Date: 20011016
Docket: S.H. No. 168194

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: O'Brien v. Canada (Attorney General), 2001 NSSC 141]

BETWEEN:

HENRY JOSEPH O'BRIEN

PLAINTIFF

-and-

THE ATTORNEY GENERAL OF CANADA, representing her Majesty the Queen, MYLES TRENHOLM, Dr. ANDRE TOUCHBURN, Dr. FRANK LORD, Dr. CLOVIS EID and Dr. BENOIT GRENIER

DEFENDANTS

DECISION

HEARD BEFORE: The Honourable Justice Robert W. Wright at Halifax, Nova Scotia in Chambers on October 3, 2001

ORAL DECISION: October 12, 2001

WRITTEN RELEASE OF DECISION: October 16, 2001

COUNSEL: For the Plaintiff - Mark Raftus

For the Defendant Doctors Touchburn, Lord, Eid and Grenier - Daniel Campbell, Q.C. and Mark Messenger

For the Defendants - The Attorney General of Canada and Myles Trenholm - James Gunvaldsen-Klaassen (watching brief only)

Wright J.: (Orally)

INTRODUCTION

[1] On December 22, 2000 the plaintiff Henry O'Brien commenced this action in the Supreme Court of Nova Scotia against the four named physicians who are resident and practicing in the Province of New Brunswick. Also joined in the action is the Attorney General of Canada and a parole officer, Myles Trenholm.

[2] The cause of action against the four physicians is framed in medical malpractice in respect of the diagnosis and treatment of the plaintiff while he was incarcerated in the Westmorland Institution in Dorchester, New Brunswick between October 21, 1998 and June 30, 1999. The defendant physicians have decidedly not yet filed a defence pending the outcome of this application to set aside the Originating Notice (Action) on the basis that the Supreme Court of Nova Scotia has no jurisdiction to hear the matter or alternatively, for an Order staying this proceeding based on the principle that Nova Scotia is a *forum non conveniens*. The application is brought pursuant to Civil Procedure Rules 11.05 and 14.25 (1) respectively.

[3] In support of the application, each of the four physicians has filed an affidavit pertaining to the issues now before the court. As well, an affidavit of Rodney J. Gillis, Q.C., has been filed which addresses certain practice considerations in the Province of New Brunswick. In response, affidavits have been filed by the plaintiff Mr. O'Brien and his solicitor Mark Raftus. None of the deponents, for either side, was cross-examined on the contents of their respective affidavits.

[4] Also appearing on the application was Mr. James Gunvaldsen-Klaasen on behalf of the Attorney General of Canada and Mr. Trenholm. Those defendants take no position on this application and their counsel attended on a watching brief only.

ISSUES

[5] Counsel have framed the issues to be decided on this application as follows:

(1) Does this court have jurisdiction to adjudicate this action?

(2) If the court does have jurisdiction, should it decline to exercise that jurisdiction on the basis that Nova Scotia is a *forum non conveniens*?

[6] Counsel acknowledge that the proper approach to be followed in deciding this application involves a two-step analysis, first dealing with the matter of jurisdiction *simpliciter* and thereafter, if necessary, with the issue of whether Nova Scotia is a *forum non conveniens*.

JURISDICTION SIMPLICITER

[7] The judicial test to be applied in determining whether or not a court has jurisdiction to hear a matter is widely known as the "real and substantial connection" test, as adopted by the Supreme Court of Canada in the three cases of *Morguard Investments Limited v. De Savoye*, [1990] 3 S.C.R 1077, *Hunt v. T & N plc,* [1993] 4 S.C.R. 289 and *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022. As LaForest, J. said in *Hunt*, "courts are required, by constitutional constraints, to assume jurisdiction only where there are real and substantial connections to that place". It is therefore appropriate to focus on the real and substantial connection test to determine the question of jurisdiction, rather than looking to the Nova Scotia Civil Procedure Rules, however broadly worded their provisions are with respect to assuming jurisdiction and ex juris service. In other words, in my view those Civil Procedure Rules merely complement the proper application of the real and substantial connection test.

[8] One has only to look at the various authorities decided in various common law jurisdictions to find that the real and substantial connection test is easy to articulate but often difficult to apply. As LaForest, J. noted in *Hunt*, the test was not intended to be a rigid test. He stated (at p. 325):

> In a personal action, a nexus may need to be sought between the subject matter and the territory where the action is brought ... The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these.

[9] This judicial test was revisited by LaForest, J. a year later in *Tolofson v. Jensen*. In that case, which concerned choice of law rather than jurisdiction, Justice LaForest wrote (at p. 1049):

> In Canada, a court may exercise jurisdiction only if it has a "real and substantial connection" (a term not yet fully defined) with the subject of the litigation ...This test has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest. In addition, through the doctrine of *forum non conveniens*, a court may refuse to exercise jurisdiction where, under the rule in *Amchem*, there is a more convenient or appropriate forum elsewhere.

[10] The most recent case on this subject emanating from this province is *Oakley v. Barry* (1998) 166 N.S.R. (2d) 282. In that action, which also alleged medical malpractice, the Court of Appeal thought it appropriate to apply *Morguard* in a flexible manner. Pugsley, J.A., in delivering the judgment of the court, concluded that the Nova Scotia courts had jurisdiction to hear the matter because there was

found to be a real and substantial connection with this province, both in relation to the subject matter of the action and the damages caused by the alleged negligence of the physicians. The court identified the following connections between the action and Nova Scotia:

(1) Nova Scotia was the situs where Nova Scotia physicians disclosed to the plaintiff the alleged initial misdiagnosis by the physicians in New Brunswick;

(2) The plaintiff was resident in Nova Scotia when commencing the action and it is in this province that the plaintiff was and continued to be treated by Nova Scotia physicians;

(3) Nova Scotia was the place where the plaintiff had suffered her damages.

[11] The Court of Appeal also concluded that the undefined nature of the real and substantial connection test permits a flexible approach to the factors to be considered, one that is to be guided by the requirement of order and fairness. The court explicitly recognized that flexibility in the application of the real and substantial connection test therefore should permit a consideration of some of the same factors as would be considered in the determination of the most convenient forum. These included a consideration of any juridical advantages or disadvantages and considerations of fairness extending to all the litigants.

[12] The court then addressed the underlying principles of order and fairness on the evidence before it. The plaintiff's affidavit disclosed that she had health problems and financial problems which suggested that it was more a matter of necessity, rather than choice, that she selected Nova Scotia in which to commence her action. The court concluded (at para. 56) that "when one considers the respondent's personal situation, and the unchallenged deposition that she is

financially incapable of proceeding with this action in any place other than Halifax, it would, in my opinion, be manifestly unfair to allow the appellants to succeed in this appeal".

[13] In the result, the court in *Oakley* was satisfied that the real and substantial connection test had been met and that the courts in Nova Scotia therefore had jurisdiction to hear the case.

[14] Attempts have been made by counsel for the applicant physicians to distinguish the *Oakley* case from the case at bar. Indeed, it is argued in their brief that none of the factors which led to a finding of jurisdiction by necessity in *Oakley*, or on a balance of convenience, are relevant here. With respect, I cannot agree. My assessment of the affidavit evidence that has been filed leads me to the conclusion that the case at bar is strikingly similar on its facts to those considered by the Court of Appeal in *Oakley*.

[15] The plaintiff Henry O'Brien is presently 66 years of age and is a lifelong resident of Cape Breton. He has lived at the same Glace Bay address for the last 21 years except for the 8-9 month period in which he was incarcerated in the Westmorland Institution in Dorchester, New Brunswick. Obviously, there was no intention on the part of Mr. O'Brien to take up residence or domicile in New Brunswick in those forced circumstances. As soon as he was released from prison, he immediately returned to his home in Cape Breton where he has since continued to reside.

[16] Mr. O'Brien's affidavit also attests to the fact that he is currently in poor health, having been left with left-sided partial paralysis as a result of the two strokes he has suffered (the first during his incarceration and the second on July 2, 2000

after his release). He has been on 24 different medications over the last two years. He is currently on an emergency list for a mitral valve replacement to be performed in Halifax in the near future. There is some evidence that he is unable to travel and that he relies heavily on health care institutions and his support network in Cape Breton in his daily life. He is also in a precarious financial situation with a pension income of only about $21,000 per annum. He deposes in his affidavit that from an ability to travel and a financial point of view, he is not capable of proceeding with this action in New Brunswick. He also attests to having a good relationship with his counsel, Mr. Raftus (who acts on a contingency fee basis) which he wishes to maintain.

[17] In addition to these considerations of fairness, the same three connections with Nova Scotia earlier identified in the *Oakley* case are present here as well. Mr. O'Brien deposes in his affidavit that Nova Scotia is the situs where Nova Scotia physicians disclosed to him the initial misdiagnosis which he attributes to the New Brunswick physicians. Furthermore, Mr. O'Brien is a resident of Nova Scotia and continues to be treated by Nova Scotia physicians in his recovery and extended rehabilitation, much of the cost of which is presently borne by this province. Thirdly, Nova Scotia is the place where the plaintiff has suffered his damages in the most part, albeit that he was treated in New Brunswick for the first month following his initial stroke.

[18] Numerous cases decided by the courts in other Canadian provinces have been cited to me by counsel for the applicant physicians which illustrate the difficulties that can be encountered in applying the reasonable and substantial connection test to various fact situations. It would be an exercise in futility to try to reconcile many of those cases where differences in general view points and on the emphasis to be given to the various factors to be considered are seen to abound. It is often the result that the courts in both provinces sought after are found to have jurisdiction *simpliciter*. At all events, I am bound to follow the result reached

in *Oakley* in concluding that the case before me does have a real and substantial connection with the Province of Nova Scotia and hence that the Supreme Court of Nova Scotia has jurisdiction to hear the case.

IS NOVA SCOTIA A *FORUM NON CONVENIENS*?

[19] Having decided that the Supreme Court of Nova Scotia has jurisdiction to hear this case, it is necessary to go on to consider whether or not that jurisdiction should be declined on the basis that New Brunswick is the more convenient forum in which the case should proceed.

[20] The principles relevant to a *forum non conveniens* analysis were considered by the Supreme Court of Canada in *Amchem Products Inc. v. B.C. Workers' Compensation Board* [1993] 1 S.C.R. 897. Sopinka, J. set out the test as follows (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.

[21] Justice Sopinka went on to say (at p. 931):

> 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 out by default and refuses a stay, provided it is an appropriate forum ...

[22] The identification of the most appropriate forum in which the litigation ought to be conducted is generally based on a weighing of the various factors which connect the litigation and the parties to the competing fora. As affirmed by the decisions of this court in *Oakley* and *Godin v. Richard* (1996) 155 N.S.R. (2d) 33, the burden is not on the plaintiff to show that Nova Scotia is the most convenient forum. Rather, it is on the defendants to show that it is not.

[23] The burden was described by McLachlin, J.A. (as she then was) in *Avenue*

Properties v. First City Development Corp. (1986) 7 B.C.L.R. (2d) 45 in these terms (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.

[24] I note that this statement was approved by the Nova Scotia Court of Appeal in *Dennis v. Salvation Army Hospital* (1997) 156 N.S.R. (2d) 372. This too was an action framed in medical malpractice, in which the issue before the court was whether Nova Scotia was the forum conveniens.

[25] There is no set list of factors which a court must take into account in weighing the appropriateness of one forum versus another. A review of the authorities discloses recurring emphasis on a number of factors, however, which were summarized by Davison, J. in *Oakley* as being the balance of convenience to all parties, location of key witnesses and the cost of assembling witnesses, the jurisdiction where the cause of action or the events to the action occurred, the location of the bulk of the evidence, the law of the jurisdiction which would apply, the residence of the parties and any loss of juridical advantage.

[26] Reference is also made to the factors reviewed by the Nova Scotia Court of Appeal in *Dennis* (summarized at paras. 32-35 inclusive) which bear striking similarity to the factors which come into play in the case at bar.

[27] In this proceeding, the factors in support of trial in Nova Scotia are:

(1) The plaintiff is a resident of Nova Scotia and has been for virtually his entire life (except for his relatively brief period of incarceration in New Brunswick);

(2) The medical personnel, who would be essential to the establishment of the plaintiff's damages claim, are in Nova Scotia. The plaintiff has been under the care of various doctors in Nova Scotia since his release from prison, including a number of specialists, some of whom are expected to testify on his behalf;

(3) The uncontroverted affidavit evidence of the plaintiff is that he is in poor health, details of which are outlined earlier in this decision. Because of his poor health, the plaintiff is limited in his ability to travel either in prolonged distances or time. If Nova Scotia is found to have jurisdiction, and to be a convenient forum, it is his intention to obtain a change of venue to Sydney (near where he lives) from Halifax (where this action was wrongly commenced for the sake of ease of filing documents with the court);

(4) The plaintiff has very limited financial resources (as earlier recited in this decision) and deposes in his affidavit that from an ability to travel and financial point of view, he is not capable of proceeding with this action in New Brunswick. He views the selection of Nova Scotia as the appropriate forum more as a matter of necessity rather than a matter of choice;

(5) The plaintiff has a good relationship with his counsel, Mr. Raftus, with whom he feels comfortable in his legal representation and with whom he has a contingency fee agreement in place;

(6) On the issue of liability, the plaintiff deposes that a key witness (besides himself) will be his wife who is also not in full health, having recovered from breast cancer but also having high blood pressure;

(7) The various health care institutions and support network on which the plaintiff relies in his daily living are in the Sydney area;

(8) The plaintiff's affidavit also makes reference to a number of witnesses who are in a position to testify with respect to the problems and personal despair he has gone through as a result of the alleged negligent medical care. He further makes reference to several potential witnesses from social welfare agencies and support groups who reside in the Sydney/Glace Bay area.

[28] The following factors, on the other hand, support New Brunswick as the appropriate forum for the trial of this action:

(1) All of the applicant physicians reside and practice in New Brunswick with the exception of Dr. Grenier who has since moved to Sherbrooke, Quebec. Similarly, others who may be called as witnesses on the liability issue, including doctors, hospital staff and correctional staff, are also resident in New Brunswick;

(2) The cause of action arose from events which took place in New Brunswick;

(3) The applicant physicians will be inconvenienced in meeting and communicating with Nova Scotia counsel and in having to travel to Nova Scotia if the case is to be tried in this province;

(4) A trial in Nova Scotia may cause scheduling problems for hospital and correctional facility staff which would be relatively minimal if the trial were to be conducted in New Brunswick.

[29] There were a number of other factors raised in argument before me but in my view, they hold no sway in weighing the balance of convenience between the parties. Potential language difficulties was one such factor argued on behalf of the applicant physicians who are all francophones and desire that the trial be conducted in the French language. That is not a concern, however, because the Supreme Court of Nova Scotia has the capability as well as the New Brunswick

courts to conduct a trial in whole or in part in the French language.

[30] The fact that the applicable law in this case will be that of New Brunswick (where the tort allegedly occurred) is likewise of no real significance in the present case simply because there is not likely to be any difference in the law as between New Brunswick and Nova Scotia, whether in relation to the standard of care to be met by physicians in treating their patients or the assessment of damages. If any such differences become apparent, they can be addressed by expert evidence in the usual way.

[31] I would further observe that practically speaking, there is no risk of a multiplicity of proceedings in this matter either way. Nor is there a juridical advantage or disadvantage to the parties either way, especially where counsel for the applicant physicians have indicated that no limitation defence would be raised if the proceeding were now to be commenced in the Province of New Brunswick. I have similarly discounted the location of the plaintiff's medical records which the *Dennis* case tells us is not a significant factor for purposes of a *forum non conveniens* application.

[32] After reviewing and weighing all the foregoing factors, in like manner as Davison, J. in *Oakley* I consider that the most telling factor in support of New Brunswick as the forum conveniens is the fact that the defendants and various medical witnesses are all resident there. Likewise, the significance to me is not so much the cost or inconvenience that a trial in Nova Scotia would have on the applicant physicians, but rather the practical aspects of conducting the trial in this province when nearly all the matters relating to liability are in New Brunswick. To be weighed against that are the various factors enumerated earlier in this decision in support of Nova Scotia as the forum conveniens, not the least of which is the real possibility that the plaintiff will be incapable, or at least severely prejudiced, in proceeding with this action in New Brunswick because of his limited ability to

travel, owing to his poor health, and his thin financial resources.

[33] On balance, I am not satisfied that the applicant physicians have established that New Brunswick is clearly a more appropriate jurisdiction to try this action, so as to deprive the plaintiff of the benefit of selecting his home jurisdiction where there has been found to be a bona fide connection between the action and that home jurisdiction. I view the present case in the same light as did the Court of Appeal in *Dennis*; that the best that can be said here is that factors which favour trial in New Brunswick, 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 the action. The result of that finding is, in the words of Justice Sopinka in *Amchem*, that the "domestic forum wins out by default".

[34] Accordingly, I conclude that Nova Scotia is not a *forum non conveniens* and that it is appropriate for the trial of this action to be heard in this jurisdiction, presumably at Sydney. This application is therefore dismissed.

[35] In keeping with the disposition of costs in *Oakley*, the plaintiff shall be entitled to recover costs of this application from the applicant physicians in the amount of $1,000.

J.