1995 **SH 116378**

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

QUINTIN DENNIS, LISA MARIE DENNIS and ALEXANDER DENNIS, an infant, by his Litigation Guardian Quintin Dennis,

PLAINTIFFS

- and -

THE SALVATION ARMY GRACE GENERAL HOSPITAL BOARD and DR. CHERRY J. PIKE, DR. POH GIN KWA and DR. NASSIR BADRUDIN,

DEFENDANTS

D E C I S I O N

HEARD: **at Halifax, Nova Scotia before The Honourable Justice Walter R. E. Goodfellow on July 2, 1996**

DECISION: **July 31, 1996**

COUNSEL: **Robert L. Barnes, Q.C.**
Solicitor for the Plaintiffs

Virve Sandstrom
Solicitor for the Defendant, Salvation Army Grace General Hospital Board

Richard S. Neidermayer
Solicitor for the Defendants, Drs. Pike, Kwa and Badrudin

GOODFELLOW, J.:

1. APPLICATION

The defendant, Salvation Army and the defendants, Drs. Pike, Kwa and Badrudin each filed an application for an order setting aside the Originating Notice (Action) filed by the plaintiff April 27, 1995 pursuant to **Civil Procedure Rule** 11.05(a). Alternatively they seek a stay of the action pursuant to **Civil Procedure Rule** 14.25, on the ground that Newfoundland is clearly the more appropriate forum to try this litigation.

2. BACKGROUND

Quintin Dennis and Lisa Marie Dennis, on August, 1990, moved from Nova Scotia to Churchill Falls, Labrador where they were married in 1991. Mrs. Dennis became pregnant in the summer of 1992, and they decided the child should be born in Newfoundland so that Mrs. Dennis could be cared for by a qualified gynaecologist/obstetrician and accordingly, in April, 1993 Mrs. Dennis went to St. John's to await their child's birth anticipated for early May. Mrs. Dennis came under the care of Dr. Pike who practices as a gynaecologist/obstetrician, and their son, Alexander Dennis was born at the Salvation Army Grace General Hospital on May 16, 1993. After his birth, Alexander Dennis was transferred to the Dr. Charles A. Janeway Child Health Centre in St. John's where the child remained until discharged June 1, 1993.

Later in June, 1993 Mr. and Mrs. Dennis moved to Kentville, Nova Scotia where they resided at the time of commencing this action. Mr. Dennis declined an employment opportunity in British Columbia and accepted instead a position in Yarmouth, Nova Scotia,

which, at the time of this Chambers application, was anticipated to occur shortly.

The defendants apply to strike or stay the Nova Scotia action on the basis that the Province of Newfoundland 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 **CPR** 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) Have the defendants met the onus upon them 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?

8. JURISDICTION

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 Mr. and Mrs. Dennis and their son had remained in Nova Scotia for a very short transitory period of time, during which this action was commenced then departed for British Columbia, 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. 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 plaintiffs have a sufficient connection of substance entitling initial exercise of jurisdiction in Nova Scotia or they do not.

Their association with Nova Scotia preceded the tort alleged as the now Mr. and Mrs. Dennis moved from Nova Scotia to Churchill Falls in 1990 and returned to Nova Scotia shortly after the birth of their son, the event for which this action is advanced. They and their son had, at the time of commencement of this action, April 27, 1995 re-established residence of approximately two years' duration, and they have remained residents up to the time of this application. The significant date is, of course, the date on which the action was commenced, and I conclude Mr. and Mrs. Dennis and their son had connections with this

jurisdiction of sufficient substance to entitle them 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.

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 and 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.

11. ANALYSIS

In conducting an analysis of the information advanced in these applications, 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.

The plaintiff's claim is in negligence against Dr. Pike personally and as an employee of the hospital. They also claim vicariously against the hospital for alleged negligence of its servants and agents. The time period of alleged negligence runs from December 16, 1992 until mid June, 1993, approximately six months.

The plaintiff's claim against Dr. Kwa alleges she was negligent in performing her duties as the attending physician on Alexander's birth May 16, 1993.

The plaintiff's claim against Dr. Badrudin, who apparently was the anesthetist during the surgical delivery of Alexander and was involved in the child's subsequent treatment.

All of the defendants resided in Newfoundland during the six-month time frame and continue to be resident. The individual defendants continue their respective professional practices in St. John's, Newfoundland.

Mr. and Mrs. Dennis were residents of Newfoundland and Labrador for some time period prior to and during the entire period negligence is alleged to have been committed.

No evidence presented of any juridical advantage that would be lost or juridical

disadvantage suffered by the plaintiff if the forum is Newfoundland.

The defendants and each of them have bound themselves not to defend on the basis of any limitation period. In the future, the requirement of consideration of limitation periods as a factor in determining jurisdiction will rarely arise as a result of the Supreme Court of Canada decision in **Tolofson v. Jensen** (1994), 3 S.C.R. 1022.

Liability is in issue.

Damages are in issue.

Witnesses

The affidavit of Mrs. Dennis recites in para. 7:

> **THAT** due to as 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 Isaac Walton Killam Hospital in Halifax (IWK);
> . A physiotherapist at the IWK;
> . An occupational therapist at Soldier's Memorial Hospital in Kentville;
> . A pre-school assessment team at the IWK;
> . A speech therapist at Soldier's 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.

None of these witnesses would appear to be witnesses as to the facts related to or surrounding the allegations of negligence. They appear likely to express either opinion evidence or evidence as to the condition, treatment and needs of the child. 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.

A good example of there likely being no call for attendance of a professional is in relation to the hearing and speech clinic in Kentville. On the hearing aspect, the IWK, Department of Occupational Therapy report dated December 5, 1995 recites:

> According to mom, Alexander's hearing was assessed in Kentville, and it was within normal limits.

Similarly, it is difficult to see any real disagreement in the IWK assessment of Alexander's serious disabilities. The child has been diagnosed with cerebral palsy.

The defendants filed an affidavit of Diane Winsor, Manager of Quality Initiatives Department of the Health Care Corporation of St. John's which has statutory responsibility in relation to the Salvation Army Grace General Hospital Board. Ms. Winsor provides all the names of the medical and nursing staff that attended on or provided medical or nursing care to Lisa Marie Dennis during labour and on delivery of the child, Alexander Dennis. This list comprises 20 professionals with the designation "Registered Nurse", a respiratory therapist and five medical doctors, two of whom are Doctors Kwa and Badrudin. All of

the registered nurses, pathologist and respiratory technicians currently reside in St. John's, Newfoundland and are employees of the Hospital.

A second list was provided of five further doctors and three further health care workers who also provided medical or nursing care for who the personnel records of the corporation do not show a current address.

Ms. Winsor expresses a legitimate concern that 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. 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, the absence of such a considerable number of nurses during a trial on this matter in Nova Scotia will have a significant adverse impact on the ability of the corporation to provide obstetrical and related care.

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.

Mrs. Dennis, whose husband has taken a new employment position in Yarmouth as a flight service specialist, indicates the obvious limitations to their financial capacity in

paragraph 12 of her affidavit.

> 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 pre-trial 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.

I have already commented that it is unlikely that all of the health care professionals will be required to travel for the purposes of the trial, and it is more reasonable to assume that the majority will not be so required. As desirable as it may be for a party to attend all pre-trial proceedings, that has never been an absolute requirement, and many trials are in fact conducted where the pre-trial procedures, with the exception perhaps of the discovery of the parties themselves, is conducted without the client being in attendance.

Clearly costs are a serious matter to any plaintiff, and it is noted that Mr. and Mrs. Dennis have been able to reach an agreement with Burchell, MacAdam and Hayman that they would not have to pay for legal services unless and until the Dennis' were successful in recovering monies either through settlement or a court decision. 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.

Mrs. Dennis also indicates in her affidavit that travel with Alexander is very difficult

although she does indicate to the IWK in the report that Alexander travels well. 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.

All three doctor defendants provided affidavits indicating that all the witnesses they anticipate calling resided in Newfoundland throughout the period of alleged negligence and continue to reside in Newfoundland at the present time. 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 are plaintiffs.

12. CONCLUSION

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.

13. COSTS

Counsel, if they are pursuing costs, are entitled to address the Court in writing.

J.