PERSONAL INJURY: The New Exception to State Immunity in Canada

Janet Walker *

When the Canadian *State Immunity Act*[1] was passed in 1982, it codified both the restrictive theory of immunity, which denies immunity to foreign states in proceedings relating to their commercial activities, and a new exception for proceedings relating to death, personal injury or damage to or loss of property occurring in Canada. Despite ongoing jurisprudence on the commercial activity section,[2] this latter exception -- the "injury exception" -- remained largely unexplored until recent months.

This article reviews the role of that exception in the legislative scheme, the unique Canadian jurisprudence calling for its application, and the striking developments that have occurred in the area with the Ontario Court of Appeal decision in *Jaffe* v. *Miller*[3] and the subsequent Ontario Court General Division decision in *Walker* v. *Bank of New York*.[4]

I - The injury exception to immunity

The two exceptions to immunity from the jurisdiction of Canadian courts, those for proceedings relating to the commercial activity of the foreign state, and for those relating to the occurrence of injury or damage, appear to parallel the fields of contract and tort respectively. However, a close reading reveals that they are not organized around causes of action at all. Indeed, any claim relating to the private or commercial activities of a foreign state would be permitted under the former of the two exceptions whether framed in contract, tort or restitution. Similarly, the latter -- the injury exception -- is defined by the context in which the action arises, rather than by a particular theory of fault or liability pleaded. It reads as follows:

> **6.** A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to
>
> (a) any death or personal injury, or
>
> (b) any damage to or loss of property
>
> that occurs in Canada.

II - An anomaly in the legislative scheme?

Although the section appears straightforward enough, its interaction with the old rules for granting immunity is intriguing. Since a right of action in the context of the private or "commercial" activities of the foreign state is provided by s. 5, s. 6 would be redundant unless it established a right of action for injury or damage caused in the course of the foreign state acting in its public or governmental function.

A right of action for those who have suffered injury or damage attributable to a foreign state acting in its official capacity within the jurisdiction seems of dubious utility. After all, the risks of liability in traffic accidents and damage to official properties owned by locals would be insurable and, therefore, the question of immunity would not arise because the injured party would be compensated by the insurer and the insurer would have been in a position to obtain a waiver of immunity should it become necessary to claim against the foreign state. Moreover, it is difficult to imagine other contexts in which private individuals would be injured in non-commercial dealings with foreign governments in Canada.[5] Injuries occurring in the course of a foreign government's official activities are likely to occur only in the foreign state, not here. It would be appropriate, therefore, for an action for compensation to be commenced in the foreign courts not in Canada. Once again, the issue of immunity simply would not arise.

It should not be surprising then, that the Canadian drafters did not have a ready answer when asked to speak to the role of the section in the proposed legislation.[6] In fact, it was only in discussing the availability of a right of recovery in situations such as that of

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property owners who suffered damages in the crash of a Soviet satellite in Northern Canada that an application for the section was suggested.[7] In sum, since the official activities of a government most likely to affect individuals adversely are those such as the enforcement of public laws and regulations, and since it would be improper for these actions to be undertaken in Canada by foreign governments, the injury exception may seem somewhat anomalous.

III - A unique Canadian jurisprudence

Onto the stage thus set, enters the unique Canadian jurisprudence on the immunity of foreign states from actions arising out of the conduct of unauthorized law enforcement activities in Canada. Despite the paucity of reported decisions considering the *State Immunity Act*,[8] the jurisprudence has been fairly dominated by actions brought by those who, while in Canada, were the object of such activities by U.S. agents. While the first trilogy of decisions was based on the common law because the events complained of predated the *Act*, it is worth noting that in each of them -- *Carrato* v. *United States*[9] (execution of a judgment for unpaid taxes), *Tritt* v. *United States of America*[10] (seizure of documents), *Jaffe* v. *Miller*[11] (arrest by bail bondsmen) -- the Ontario High Court held that the U.S. Government was immune.

IV - The Ontario Court of Appeal pronounces

It was not until the 1993 Ontario Court of Appeal decision in *Jaffe*[12] that the injury exception to immunity received any consideration by an appellate level court. In a much-publicized incident in 1981, Mr. Jaffe had been returned from Toronto to Florida for trial by civilian bounty hunters. Diplomatic efforts secured his return and his abductors were extradited, tried, and convicted.[13] He then sued those he regarded as responsible for the abduction.

Speaking for the Court, Finlayson J.A. upheld the decision of Ontario High Court granting immunity to the government defendants. Finlayson J.A. adopted an underlying theory of immunity advanced in a Supreme Court of Canada decision[14] which had regarded immunity as based on "the conception of an invitation by the host state to the visiting state." As it had been suggested by the Supreme Court "when one state admits within its boundaries a foreign sovereign or his representative, the terms of that entry are to be gathered from the circumstance of the invitation and its acceptance."[15]

a) "functionaries" are entitled to immunity

After reviewing the development of the common law restrictive theory of immunity, Finlayson J.A. began addressing the issues before the court by ruling that the *State Immunity Act* had not changed the law on the general availability of immunity to "functionaries" of foreign states. The *Act*, he said, was silent on the question of which employees were to be considered "functionaries" and "it will be a matter of fact for the court to decide in each case whether any given person performing a particular function is a functionary of the foreign state."[16] In the case at bar, he agreed with the trial judge that "the responding defendants are all functionaries of the State of Florida. Their positions are created by the State Constitution and they are entitled to state immunity when acting within the scope of those duties and in furtherance of a public act."[17]

b) "illegality" is irrelevant to immunity

Finlayson J.A. then turned to the more controversial question of whether the defendants had lost their immunity because the alleged acts involved some illegality. The appellant had argued that, notwithstanding the fact that the defendants actions rendered their employer (the State of Florida) vicariously liable for their tortious conduct, their conduct was of such an egregious nature as to fall outside the "invitation of the host state to the foreign state" as conceived of by the Supreme Court. Unable to find any indication in the cases considered that illegality was a factor affecting state immunity, Finlayson J.A. ruled that the illegality of the defendant's actions did not disentitle them to

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immunity.

Analysis of this issue under the rubric of "legality" may be confusing, however, where the conduct at issue is "legal" according to U.S. law and "illegal" according to Canadian law. After all, the use of the term begs the question of which law will determine its legality. However, the solution to this conundrum may have been clarified for future litigants by the coming into force of bilateral treaties for mutual legal assistance between Canada and the United States.[18] These treaties establish mandatory procedures for cooperation in the pursuit of the investigation, trial and enforcement of the public laws of each country in the territory of the other. The failure to follow such procedures would render the conduct a violation of international law and therefore beyond the terms of the "invitation" of the "host state" in the theory of immunity adopted by Finlayson J.A.. It will be interesting to observe what effect these treaties may have on the analysis of this issue in future cases.[19]

c) the historical and geographical scope of the injury exception

Finally, Finlayson J.A. made several significant findings with respect to the historical and geographical scope of the injury exception. It is important to recall here that Mr. Jaffe was abducted by civilian bounty hunters in Canada in 1981 before the legislation came into force but his subsequent incarceration in Florida extended beyond its coming into force. On the historical scope of the exception, the application of the *Act* to events prior to its coming into force was considered. Finlayson J.A. took the view that the immunity in question applied to the conduct that gave rise to the proceeding and not to the proceeding itself. Taking into account the general grant of immunity in s. 3, he ruled that "the immunity attaches when the foreign state is permitted to exercise a presence in the host country and is subject to whatever terms are recognized at the time of such an entry." Consequently, to be permitted to sue, Mr. Jaffe would have had to be in a position to allege injury that occurred *in* Canada *after* the *Act* came into force.

Turning to the geographical limitations of the exception, the court considered the unusual chronology of events in this case. Having held that Mr. Jaffe would succeed in defeating the claim of immunity only if he was able to show that the injury occurred *in* Canada *after* the *Act* came into force, Finlayson J.A. noted that the abduction took place in Canada prior to the *Act* coming into force and the malicious prosecution occurred in Florida after it came into force. Neither factor satisfied the two requirements set by the Court for the exception. Then it was observed that the "troublesome feature" of the case was the wrongful imprisonment which began before proclamation and continued until after the *Act* was in force. Finlayson J.A. considered the possibility that the false imprisonment was a mere continuation of the kidnapping and therefore could engage the exception, but decided that the kidnapping came to an end with Mr. Jaffe's delivery to the Florida court. Since the subsequent imprisonment resulted not from the kidnapping but from the judicial process which occurred in Florida, it did not engage the exception. It is not clear whether this finding would have been sustained if the Ontario court had found that the Florida court had encouraged the bounty hunters to return Mr. Jaffe from Canada. Such a finding would indicate the identity between the parties responsible for Mr. Jaffe's kidnapping and those responsible for his imprisonment.

Despite the fact that the Court of Appeal had reiterated the results of previous decisions in the area,[20] the decision represented an advance in the judicial consideration of the section, in particular, the phrase "injury ... that occurs in Canada". The Court acknowledged that the Mr. Jaffe's false imprisonment (kidnapping) in Canada was sufficient to engage the exception to immunity and, accordingly, the phrase "personal injury" did not limit actions to those arising from purely physical injuries. Similarly, by suggesting that the exception would apply if the Florida incarceration could be shown to be a continuation of the kidnapping, the Court indicated that the question of where the tort "occurred" would be resolved in favour of the locus of the cause of the damage rather than where the damage was incidentally felt. Had

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the pleadings so satisfied the court, the Florida incarceration may thus have been acknowledged to be the inevitable consequence of the kidnapping which had "occurred" in Canada. Although these findings were technically *obiter*, they gave guidance to other courts as to their jurisdiction with respect to foreign state defendants under the *State Immunity Act*.

V - A beachhead on foreign state defendants in tort

Scarcely a week had passed after the release of this decision when the Ontario Court General Division was faced with another case of transborder abduction: *Walker* v. *The Bank of New York*.[21] In a decision released September 16, 1993, Day J. reviewed a claim for immunity arising out of an extraordinary fact situation. The plaintiff, an Ontario business broker, alleged that the defendant U.S. Customs agents, in pursuit of an American businessman, had randomly ensnared him in an undercover operation involving a U.S. export regulation intended to apply only to Americans. According to the pleadings, Mr. Walker tried to verify the *bona fides* of the New York "business" persons (undercover Customs agents) seeking chrome-plated ceremonial pistols for a purchaser in Ecuador[22] by vetting their bank references first with the branch-level account officer and subsequently with a senior vice-president. He informed the Bank of his concerns with respect to the lawfulness of the proposed transaction and the Bank undertook to conduct a thorough investigation and inform him of anything that might adversely affect his participation in the negotiations. It was later revealed in transcripts of telephone conversations that the Bank was then persuaded by the Custom's agents not to correct the misrepresentations made by the account officer at their behest. Evidently, the Bank agreed not to inform Mr. Walker that the company and the proposed purchase were fictitious and the "business persons" were Customs agents. Relying on the Bank's assurances of the legitimacy of its customers and their business, Mr. Walker accepted a plane ticket from the agents for further negotiations in the Bahamas. Unfortunately, these agents had routed him through New York and were waiting to arrest him at La Guardia Airport.

Mr. Walker sued both the Bank and U.S. Customs for deceiving and falsely imprisoning him and the defendants moved to have the suit dismissed on the bases that they were immune and that his claim was a relitigation of the American proceedings. Since the events occurred after the coming into force of the *State Immunity Act*, the applicability of the *Act* was not in dispute and the court began by addressing the threshold issue of whether the Bank and its employees were qualified to claim immunity. The Court rejected the argument by the Bank that it should be regarded as an agency of the United States government on the basis that its employees had acted at the behest of the Customs agents. It ruled that an entity could qualify as an agency of the foreign state only if it had an ongoing institutionalized relationship with that state. In support of this ruling, Day, J. noted that the defendants had not shown any authority for the proposition that "*ad hoc* assistance to a foreign government served to transform an individual or private corporation into a government agency for the purposes of state immunity". The Bank could not claim immunity.

Turning to the applicability of the injury exception to the immunity of the Government Defendants, the Court examined the pleadings to determine whether a personal injury had occurred in Canada. With respect to the alleged deceit, Day J. found that despite the lack of a physical presence of the defendants in Canada, the deceit occurred at the moment that the plaintiff acted upon the misrepresentations of the defendants and that "[t]hey were made by telephone calls to Mr. Walker in Canada from the United States, with the intent that they be acted upon in Canada and, in fact, they were acted upon in Canada."

With respect to the claim for false imprisonment, the Court held

> Since Mr. Walker's willingness to accept the airline ticket provided by the Government Defendants was alleged to be the product of trickery,

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deceit and fraud, his actions cannot be considered to be voluntary, if established.

The restraint upon a person need not be physical and the person restrained need not be cognizant of the restraint for there to be false imprisonment. The tort is complete at the moment of total restraint. Once Mr. Walker boarded the aircraft at Toronto he could no more leave it than change its destination. The United States Government Defendants were awaiting his arrival at La Guardia having planned to lure him there for his arrest. [footnotes omitted]

Having determined that the injuries were alleged to have occurred in Canada after the *Act* had come into force, Day J. ruled that the exception to immunity found in s. 6 of the *Act* applied and that Mr. Walker could proceed.[23]

VI - Civil liability and foreign law enforcement activities in Canada

While the prospect of foreign law enforcement officials interfering with persons in Canada may once have seemed extraordinary, the increase in international trade and its regulation suggests a similar increase in the likelihood of unauthorized incursions into Canada. The advent of treaties relating to mutual legal assistance also attests to the need for regulation of international law enforcement activities.[24] From its ambiguous origins, the injury exception has emerged as an important, if unanticipated, key to the redress of injury caused by foreign law enforcement officials in Canada.

The significance of this application for the section should not be minimized. In recent years, extraterritorial law enforcement has been recognized as a serious issue that is difficult to address. The problem has been exacerbated between countries with otherwise good relations such as Canada and the United States by the subtle but profound differences between their perspectives on international relations.[25] These differences have challenged diplomatic efforts to reach understanding on the need to regulate enforcement activities in the territory of the other state.[26]

Moreover, there are constitutional barriers to resolving the problem: the separation between the judicial and executive branches of government caused the United States Supreme Court,[27] despite the entreaties of many nations, to find itself powerless to put an end to transborder abduction by depriving the Executive of the fruits of this practice through declining to take jurisdiction over abducted defendants. This was particularly disappointing for Canada which had stated its position as an intervenor as follows:[28]

> Canada will continue to protest such abductions when they occur and to seek the extradition and prosecution of those responsible, whether they be private individuals, federal state or local law enforcement officers. A decision by the Court to dismiss petitioner's application would virtually eliminate the possibility that Canada would be forced into such an undesirable situation.

Given the uncertainty of diplomatic efforts to resolve the problem and the inability of U.S. courts to discourage it, immunity from civil liability can serve only to foster such activities, by reassuring agents who would engage in unauthorized extraterritorial investigations that they have everything to gain in making exotic and colourful arrests, and nothing to lose in civil liability.

The injury exception thus offers some measure of hope in the search for a resolution to such an intractable problem. Indeed, there is evidence that the seemingly remote potential for civil liability may already be proving a deterrent to extraterritorial enforcement activities. In a recent Florida case of transborder abduction by small plane from the Bahamas, the defendant was required as a condition of his plea agreement to forego criminal and civil redress anywhere in the world for the method by which he was brought to the United States.[29] Having signed the agreement, he returned to Cyprus and brought an action in Florida to have the

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agreement declared void on the basis that it had been signed under duress.

Coerced contracts waiving the right to sue for transborder abduction may seem to be a step in the wrong direction, but the existence of such contracts demonstrates that the potential for civil liability is now becoming a factor in the decision by law enforcement agents to engage in extraterritorial enforcement measures. In this way, the injury exception, once apparently devoid of practical application, has now emerged as a key to resolving a thorny problem in international relations. Perhaps even more significant to Canadian business persons participating in the expanding world of international trade, however, the newly recognized exception to immunity for injury occurring in Canada provides assurance that there are effective deterrents and accessible means of redress for injury occurring in the course of unauthorized law enforcement activities by foreign functionaries in Canada.

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NOTES

1. *State Immunity Act*, R.S.C. 1985, c. S-18.

2. Including, for example, *Re Canada Labour Code*, [1992] 2 S.C.R. 50, 91 D.L.R. (4th) 449.

3. *Jaffe v. Miller* (1993), 13 O.R. (3d) 745. Leave to appeal to S.C.C. denied January 20, 1994.

4. September 16, 1993, *per* Day J., unreported.

5. If, indeed, these situations are properly viewed as non-commercial.

6. House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, Issue 59, 23 June 1981, at 59:17.

7. Senate of Canada, *Standing Senate Committee on Legal and Constitutional Affairs*, Issue 12, 9 April 1981, at 12:9-11.

8. See *Canada Labour Code, supra*, note 2 per La Forest J.

9. (1982), 40 O.R. (2d) 459 (H.C.).

10. (1989), 68 O.R. (2d) 284 (H.C.).

11. (1990), 75 O.R. (2d) 133 (H.C.).

12. *Supra*, note 3.

13. *R. v. Johnsen*, 2 W.C.B. (2d) 392 (Ont. H.C.); aff'd *R. v. Kear* (1990), 51 C.C.C. (3d) 574 (Ont. C.A.).

14. *Saint John v. Fraser-Brace Overseas Corp.*, [1958] S.C.R. 263.

15. *Ibid.* at 266.

16. *Supra*, note 3 at 759.

17. *Ibid.*

18. For example, *Canada-United States: Treaty on Mutual Legal Assistance in Criminal Matters*, 18 March 1985, 1990 Can. T.S. No. 19; reprinted in (1985), 24 *Int. Leg. Mat.* 1092; *Agreement Betweeen Canada and the United States of America Regarding Mutual Assistance and Co-operation Between their Customs Administration*, 20 June 1984, Can. T.S. 1985 No. 23.

19. Finlayson J.A. then ruled that the failed motion to stay Mr. Jaffe's action on the grounds of *forum non conveniens* (*Jaffe v. Dearing* (1988), 65 O.R. (2d) 113) did not constitute attornment to the jurisdiction and, therefore, did not preclude the defendants from claiming immunity.

20. See *supra*, notes 9 to 11, and surrounding text.

21. Now on appeal to the Ontario Court of Appeal C16759/C16778.

22. The agents subsequently alleged that he ought to have known that they, as purchasers, might have intended to tranship the pistols to Chile which was a destination prohibited by U.S. law. However, since this was a fictitious transaction, no pistols were ever shipped, and no applications for documents were ever made.

23. The defendants had also moved to have the action dismissed on the basis that it was a relitigation of the New York criminal proceedings.

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However, Day J. ruled that there was no identity of issues before the two courts: "[i]n this case the issues are whether the Defendants committed the tort of deceit and, in the case of the Bank of New York Defendants, a breach of duty, as well as the torts of false imprisonment and conspiracy as against Mr. Walker. These issues were never raised, nor is there evidence that they were relevant or could have been raised in the criminal proceedings in the United States, especially as far as the Bank of New York Defendants are concerned." He then concluded that the action should not be dismissed as an abuse of process.

24. See *supra*, note 18, and surrounding text.

25. See A.L. de Mestral & T. Gruchalla-Wesierski, *Extraterritorial Application of Export Control Legislation: Canada and the U.S.A.* (Dordrecht, The Netherlands: 1990).

26. In this way, when a Canadian police officer arrested a suspect after venturing in hot pursuit into the U.S. end of the Windsor-Detroit tunnel and the U.S. Government protested, the suspect was returned promptly with an apology for this violation of U.S. sovereignty. The diplomatic note from the U.S. in reply thanked the Canadian government but indicated that it did not regard such extraterritorial apprehensions as a violation of international law.

27. In *United States v. Alvarez-Machain,* 112 S.Ct. 2188, reprinted in (1992) 31 *Int. Leg. Mat.* 900.

28. *Ibid.*, at 928.

29. The pleadings in the action *Alikhani v. U.S.* 93-8513 (Sou. Dist. Fla.) allege that he was taken from the small plane to a hotel room by Customs agents and held there, chained to the bed at night, and required to assist in sting operations by day. According to the pleadings, the Bahamas' diplomatic protest unnerved his captors who then placed him in custody and proceeded with the charge.

The New GATT

Greg Somers *

Beginning on July 1, 1995, much of the world's trade will be carried out under the auspices of the Multilateral Trade Organization, and subject to the procedures and disciplines set out in the new GATT 1994. This development, arising out of the successful conclusion of the Uruguay Round, establishes a unitary framework and a supervisory General Council akin to that envisaged and periodically attempted by prior architects of the GATT. This paper sketches the GATT background to the Uruguay Round, outlines the Uruguay Round results and summarizes the expected impact of some features of the new GATT.

Historical Background

In the aftermath of World War II, its victors met at Bretton Woods with a view to establishing a new world economic order, to be administered through 3 distinct institutions: the World Bank, the International Monetary Fund, and the International Trade Organization (ITO). Negotiations for the ITO were begun at a conference of that name in Geneva in 1946, and a draft ITO charter was completed at Havana in 1948. Under the ITO it was contemplated that the GATT would form a part of a much larger world trade framework, but in the negotiating interim, agreement was reached among the (then 22) members that part-implementation of the GATT, including its tariff bindings, should proceed under a temporary Protocol of Provisional Application[1], which implemented Articles I, II and XXIV through XXXV, and permitted signatories to grandfather existing, non-conforming legislation in respect of Articles III through XXIII of the GATT[2].

The rejection by the U.S. Congress of the ITO Charter and President Truman's unwillingness to pursue the ITO agenda further meant that by 1950 the third branch of the Bretton Woods system, except for the provisional GATT 1947 Agreement, went missing.

At its inception in 1947 and for the next 3 decades, the GATT was merely one of many relatively obscure multilateral agreements. Additional tariff concessions (and some 13 amendments) were negotiated in 7 successive

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