. Paradis* Chief Justice Michaud apparently exercised his discretion on the sole ground that several of the witnesses were resident in New Brunswick and did not discuss the propriety of this exercise on the motion to set aside the order because, he stated, it was not questioned.

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21. [1924] 3 D.L.R. 103, at p. 104 (Man. C. A.).

ASSAULT — AGREEMENT TO "FIGHT IT OUT"— RIGHT TO RECOVER DAMAGES — EX TURPI CAUSA — VOLENTI NON FIT INJURIA

The plaintiff and defendant, who had been drinking in a tavern, quarrelled and agreed to go outside and settle their differences with their fists. The plaintiff, knocked down by a blow to the head, suffered a couple of broken teeth, cuts on his face and a fractured ankle. He claimed damages for assault. The defendant denied the assault, alleging that the plaintiff was the assailant and that reasonable force only was used in self-protection. **Held,** for the defendant. *Wade v. Martin.* [1955] 3 D.L.R. 635 (Nfld.).

This case was decided on two grounds, each embodied in a Latin maxim: (1) ex turpi causa non oritur actio; and (2) volenti non fit injuria. In regard to the former, the trial judge said the fight was a breach of the peace; that it was "indeed criminal". Consent of the parties to participate in the fracas could not render it innocent because " 'No person can license another to commit a crime'. . . Nor can anyone lawfully consent to bodily harm, save for some reasonable purpose: for example, a proper surgical operation or manly sports."[1]

In *The Queen v. Coney,* Mathew, J. said: "It was said, that because of the consent of the combatants to fight there could not be an assault, . . . The contention really meant that the agreement of the men to fight rendered the contest lawful and innocent. There is, however, abundant authority for saying that no consent can render that innocent which is in fact dangerous."[2] And in *Rex v. Donovan,* Swift,

1. Salmond on Torts (11th. ed. 1953) 42.
2. (1881-2) 8 Q.B. 534, at pp. 546 and 547.