C.A. No. 130542

NOVA SCOTIA COURT OF APPEAL
Cite as: Dennis v. Salvation Army Grace General Hospital Board, 1997 NSCA 177
Freeman, Jones and Flinn, JJ.A.

BETWEEN:

QUINTIN DENNIS, LISA MARIE DENNIS, and ALEXANDER DENNIS, an infant, by his Litigation Guardian Quintin Dennis Appellants	)	Michael J. Wood and Robert L. Barnes, Q.C. for the Appellants
- and -	)	
THE SALVATION ARMY GRACE GENERAL HOSPITAL BOARD and DR. CHERRY J. PIKE, DR. POH GIN KWA, and DR. NASSIR BADRUDIN Respondents	)	Virve Sandstrom and Richard S. Niedermayer for the Respondents
	)	Appeal Heard: November 15, 1996
	)	Judgment Delivered: January 13, 1997

THE COURT: Appeal allowed per reasons for judgment of Flinn, J.A.; Jones and Freeman, JJ.A. concurring.

FLINN, J.A.:

Introduction

The appellants' action against the respondents was stayed by Order of Justice Goodfellow of the Supreme Court of Nova Scotia in Chambers. Justice Goodfellow decided that the Province of Newfoundland and Labrador was the more appropriate forum for the trial of the action.

In this appeal the appellants claim that the Chambers judge made errors of law in his application of the test for a *forum non conveniens* application. The appellants further submit that a serious injustice will befall the appellants if they are not permitted to proceed with their action in Nova Scotia.

Background Facts

In 1990 the appellants, Quinton and Lisa Marie Dennis, moved from Nova Scotia to Churchill Falls, Labrador where they were married in 1991. Mrs. Dennis became pregnant in the summer of 1992. In December of 1992 she engaged the respondent, Dr. Pike, of St. John's, Newfoundland, an obstetrician, to assist her with her pregnancy. She made arrangements for her child to be born in St. John's, Newfoundland. In April 1993 Mrs. Dennis went to St. John's, Newfoundland, to await the birth of her child which was expected in May, 1993. From time to time, up to the delivery of her child, she attended with Dr. Pike for assessment and management of her pregnancy. As a result of complications, her child, the infant appellant Alexander Dennis, had to be delivered by caesarian section. Attending Mrs. Dennis at that operation were the respondents, Dr. Kwa, an obstetrician; and Dr. Badrudin, an anesthetist.

Upon delivery of the infant appellant, it was determined that he had suffered irreversible and profound damage to his brain and central nervous system leading to seizures and other ongoing disabilities. After his birth the infant appellant

Alexander Dennis was transferred to the Dr. Charles A. Janeway Child Health Care Centre in St. John's, Newfoundland, where he remained until discharged on June 1st, 1993. Later in June, 1993, the appellants moved back to Nova Scotia, taking up residence in Kentville, where they resided at the time of commencing this action. They have subsequently moved to Yarmouth, Nova Scotia.

On April 27th, 1995, the appellants commenced this action against the respondents alleging that the respondents, or their employees, were negligent in the treatment provided to Mrs. Dennis and her infant son in the period leading up to and surrounding his birth on May 16th, 1993.

The respondents, have not, as yet, filed a defence to the action. Instead, they made application to the Supreme Court of Nova Scotia, for an order setting aside the originating notice action pursuant to **Civil Procedure Rule** 11.05A; or alternatively, an order staying the action pursuant to **Civil Procedure Rule** 14.25 on the ground that Newfoundland and Labrador, and not Nova Scotia, is clearly the more appropriate forum to try this action.

Material Filed on the Chambers Application

In support of its application, before the Chambers judge, the respondent hospital filed an affidavit of Dianne Winsor, the manager of Quality Initiatives Department. In her affidavit she provides all the names of the medical and nursing staff that attended on, or provided medical or nursing care to the appellant, Mrs. Dennis, during labour and on delivery of the infant appellant. This list comprises 20 registered nurses, one respiratory therapist, and five medical doctors (two of whom are the respondents Dr. Kwa and Dr. Badrudin). Based on her information and belief, all of the persons on the list reside in or near St. John's, Newfoundland.

A second list was provided of five further doctors and three further health

care workers who also provided medical or nursing care. Their current addresses are not stated.

Ms. Winsor then deposes in her affidavit as follows:

> "7. THAT I am advised by legal counsel to the Corporation that if this matter proceeds to trial in Nova Scotia or in Newfoundland, then many of the nursing staff of the Hospital will likely be called to testify, and that, although the Court may be willing to provide some accommodation, in all likelihood those testifying will have to be available to begin testifying on short notice. If this matter proceeds to trial in Nova Scotia, then the Corporation will incur significant costs for salary, travel and accommodation of those of its employees called to testify, and salary costs for replacement staff. I am advised by legal counsel that these costs will not be recoverable in the event that the action against the Hospital is dismissed.
>
> 8. THAT, further, as most of the nursing staff involved still work in the Labour and Delivery service, including the Obstetrical Unit, the Antepartum Assessment Unit and the Neonatal Intensive Care Unit, of the Grace General Hospital site, the absence of such a considerable number of nurses during a trial of this matter in Nova Scotia will have a significant adverse impact on the ability of the Corporation to provide Obstetrical and related care. On the other hand, if an equivalent action in the Supreme Court of Newfoundland were to be tried in St. John's then the requirement that nurses attend to testify can more reasonably be accommodated with the obligations of the Corporation to provide Obstetrical and related care to residents of St. John's and surrounding areas.
>
> 9. THAT the original medical records of the Plaintiffs Lisa Marie Dennis and Alexander Dennis, including original fetal monitor tracings, remain in the custody of the Corporation. If this matter were to proceed to trial in the Supreme Court of Newfoundland then these original records could be made available for use by the parties at trial, without substantial risk of loss during transportation."

The respondent doctors deposed to affidavits stating that all of the witnesses they would anticipate calling, at a trial of this action, reside in Newfoundland. Further, the doctors depose to the severe inconvenience, to them because of the time and cost, if it were necessary to come to Nova Scotia for a trial of the action.

The appellant Lisa Marie Dennis filed a detailed affidavit in support of her position that the trial of this action should be held in Nova Scotia. After deposing to the background facts with respect to this matter, Mrs. Dennis deposes in her affidavit as follows:

> "7. THAT due to his many health problems, which we allege were caused by the negligence of the Defendants, Alexander has had to receive constant medical and health care, and continues to be actively treated by the following:
>
> - our family doctor in Kentville, Nova Scotia;
> - a pediatric neurologist at the Izaak Walton Killam Hospital in Halifax (IWK);
> - a physiotherapist at the IWK;
> - an occupational therapist at Soldiers' Memorial Hospital in Kentville;
> - a preschool assessment team at the IWK;
> - a speech therapist at Soldiers' Memorial Hospital in Kentville;
> - the Hearing and Speech Clinic in Kentville;
> - an ophthalmologist at the IWK;
> - an early intervention worker in Kentville;
> - an in-home support worker in Kentville;
> - a remedial seating person at the IWK.
>
> 8. THAT I believe that all of the professionals referred to in the preceding paragraph have important information about Alexander's condition, his development, his care requirements and his future prospects which we will want to present as part of the evidence in support of case at the trial of this proceeding.
>
> 9. THAT in early July, 1996, we will be moving to Yarmouth, Nova Scotia, so that Quintin can commence employment in his new position of flight service specialist. When we move to Yarmouth, it will be necessary to replace a number of the professionals who have been treating Alexander with people located in Yarmouth. These new health care professionals will also have useful information about Alexander which we will want to present as part of the trial evidence in this proceeding.
>
> 10. THAT prior to accepting the Yarmouth position, Quintin was offered a position which would have required us to move to British Columbia. The British Columbia position offered great opportunities for career advancement, however, we decided to stay in Nova Scotia so that we could pursue this litigation to its conclusion.

> 11. THAT attached hereto as Exhibit "A" to my affidavit is a Preschool Needs Program Assessment Report prepared by staff at the IWK outlining Alexander's needs and abilities as of December, 1995. As a result of Alexander's medication condition, we have had to spend many thousands of dollars on treatment as well as specialized equipment for him. As he grows, we will continue to have these expenses. As a result of these medical expenses, we have limited financial resources, however, we are prepared to devote everything we have to this litigation. In order to allow us to proceed with this matter, we have reached an agreement with Burchell MacAdam & Hayman that they would not be paid for their services unless and until we were successful in recovering moneys either through settlement or a court decision.
>
> 12. THAT we want this proceeding to be litigated in Nova Scotia because we reside here and we want to attend most if not all pretrial proceedings. I do not believe we would be in a financial position to do this if the matter proceeded in Newfoundland. In addition, Quintin has limited ability to get time off work since he is starting a new position which makes travel to Newfoundland extremely difficult to arrange. Another financial concern is that we cannot afford the costs of having all of the Nova Scotia health care professionals who have treated Alexander travel to Newfoundland for the trial of this matter.
>
> 13. THAT if we are required to travel to Newfoundland we will take Alexander with us since there are no acceptable child care options that would allow us to leave him in Nova Scotia. Travel with Alexander is very difficult as a result of the specialized equipment he requires and this is getting worse as he gets older and bigger. These problems may cause us to miss portions of this litigation that we want to attend and we are concerned that this may prejudice our ability to properly instruct our counsel."

Decision of the Chambers judge

The Chambers judge decided, firstly, that Nova Scotia was an appropriate jurisdiction to hear the appellants' action. However he granted the respondents' application and stayed the appellants' action. At the conclusion of his decision, the Chambers judge said the following:

> After very carefully weighing all the factors and applicable law, including the onus upon the defendants, I conclude that very clearly the appropriate forum for the trying of this matter is

> in the Province of Newfoundland and Labrador, and accordingly, a stay will be issued of this action in Nova Scotia.

The Chambers judge does not indicate, precisely, why he came to that conclusion; or what factors clearly favoured the jurisdiction of Newfoundland and Labrador over that of Nova Scotia. However, from a review of the decision of the Chambers judge, as a whole, it is a reasonable inference that he came to his conclusion for two reasons:

> 1. He discounted the factors which the appellants have put forth as favouring the trial of the action in Nova Scotia (and I will say more about that later in these reasons); and
>
> 2. He said in his decision, immediately before his conclusion:
>
> > Determining the clearly appropriate forum is not a number counting exercise; however, some limited weight must be given to the fact that there are more defendant [respondent] parties to be inconvenienced then there plaintiffs.[appellants]

Standard of Review

The standard of review of an appeal of a decision involving the exercise of discretion by a Chambers judge was considered by this Court in **Minkoff v. Poole** (1991), 101 N.S.R. (2d) 143 where Chipman J.A. stated as follows at pp. 145-146:

> "At the outset, it is proper to remind ourselves that this court will not interfere with a discretionary order, especially an interlocutory one such as this, unless wrong principles of law have been applied or a patent injustice would result. The burden on the appellant is heavy: **Exco Corporation Limited v. Nova Scotia Savings and Loan et al.** (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331, at 333, and **Nova Scotia (Attorney General) v. Morgentaler** (1990), 96 N.S.R. (2d) 54; 253 A.P.R. 54, at 57.
>
> Under these headings of wrong principles of law and patent injustice an Appeal Court will override a discretionary order in a number of well-recognized situations. The simplest cases involve an obvious legal error. As well, there are

> cases where no weight or insufficient weight has been given to relevant circumstances, where all the facts are not brought to the attention of the judge or where the judge has misapprehended the facts. The importance and gravity of the matter and the consequences of the order, as where an interlocutory application results in the final disposition of a case, are always underlying considerations. The list is not exhaustive but it covers the most common instances of appellate court interference in discretionary matters. See **Charles Osenton and Company v. Johnston** (1941), 57 T.L.R. 515; **Finlay v. Minister of Finance of Canada et al** (1990), 71 D.L.R. (4th) 422; and the decision of this court in **Attorney General of Canada v. Foundation Company of Canada Limited et al.** (S.C.A. No. 02272, as yet unreported)."

Principles of Law

In the case **679927 Ontario Limited v. Wall** (1996), C.A. No. 128160 (not yet reported) I reviewed the principles upon which a court will grant a stay of proceedings on the basis of *forum non conveniens.* In that case I said the following:

> The principles upon which a court will grant a stay of proceedings on the basis of *forum non conveniens* have been recently reviewed by the Supreme Court of Canada in the case of **Amchem Products Inc. v. B.C. (W.C.B.)**, [1993] 1 S.C.R. 897. It is appropriate that I make some detailed reference in this regard because **Amchem** modifies the test enunciated by the English authorities, which have been consistently referred to by our courts, particularly the cases of **MacShannon v. Rockware Glass Ltd.**, [1978] A.C. 795 (H.L.) and **Spiliada Maritime Corporation v. Cansulex Ltd.**, [1987] A.C. 460; [1986] 3 All E.R. 843 (H.L.).
>
> In **MacShannon**, Lord Diplock enunciated the test in the following words at p. 810-812, [1978 A.C.]:
>
> > A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused.
> >
> > In order to justify a stay two conditions must be

satisfied, one positive and the other negative:

> (a) the defendant must satisfy the court that there was another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and
>
> (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.

As to condition (b) of the test enunciated in **MacShannon**, Justice Sopinka said the following in **Amchem** at p. 919:

> In my view there is no reason in principle why the loss of a juridical advantage should be treated as a separate and distinct condition rather than being weighed with the other factors which are considered in identifying the appropriate forum.

In **Spiliada**, decided by the House of Lords eight years after **MacShannon**, Lord Goff stated the test as follows at p. 854-855, ([1986] 3 All E.R.):

> The basic principle is that a stay will only be granted on the ground of forum non-conveniens where a court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.
>
> As Lord Kinnear's formulation of the principle indicates, in general, the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay ... It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence.

It is noteworthy, that in explaining the test, Lord Goff acknowledges the strong position of a plaintiff, in Canada,

where the competing jurisdiction is another province of Canada:

> "The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established. Such indeed appears to be the law in the United States, where 'the court hesitates to disturb the plaintiff's choice of forum and will not do so unless the balance of factors is strongly in favour of the defendant' (see Scoles and Hay *Conflict of Laws* (1982) p. 366, and cases there cited); and also in Canada, where it has been stated that 'unless the balance is strongly in favour of the defendant, the plaintiff's choice of forum should rarely be disturbed' (see Castel *Conflict of Laws*) 3rd edn, 1974) [p. 282). This is strong language. However, the United States and Canada are both federal states; and, where the choice is between competing jurisdictions within a federal state, it is readily understandable that a strong preference should be given to the forum chosen by the plaintiff on which jurisdiction has been conferred by the constitution of the country which includes both alternative jurisdictions."(emphasis added)

In **Spiliada** the House of Lords had decided that the burden of proof is different when the defendant is served within the jurisdiction, as opposed to *ex juris*. In **Amchem**, Justice Sopinka said at p. 920:

> "...It seems to me that whether it is a case for service out of the jurisdiction or the defendant is served in the jurisdiction, the issue remains: is there a more appropriate jurisdiction based on the relevant factors."

And further at p. 921:

> "...The burden of proof should not play a significant role in these matters as it only applies in cases in which the judge cannot come to a determinate decision on the basis of the material presented by the parties."

In **Amchem** Justice Sopinka, writing for a unanimous Court, said the following about the test to be applied in an application to stay proceedings in a forum which the plaintiff has selected at p. 921:

> "...While the standard of proof remains that applicable in civil cases, I agree with the English authorities that the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff."

And at p. 931, he said:

> "...Under this test the court must determine whether there is another forum that is clearly more appropriate. The result of this change in stay applications is that where there is no one forum that is the most appropriate, the domestic forum wins outs by default and refuses a stay, provided it is an appropriate forum.
>
> (emphasis added)

There is good reason why, in order to displace an appropriate forum selected by the plaintiff, a more appropriate forum must be clearly established. I cannot express that reason any better than did by McLachlin, J.A. (as she then was) in the case of **Avenue Properties Ltd. v. First City Development Corporation Ltd. et al** (1986), 7 B.C.L.R. (2d) 45 at p. 50:

> "...a plaintiff's choice of forum should not be lightly denied. It is his right to have ready access to the courts of his jurisdiction and not to be required to travel outside his jurisdiction to present his case. This is particularly the case where the plaintiff resides in the jurisdiction where he seeks to bring his action or where there is some other *bona fide* connection between the action and the jurisdiction in which it is sought to be brought. Accordingly, the court's jurisdiction to stay proceedings should be used sparingly."

It is apparent, from what Justice Sopinka has said in **Amchem**, that when a plaintiff who has commenced an action in Nova Scotia is faced with an application by a defendant to stay the action (because the defendant claims that another jurisdiction is, clearly, a more appropriate jurisdiction to hear the matter) the plaintiff cannot sit back, do nothing, and claim that the onus is on the defendant to make his case. If the plaintiff does so, he runs the risk that the Court will find, on the evidence before

> it, that the other jurisdiction is clearly the more appropriate jurisdiction. The plaintiff, therefore, has an evidentiary burden as well, to show the existence of factors which will persuade the Court to exercise its discretion in his favour, and against the defendant's application.
>
> Finally, as Justice Sopinka said in the introduction to his discussion of *forum non-conveniens*, in **Amchem** at p. 912:
>
> > "I recognize that there will be cases in which the best that can be achieved is to select an appropriate forum. Often there is no one forum that is clearly more appropriate than others."

Disposition

I agree with counsel for the appellants that the Chambers judge made errors in law in his application of the test to the facts of this case. He, incorrectly, gave no weight, or insufficient weight, to factors which the appellants had put forward as favouring Nova Scotia as the jurisdiction to hear this matter.

In paragraphs 7, 8 and 9 of her affidavit, the appellant Mrs. Dennis, lists the professionals who were presently providing care for her child, all of whom are in Nova Scotia. She deposes that these professionals will have relevant information concerning the child's condition, development, care requirements and future prospects which she would want to present as part of the evidence in support of the case. She further deposes that upon her family's move to Yarmouth, Nova Scotia (in July of 1996), it will be necessary to replace some of those professionals with ones at or near Yarmouth. This is, certainly, a factor which favours the trial of the action being in Nova Scotia; because these witnesses would be required to establish the damage claim.

The Chambers judge discounted this factor in the following words:

> ". . . It is reasonable to make the assessment that normally evidence from these types of professionals is generally admitted by records and reports more often than not without any attendance being required. Failure on the part of the defendant to admit the obvious, ie. treatment, can be dealt with

by the Trial Justice in costs."

In my opinion, the Chambers judge was wrong to assume that the appellants' medical witnesses (who would be essential to the establishment of the quantum of the appellants' damage claim) may not be needed at trial, or otherwise; and as a result, the Chambers judge was wrong to summarily discount this factor. The respondents have made no admission that the child's condition had anything to do with the care of his mother before and during delivery; nor do they admit, for the purpose of assessment of damages, what the child's condition is, his future prospects, or his care requirements. In fact, the respondents may well require that the child be examined by a physician of their choice. The child's condition, and future needs, may well become an issue at trial. While discovery examination of the appellants' Nova Scotia medical witnesses will, undoubtedly, take place in Nova Scotia, there may very well be a need for them to attend, on discovery examination of any of the respondents' medical witnesses, outside of Nova Scotia. That would involve attendance, not only of the appellants' medical team, but of the appellants themselves so that they could properly instruct their counsel.

Another factor which the appellants put forth, as favouring trial of this action in Nova Scotia, is their lack of financial resources. In that regard, they have been successful in retaining Nova Scotia counsel to handle their case on a contingent fee basis. Under that arrangement they do not have to pay for legal services unless and until they are successful.

The Chambers judge discounted this factor as follows:

> ". . . There is nothing before me to suggest that the possibility does not exist of the Dennis' entering into a contingency fee agreement with a solicitor or firm in the Province of Newfoundland."

In my opinion, the Chambers judge erred in discounting this factor in the

manner in which he did. If there was evidence to counter this factor, which, certainly, is a factor which favours a trial in Nova Scotia, in this case, counsel for the respondents could have adduced such evidence. For example, the respondents could have adduced affidavit evidence, if such were available, deposing to the fact that contingent fee agreements are lawful in the Province of Newfoundland and Labrador, and that there are competent counsel in that Province who conduct litigation on a contingent fee basis. The respondents adduced no such evidence. The manner in which the Chambers judge dealt with this factor clearly indicated that he felt it was the appellants' responsibility to show that they could not obtain the same arrangements for legal counsel in another province. The fact of the matter is that the appellants, who lack financial resources to fund this litigation, have successfully engaged competent counsel, in Messrs. Wood and Barnes, to handle this case for them on a contingent basis. The Chambers judge should have dealt with that as a factor favouring trial of the action in Nova Scotia, and he should have weighed it against factors which favoured a trial of the action in Newfoundland and Labrador. He erred in not doing that.

The appellant, Mrs. Dennis, also deposed to the travel problems which the appellants would encounter if the trial were to be held in Newfoundland and Labrador. In her affidavit she referred both to the expense involved, and the problems which she would encounter having to travel with her severely handicapped child. The Chambers judge simply said the following about this factor:

> ". . . On balance, however, I accept that a child with cerebral palsy would have real difficulties with respect to travel. The question is, how much travel would be involved? Normally it would be for the purposes of trial only."

Regardless of whether the trial was held in Newfoundland and Labrador or Nova Scotia, there would be travel involved to Newfoundland and Labrador to

attend at discoveries and to instruct counsel. If the trial were held in Newfoundland and Labrador it would add to that burden on the appellants. The Chambers judge erred in not considering that factor.

The appellant, Mrs. Dennis, also deposed to the fact that her husband had started a new job, would have difficulty taking time off of work with respect to this litigation, which would be further complicated if it involved travel to the Province of Newfoundland and Labrador. The Chambers judge made no comment on this factor. He, therefore, erred in failing to take it into account.

The Chambers judge also commented on the factors put forth by the respondents as favouring the trial of this action in the Province of Newfoundland and Labrador.

With respect to the concerns expressed by the respondent Hospital, that the Hospital would incur significant costs for salary, travel and accommodation of those of its employees called to testify; and if a considerable number of nurses were required for a trial of this action in Nova Scotia, it would have a significant adverse impact on the ability of the Hospital to provide obstetrical and related care, the Chambers judge said the following:

> "Clearly not all of the nurses are likely to be called, but a sufficient number can be reasonably projected to be called so as to raise the serious concerns expressed by Ms. Winsor in her affidavit."

As to the deposition that all of the appellants medical records were located in the Province of Newfoundland and Labrador, the Chambers judge made no comment.

As to the concern expressed by the respondent doctors, the Chambers judge said the following:

> ". . . Each of the doctors swears that they would be severely inconvenienced because of the time and cost necessary for

them to come to Nova Scotia.

> Determining the clearly appropriate forum is not a number counting exercise; however, some limited weight must be given to the fact that there are more defendant parties to be inconvenienced then there plaintiffs."

In summary, while there, certainly, are factors which favour the trial of this action in the Province of Newfoundland and Labrador, there are also factors which favour the trial in Nova Scotia.

The error of the Chambers judge was not to give proper recognition to the factors which favour Nova Scotia, and weigh them against the factors which favour Newfoundland and Labrador. Only after doing that would he be able to properly conclude, on the basis of the material before him, whether the respondents had established that Newfoundland and Labrador was clearly a more appropriate jurisdiction to hear the matter.

The following, in summary form, are the factors, put forth by the appellants, which favour a trial of this action in Nova Scotia:

(1) The appellants are residents of Nova Scotia.

(2) The medical personnel, who would be essential to the establishment of the appellants' damage claim, are in Nova Scotia.

(3) The appellants have retained competent Nova Scotia counsel, without the financial concern as to how they will pay for their legal representation.

(4) Because of the appellants' lack of financial resources, the problems associated with the appellant husband in commencing a new job, and the problems associated with travel of their severely handicapped child, if the appellants are required to bring their action in the Province of Newfoundland and Labrador it will create an undue burden on them. That burden would be lessened if the trial is held in Nova Scotia.

The following, in summary form, are the factors put forth by the respondents, which favour trial of the action in the Province of Newfoundland and Labrador:

(1) To the extent that the respondents are liable to the appellants, that liability arose in the Province of Newfoundland and Labrador.

(2) A trial in Nova Scotia will cause a scheduling problem for the respondent Hospital, and inconvenience to the nurses who are employees of the Hospital.

(3) The appellants medical records are located in the Province of Newfoundland and Labrador.

(4) The respondents Doctors will be inconvenienced if they have to travel to Nova Scotia for a trial of the action.

Since the cause of action in this law suit arose in the Province of Newfoundland and Labrador, that is certainly a relevant factor favouring the Province of Newfoundland and Labrador as the appropriate jurisdiction for the trial of this action. Weighed against that, is the fact that the quantum of the appellants' damage claim would be established through witnesses who are all residents of Nova Scotia.

Further, the inconvenience to the hospital and doctors in Newfoundland is, certainly, real, and a factor which favours a trial in the Province of Newfoundland and Labrador. Weighed against that is the burden on the appellants, because of their lack of financial resources, the problems associated with the appellant husband's new job, and the travel problems associated with their severely handicapped child, if the trial were held in Newfoundland and Labrador. That burden will be considerably lessened if the trial is held in Nova Scotia. In addition, there is the factor that the appellants have competent legal counsel in Nova Scotia

without the financial concern as to how counsel will be paid.

With respect to the location of the appellants' medical records in the Province of Newfoundland and Labrador, the Chambers judge, obviously, did not consider that to be a relevant factor and rightly so. As I said in **679927 Ontario Limited v. Wall** (supra), since the respondents do not suggest that there is anything unique about those hospital records, then, for the purposes of a *forum non conveniens* application, their location is not significant.

Looking at these factors, in this light, it cannot be said, in my opinion, that the respondents have established that the Province of Newfoundland and Labrador is, clearly, a more appropriate jurisdiction to try this action, so as to deprive the appellants of the benefit of an appropriate jurisdiction which they have selected. This is the test which the respondents are required to meet, as set out by the Supreme Court of Canada in **Amchem**; and, quite simply, it has not been met.

In coming to this conclusion, I have also considered the fact that the competing jurisdictions, here, are both provinces of Canada. Further, Halifax, Nova Scotia, where the appellants propose the trial of this action, is approximately one and a half hours, by air travel, from the City of St. John's where the respondent hospital is located and where the respondent medical doctors reside and conduct their practice.

From the respondents' point of view, the best that can be said, with respect to this application, is that the factors which favour trial in Newfoundland and Labrador, when weighed against the factors which favour trial in Nova Scotia, show that there is no one jurisdiction which is clearly more appropriate than the other for the trial of this action.

That being the case, and in accordance with Justice Sopinka's decision in **Amchem**, "the domestic forum wins out by default", and the respondents' application must fail.

I would, therefore, allow the appeal. I would set aside the decision and order of the Chambers judge, and order that the respondents' application be

dismissed. I would also order that the respondents pay to the appellants their costs both here and in the court below, which I would assess at $2,000, plus disbursements.

Flinn, J.A.

Concurred in:

Jones, J.A.

Freeman, J.A.

C.A. No. 130542

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

QUINTIN DENNIS, LISA MARIE DENNIS, and ALEXANDER DENNIS an infant, by his Litigation Guardian Quintin Dennis Appellants - and - THE SALVATION ARMY GRACE GENERAL HOSPITAL BOARD and DR. CHERRY J. PIKE, DR. POH GIN KWA, and DR. NASSIR BADRUDIN Respondents	)	REASONS FOR JUDGMENT BY: FLINN, J.A.