1995 **SH 119812**

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

MADONNA HUNT, **PLAINTIFF**

- and -

BARRY DURDLE, **DEFENDANT**

D E C I S I O N

HEARD: **at Halifax, Nova Scotia before The Honourable Justice Walter R. E. Goodfellow on July 4, 1996 in Chambers**

DECISION: **August 2, 1996**

WRITTEN RELEASE OF ORAL: **August 2, 1996**

COUNSEL: **Lawrence W. Scaravelli**
Solicitor for the Plaintiff

Philip M. Chapman
Solicitor for the Defendant

GOODFELLOW, J.:

1. APPLICATION

The defendant filed an application for an order staying the Originating Notice (Action) filed by the plaintiff August 25, 1995 pursuant to **Civil Procedure Rule** 14.25 asserting that the Province of Newfoundland and Labrador is clearly the more appropriate forum to try this litigation.

2. BACKGROUND

Madonna Hunt was a resident of Ontario when she visited her son October 5, 1991 in Mount Pearl, Newfoundland. Her son was a tenant in premises owned and leased by Barry Durdle.

Ms. Hunt alleges she fell down a flight of stairs in the premises and broke her foot, and she claims damages based upon negligence.

She was treated in hospital in St. John's Newfoundland where she had surgery, and upon discharge she returned home to Ontario where she remained until November, 1992 when she moved to the Province of Nova Scotia. She commenced this action August 25, 1995 and the defendant responds seeking a stay on the basis that the Province of Newfoundland and Labrador is clearly a more convenient and appropriate jurisdiction.

3. SERVICE OUT OF JURISDICTION - WITHOUT LEAVE

Effective March 1, 1972 the present **Civil Procedure Rules** came into effect. By virtue of **C.P.R.** 10 , leave to issue and serve an Originating Notice (Action) elsewhere in Canada or one of the States of the United States of America is no longer required.

MacDonald, J.A. of the Nova Scotia Court of Appeal in **Robinson v. Warren** (1982), 55 N.S.R. (2d) 147 (C.A.) placed the significance of the Rule change in proper prospective when he adopted the interpretation of a similar Rule change that occurred in Ontario in 1975 by commenting upon the Ontario Court of Appeal in **Singh et al. v. Howden Petroleum Ltd. et al.** (1979), 24 O.R. (2d) 769 (C.A.) in which part of the headnote adopted states:

> This procedural change does not alter or remove from the Court the discretion to control its own process. The Court retains the power and discretion, in addition to the question of *forum conveniens*, to set aside service *ex juris* in appropriate cases.

4. CIVIL PROCEDURE RULES

11.05.

A defendant may, at any time before filing a defence or appearing on an application, apply to the court for an order,

(a) setting aside the originating notice or service thereof on him;

(b) declaring that the originating notice has not been duly served on him;

(c) setting aside any order giving leave to serve the originating notice on him elsewhere than in Canada or one of the states of the United States of America;

(d) extending the time for filing a defence or appearing on an application;

and the application shall not be deemed to be a submission to the jurisdiction of the court. [E. 12/8]

Striking out pleadings, etc.
14.25.

(1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,

(a) it discloses no reasonable cause of action or defence;

(b) it is false, scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the proceeding;

(d) it is otherwise an abuse of the process of the court; and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

(2) Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under paragraph 91)(a). [E. 18/19]

5. ISSUES

(1) Does the Supreme Court of Nova Scotia have jurisdiction to hear this matter?

(2) Has the defendant met the onus upon him satisfying the Court that the Province of Newfoundland and Labrador is clearly a more convenient and appropriate forum in which to litigate this matter?

6. ONUS

The defendant has the burden of establishing, on a balance of probabilities, that, on the balance of convenience and on all relevant factors, the Province of Newfoundland and Labrador would be the more convenient forum in which to litigate this matter.

Stated another way, the defendant has the burden of establishing another forum other than Nova Scotia is clearly more appropriate.

The starting point used to be the House of Lords decision in **MacShannon v. Rockware Glass Ltd.**, [1978] A.C. 795. The House of Lords directed a two-part test where

the defendant was seeking a stay on the grounds of *forum non conveniens* and must, in order to succeed, establish:

(1) That there is another forum to which the defendant is amenable in which justice can be done at substantially less inconvenience or expense; and

(2) That the stay does not deprive the plaintiff of a legitimate personal or juridical advantage if the action continued in the domestic court.

The Supreme Court of Canada, in **Amchem Products Inc. et al. v. Workers Compensation Board (B.C.)**, [1993] 1 S.C.R. 897, 150 N.R. 321, streamlined the test by simply adding the second condition as part of the first. At p. 919 Sopinka, J., writing for the Court, stated:

> In my view, there is no reason in principle why the loss of 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.

7. ISSUE (1)

(1) Does the Supreme Court of Nova Scotia have jurisdiction to hear this matter?

In order to institute and maintain an action in Nova Scotia, there must be a sufficient connection of substance with the jurisdiction of Nova Scotia.

If Ms. Hunt had remained in Nova Scotia for a very short transitory period of time,

during which this action was commenced then departed for Ontario, the issue of sufficiency of attachment might well have arisen. In the present case, the Courts of Nova Scotia and Newfoundland and Labrador have jurisdiction because both provinces exhibit sufficient factual connection of substance. Residence particularly coupled with employment or a genuine attempt at seeking employment is sufficient to find initial jurisdiction in most cases. The existence of jurisdiction does not lead to its automatic exercise. MacDonald, J.A. in **Robinson v. Warren** above, at pp. 155/156:

> Simply because a court has jurisdiction over the subject matter and the parties, does not mean that it will always exercise this jurisdiction. The court may in its discretion decline to take jurisdiction under the doctrine of *forum conveniens*. The *forum conveniens* does not by itself govern the exercise of the discretion, but it is an element to be considered together with all the other facts of the case.

In **Morgard Investments Ltd. v. deSavoye,** [1990] 3 S.C.R. 1077, the Supreme Court of Canada stressed the need for a real and substantial connection, and subsequent cases show that the assumption and jurisdiction must be based on considerations of order and fairness. The unreported decision, **Leroy v. Dr. Jarjoura**, dealt with a Quebec resident who received treatment at a dental clinic from a Quebec dentist and then moved to Ontario where he commenced action. Justice Monique Métivier followed the Ontario Court (Gen. Div.) decision, **MacDonald v. Lasnier et al.** (1994), 21 O.R. (3d) 177 and concluded that mere residence in Ontario was insufficient for jurisdiction in application of the real and substantial connection test. In reaching that conclusion Justice Métivier, to some extent did the balancing required of a determination of which forum is clearly the more convenient forum in which to litigate the matter. She went on, in any event, to decline jurisdiction

concluding that Quebec was the more convenient forum.

In the determination here of whether or not there is initially a sufficient connection of substance, the Court looks only at the connecting factors and not the factors that support the defendant's claim to Newfoundland and Labrador being a clearly more appropriate forum. Either the plaintiff has a sufficient connection of substance entitling initial exercise of jurisdiction in Nova Scotia or she does not.

Madonna Hunt moved to the Province of Nova Scotia. The brief filed by the defendant says this move was in November, 1992, and the affidavit of Ms. Hunt is not very specific but says simply that she moved to Halifax in mid 1993.

The significant date is of course the date on which the action was commenced, and I conclude that Ms. Hunt had a sufficient resident connection with this jurisdiction of sufficient substance to entitle her to assert initial jurisdiction.

The significant date is, of course, the date on which the action was commenced, and I conclude Ms. Hunt had a genuine residence connection with this jurisdiction of sufficient substance to entitle her to assert initial jurisdiction.

Jurisdiction cannot be retroactively established; however, what transpires post the commencement of the action can be considered and weighed as confirmatory that the

residence of the plaintiffs was not transitory and to negate that any element of forum shopping exists.

Issue number (1) is answered in the affirmative.

9. TEXT

In the *Canadian Conflict of Laws* by Professor Castel the author says at pp. 281-282:

> The principle of *forum conveniens* is that a court may resist imposition upon its jurisdiction even when this jurisdiction is authorized by statute if it is not a convenient forum. It is difficult to catalogue the circumstance that will justify or require either the grant or the denial of remedy. The doctrine of *forum conveniens* leaves much to the discretion of the court to which the plaintiff resorts. The question whether the forum is appropriate is one of degree and the answer will vary from case to case. Unless the balance is strongly in favour of the defendant, the plaintiff's choice of forum should rarely be disturbed. In practice, however, Canadian courts have often been reluctant to allow an action to be brought against a defendant who is outside the jurisdiction.
>
> The court will consider as important the relative ease of access to sources of proof, the availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance of willing witnesses, and all practical problems that make the trial of a case easy, expeditious and inexpensive. Considerations of public interest in applying the doctrine of *forum conveniens* should include the undesirability of piling up suits in congested centres, the burden of jury duty on people of a community having no relation to the litigation, the local interest in having localized controversies decided at home and the unnecessary injection of problems in conflict of laws. In general the doctrine of *forum conveniens* seldom justifies refusing jurisdiction based on the residence of the plaintiff or the defendant.

10. REVIEW OF CASES

A. Jurisdiction - Nova Scotia

Robinson v. Warren (1982), 55 N.S.R. (2d) 147.

Robinson, a Nova Scotia resident temporarily in Alberta was a passenger in Warren, an Alberta resident's motor vehicle which left the highway. No other motor vehicles involved. No other witnesses to the event other than the parties. Two weeks in hospital in Alberta followed by three weeks hospitalization in Nova Scotia. Medical treatment continuing in Nova Scotia.

Trial Judge's determination of Nova Scotia jurisdiction confirmed on appeal.

Pandalus Nordique v. Ulstein Propeller (1991), 105 N.S.R. (2d) 52.

New Brunswick company, owner/operator of fishing vessel "Pandalus", purchased propeller package from Shelburne Marine Nova Scotia which was designed, manufactured and assembled in Norway, installed in Nova Scotia. Vessel went to fishing grounds, propeller broke away, towed to St. John's, Newfoundland where the fish were unloaded and repairs.

As between Norway and Nova Scotia, far more convenient to be heard in Nova Scotia, both on the issue of liability and on damages.

Monahan et al. v. Trahan (1992), 117 N.S.R. (2d) 393.

Accident in Quebec, Nova Scotia resident.

Para. 20 at p. 397:

> Given the significant differences in the legislation in Nova Scotia as compared to Quebec on the point of limitation periods, I accept Mrs. Barry's submission that if the limitation became an issue, then to compel Mrs. Monahan to proceed in Quebec would in all likelihood deprive her of her right of action because she is out of time.

Jurisdiction Nova Scotia.

N.B. The Supreme Court of Canada has since determined that limitation periods are now a matter of substantive law and the Quebec limitation period would have to be applied by the Trial Judge no matter in which province the matter was tried.

Benedict and Benedict v. Antuofermo (1979), 19 N.S.R. (2d) 262.

Benedict, a Nova Scotia resident, motor vehicle collision in Ontario.

Antuofermo, owner and operator, resident of State of Michigan. All occupants of Benedict motor vehicle from Nova Scotia. At the time of this decision, Ontario limitation period held a procedural matter. It had expired, being one year; however, plaintiff within the Nova Scotia two year limitation period.

Jurisdiction Nova Scotia.

Landmark Sport Group Atlantic Ltd. v. Karpov et al. (1995), 142 N.S.R. (2d) 280 (N.S.S.C.).

The plaintiff Nova Scotia Company entered an exclusive negotiation agreement with Karpov, a Russian hockey player. A representative of the Nova Scotia Company went to Europe for signing by Karpov of the contract prepared in Nova Scotia. Subsequently Karpov concluded a similar agreement with the corporate defendant through its employee, Grossman. The defendants negotiated a contract for Karpov with an NHL team. The defendants and Karpov have no connection with Nova Scotia. Both corporate defendant and Grossman are residents of New York. Tidman, J. stated:

> There is a real and substantial connection to Nova Scotia because the plaintiff and all its witnesses are resident in Nova Scotia. The contract allegedly conspiratorially breached by all defendants appears to have a closer connection to Nova Scotia than to any other jurisdiction.

Maritime Telegraph and Telephone Co. v. Pre Print Inc. (1995), 145 N.S.R. (2d) 82.

MacDonald, J. dealt with a governing law clause and an attornment clause in a contract calling for interpretation in and application of Alberta law. He concluded such did not oust the Nova Scotia jurisdiction and went on to conclude jurisdiction to remain in Nova Scotia after consideration of the following at p. 86:

> I have reached this conclusion for the following reasons:
>
> - The plaintiff is a Nova Scotia based company. It contracted for materials and services to enhance its Nova Scotia based operations.
>
> - The defendant's initial demonstration of its product and initial contract discussions were held in this province.
>
> - The product was to be delivered to, installed, and initially serviced in this province.
>
> - Local suppliers were used to supply part of the necessary equipment.

- Because of the installation, monitoring and training aspects of the contract, most of the witnesses are located in this province.

- Although the defendant has ties in Alberta, it markets its products worldwide in numerous countries.

- Although much of the program was produced in Alberta, there was significant involvement by the defendant's affiliate in Germany.

- Each party would have extensive files. It should not be a major inconvenience to have the defendant produce its documents for a trial in Nova Scotia.

- Finally, there is nothing to suggest that the application of Alberta law in Nova Scotia will be cumbersome or greatly inconvenient.

I am mindful of the fact that the defendant has commenced an action against the plaintiff in the Province of Alberta. Having parallel actions is undesirable. This, however, is not enough to expel the jurisdiction of this court.

The Nova Scotia Court of Appeal confirmed this conclusion, **Maritime Telegraph and Telephone Co. v. Pre Print Inc.** (1996), 147 N.S.R. (2d) 148, not only on the basis that it ought not to interfere with the discretion of a Chambers Judge, but as Flinn, J.A. said at p. 159:

I would go further and say the Chambers Judge was correct in his conclusion.

Witham v. Liftair International (1985) Limited (1992), 114 N.S.R. (2d) 43.

Witham, an independent helicopter pilot entered a per diem contract with Liftair, an Alberta Company. Payments were made directly to Witham's Nova Scotia bank account. Transportation by Liftair was provided from Nova Scotia to designated sites. The first contract in Yemen plus verbal contract in Ethiopia. Liftair contemplates counterclaim on

Yemen work. Court concluded counterclaim severable and at p. 48 Kelly, J. stated:

> Although there is significant evidence that the balance of convenience is not solely in this jurisdiction, it is not so strongly in favour of the defendant that I feel I should disturb the plaintiff's choice, and I therefore deny the application.

Carroll v. WAG Aero Inc. (1994), 137 N.S.R. (2d) 295.

The plaintiff purchased aircraft parts from defendant who manufactured and sold parts in Wisconsin, USA. Sales were by mail order, telephone and by catalogue. The defendant had no presence in Nova Scotia. Parts all regulated by various agencies in the USA. All quality control and employees in the USA. Gruchy, J. said in para. 7 at p. 297:

> But the plaintiff complains of his loss in Nova Scotia and shows a competing connection with this jurisdiction. He says that the real connection centres around the site of delivery, the residence of the plaintiff, the site of the crash, the location of the aircraft remains and the location of the majority of lay and expert witness. The plaintiffs affidavit sites both his view as to the number of witnesses anticipated without specificity. While I may have some reservations about the number of witnesses anticipated by the plaintiff, it is not for me to second guess his statement.

Gruchy J., followed the Supreme Court of Canada in **Moran v. Pyle National (Canada) Ltd.**, [1994] 2 W.W.R. 586; 1 N.R. 122 (S.C.C.) where the Court held in product manufacturing cases the form where damage is suffered is entitled to jurisdiction.

Gruchy, J., at p. 299 stated:

> I cannot reach any firm conclusion as to which form will be the least convenient.

N.B. This is a correct application of the onus, and hence the Nova Scotia jurisdiction

remained.

B. Jurisdiction - Elsewhere

Garson Holdings Ltd. v. Wade (Norman) Co. Ltd. (1991), 111 N.S.R. (2d) 32.

An action was commenced in Nova Scotia by a commercial landlord against a tenant. The plaintiff had its head office in Nova Scotia and claimed a loss of present and future rental income, repairs and clean-up costs, etc. in relation to a building it owned which is located in New Brunswick. The defendant listed seven specific witnesses who would be required to give evidence, five of whom are from New Brunswick and the remaining two from Ontario. Additional possible witnesses all reside in New Brunswick.

Gruchy, J., at pp. 35-36 stated:

> The premises are located in New Brunswick and evidence with respect to the state of the premises would clearly come from New Brunswick. If the question of mitigation arises, such efforts would have had to be made in New Brunswick and, accordingly, that evidence would be more conveniently presented in New Brunswick.
>
> On the other hand, the plaintiff has very little evidence in Nova Scotia. He was the only employee of the plaintiff involved in the formulation of the lease. The plaintiff's mechanical manager who may be required to give evidence is a resident of New Brunswick. The plaintiff's leasing agents were from New Brunswick. Mr. Garson, the principal of the plaintiff, travels to Saint John frequently and, accordingly, a trial in New Brunswick would not be of major inconvenience to him.
>
> I conclude from the evidence contained in the affidavits before me and from the discovery evidence of Mr. Garson that the balance of convenience in this case strongly favours the trial of the matter in New Brunswick.

Stay of Nova Scotia proceeding issued.

693663 Ontario Inc. v. Deloitte & Touche Inc. et al. (1991), 109 N.S.R. (2d) 295 (C.A.), affirming 102 N.S.R. (2d) 376.

The Royal Bank held a debenture over assets of marine harvesting in Prince Edward Island. Deloitte & Touche appointed receivers of marine harvesting by the Supreme Court of P.E.I. As receivers, they sold real and personal property situate in P.E.I. to 693663 Ontario Inc. The sale was subject to approval of the P.E.I. Supreme Court. A dispute arose over the contract of sale and 693663 sued in P.E.I. Leave was granted subject to its payment of security for costs in the amount of $10,000. Security not paid, then 693663 commenced this action in Nova Scotia. Stay granted in Nova Scotia action approved by the Court of Appeal.

Jurisdiction Prince Edward Island.

Ryle (S.G.) & Associates Ltd. v. Resources Management International Inc. (1988), 86 N.S.R. (2d) 171.

The plaintiff was injured in Indonesia. The defendant applied for a stay of the Nova Scotia action, arguing that Indonesia was a more convenient forum. Allowing the application, the Court considered the ease of access to sources of proof; the compulsory test for attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; the language problem; and the fact that Indonesian law would be applicable to the cause of action. Especially important was the fact that liability and negligence was to be gauged by the local standards of Indonesia, not Nova Scotia. Ultimately, the Court found that

neither forum was a convenient one, but the inconvenience to the defendant of defending a Nova Scotia action was greater than the inconvenience to the plaintiff of prosecuting an action in Indonesia.

Jurisdiction Indonesia.

11. ANALYSIS

In conducting an analysis of the information advanced in this application, I am mindful of the case authorities reviewed, and also I am guided by the comment of LaForest, J. of the Supreme Court of Canada in **Hunt v. T & N (PLC)** (1993), 109 D.L.R. (4th) 16 at p. 42:

> Whatever approach is used, the assumption, and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contracts or connections.

No exhaustive list of features that should be considered is possible, and a particular feature may weigh more heavily in the context of one case than it does in another.

Madonna Hunt was, at the time of the alleged negligence, a resident of Ontario.

Barry Durdle was, at the time of the alleged negligence, a resident of the Province of Newfoundland and continues to be a resident of that Province. The allegation of negligence relates to real property owned by Barry Durdle situate in Mount Pearl,

Newfoundland and Ms. Hunt's Statement of Claim makes the following allegations as to negligence:

> 6. The Plaintiff repeats the preceding paragraph hereof and states that the aforesaid losses, injuries and damage were caused solely and entirely by the negligence of the Defendant in that:
>
> (a) The steps leading to the basement in the premises were negligently constructed in that they did not meet the requirements of the Newfoundland Building Codes and that there was no landing at the top of the stairs where the door swings out and there was no hand rail on the stairs.
>
> (b) Such other negligence as may appear.

Liability is in issue.

Damages are in issue.

All the witnesses as to liability would appear to be residents of the Province of Newfoundland.

Witnesses as to the issue of damages would include personnel at St. Claire's Hospital, the surgeon, Dr. D. B. Peddle of St. John's, Newfoundland, and from Ontario, Ms. Hunt indicates in her affidavit, treatment by Dr. Israel of Kitchener/Waterloo, Ontario and physiotherapists.

It is not unusual for agreement to be reached for reports of physiotherapists to be

tendered by agreement negating their personal attendance, and that may well come to be with respect to Dr. Israel. In any event, if any medical personnel are required to attend from Kitchener/Waterloo, there is little difference between attending in Halifax or St. John's, Newfoundland. Some measure of expense would be incurred by the plaintiff in any event.

The plaintiff also received treatment from three doctors in Halifax and was examined and treated by a doctor on behalf of the defendant.

The affidavit of John F. Dawson, a Newfoundland barrister, was filed, and he indicates that Ms. Hunt continued to reside in Kitchener until November, 1992 when she moved to the Province of Nova Scotia. He points out that an adjuster was appointed by Mr. Durdle's insurers October 24, 1991. The adjuster interviewed a number of witnesses, attended at the premises for measurements, photographs, etc., and this brought forward an appointment of a Newfoundland solicitor by Ms. Hunt, John L. Ennis of the Law Firm of Parsons Rose, Barristers and Solicitors.

During 1992 and 1993 communications took place between the adjuster and Ms. Hunt's Newfoundland solicitor, including the exchange of medical information and information on liability. During this period Ms. Hunt has been a resident of Nova Scotia.

Mr. Dawson's firm was engaged in December, 1993 and dealt with Ms. Hunt's

Newfoundland solicitor until July, 1995 when Ms. Hunt retained the services of her Nova Scotia solicitor.

Mr. Dawson points out the probable application of building codes and regulations specifically to the City of Mount Pearl and the probable need of calling expert evidence of residents of Newfoundland who are familiar with the Provincial and Municipal Codes and Regulations. In addition, he indicates relevant witnesses regarding the construction of the premises are resident in Newfoundland, and that such would include building inspectors employed with the City of Mount Pearl.

Ms. Hunt's son is believed to have remained a resident of Newfoundland.

Mr. Hunt's affidavit is silent as to her financial position and whether or not the selection of the Newfoundland jurisdiction would be of any financial consideration to her. In addition, her affidavit is silent as to any inconvenience to her by the selection of a particular province. I make the assumption that she would suffer some degree of inconvenience and financial concern; however, her affidavit is clearly silent in this regard.

I make the assumption that her medical witnesses are more likely to have their expert opinion evidence on damages tendered by agreement.

All the medical records surrounding the alleged negligence are in Newfoundland.

This is not a case in which this factor is of any significance.

No evidence presented of any juridical advantage that would be lost or juridical disadvantage suffered by the plaintiff if the forum is Newfoundland. The defendant's solicitor confirms that there is no limitation impediment and that the limitation period that applies to this situation is a period of six years from the alleged negligence.

Ms. Hunt engaged a Newfoundland solicitor who dealt with the defendant's Newfoundland solicitor, and if jurisdiction were to continue in Nova Scotia, Mr. Durdle or his insurance company would be put to the additional expense of briefing and transferring the file from Newfoundland to Nova Scotia. Ms. Hunt has already incurred this expense herself, but the fact that she wishes to impose this additional expenditure upon Mr. Durdle is to be considered.

The fact that Mr. Durdle is apparently covered by insurance is not a factor to be taken into account. **Civil Procedure Rule** 1.03 provides:

> **Object of rules**
> 1.03.
> The object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding.

and the Courts concern is with the expense of litigation, not specifically with the source of funds for such payment. The Court has a duty to reduce and limit, where possible, the cost of litigation.

12. CONCLUSION

The information provided in this application overwhelmingly supports the conclusion that the clearly, most convenient and appropriate forum is the Province of Newfoundland and Labrador, and accordingly a stay of the action will issue.

13. COSTS

Counsel are entitled to be heard on the issue of costs.

J.