

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Penny v. Bouch,
2008 NSSC 378

Date: 20081217
Docket: S.H. No. 291463
Registry: Halifax

Between:

Caiden Christopher Penny, an infant, by his Litigation
Guardian Vicki Penny and **Vicki Penny**

-and-

Peter J. Bouch, William R. Young, Jared Yeung, Richard Moffatt and the
David Thompson Health Region, a body corporate, carrying on business as the
Red Deer Regional Hospital Centre

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Judge: The Honourable Justice Robert W. Wright

Heard: October 30, 2008 in Chambers at Halifax, Nova Scotia

Written

Decision: December 17, 2008

Subject: Whether medical malpractice action should be tried in Nova Scotia - territorial competence (jurisdiction *simpliciter*) - declining jurisdiction (*forum non conveniens*) - *Court Jurisdiction and Proceedings Transfer Act*.

Summary: On January 31, 2008 the plaintiff commenced an action in this court, both in her capacity as litigation guardian for her infant son and in her personal capacity as well. The action seeks damages for medical malpractice against four physicians in Alberta who treated her during her pregnancy in 2004 and against the Alberta hospital in which her son was born with severe neurological deficits.

At the time the action was commenced, the plaintiffs were living in Ontario.

However, in June of 2008 the plaintiff returned to her native Nova Scotia with her severely disabled son, intending to live in this province for the indefinite future with support from her family. Since returning here, her son has been undergoing testing and treatment by seven medical specialists, which will continue indefinitely. The ongoing damage is therefore now sited in Nova Scotia, although the alleged tort was completed in Alberta.

The plaintiffs are impecunious but have been able to secure experienced Nova Scotia counsel on a contingency fee basis. They do not have the financial resources or mobility to litigate the case in Alberta. In June of 2008, the defendants brought this application to have the action dismissed for lack of jurisdiction or in the alternative, stayed on the ground that Nova Scotia is not the most appropriate forum. They maintain that Alberta is the proper forum for this litigation.

Issues:

- (1) Is there a real and substantial connection between Nova Scotia and the subject matter of this action such that this court has jurisdiction to hear the case?
- (2) If so, should this court exercise its discretion to decline jurisdiction in favour of Alberta?
- (3) Does the *Court Jurisdiction and Proceedings Transfer Act* apply in the determination of these issues, where it did not come into force until June 1, 2008?

Held:

- (1) That Act applies notwithstanding that it did not come into force until after the commencement of the proceeding. However, because the Act is largely a codification of common-law principles, the outcome is not affected by it.
 - (2) After weighing all the relevant factors, the court found that there is a real and substantial connection between Nova Scotia and the subject matter of the action and the parties. Of significant weight is the connection between Nova Scotia and the plaintiffs' claim and the unfairness to the plaintiffs in not assuming jurisdiction.
 - (3) After weighing all relevant factors, the court concluded that there is no one jurisdiction which is clearly more appropriate than the other for the trial of the action. The selected forum therefore wins out by default and the defendants' application was accordingly dismissed with costs.
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