SC CV 94 013

CV 04743

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

B E T W E E N

THE ESTATE OF CARMELLE STEWART, deceased,
by its Administrator, Frank Stewart

Plaintiff

- and -

THE ESTATE OF PATRICK EVANS STEWART,
MELBERG ENTERPRISES LIMITED AND KIM ROBERT SNOWDOWN

Defendants

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a) Application for a declaration that the Northwest Territories is a ***forum non conveniens***, denied.
b) Application for a declaration re choice of law, denied as being premature.
c) Application to strike the statement of claim filed pursuant to Fatal Accidents Act as not disclosing a cause of action, denied.
d) Application to strike an estate action pursuant to s.31 of Trustee Act granted by reason of plaintiff's lack of capacity to sue.
e) Application to set aside service ***ex juris***, denied.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.E. RICHARD

Heard at Yellowknife, Northwest Territories
February 24, 1994

Reasons filed: May 25, 1994

Counsel for Plaintiff: K. Dann
Counsel for Defendants
Melberg & Snowdown: S. Sabine
Counsel for Defendant
Estate of Patrick
Evans Stewart: G. McLaren

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REASONS FOR JUDGMENT

1 The within litigation arises from the death of Carmelle Stewart, a 22-year old resident of Inuvik, N.W.T., in a motor vehicle accident in the Yukon Territory in June 1991. In June 1993 her estate launched legal proceedings both in the Yukon Territory and in this court, alleging that the defendants' negligence caused her death. In their present application to this court, the defendants seek to be extricated from the N.W.T. lawsuit, on various grounds. The main issue on the defendants' application is whether the court should decline jurisdiction on the basis of ***forum non conveniens***.

2 Miss Stewart's uncle, Patrick Stewart, who was also killed in the accident, was driving the vehicle in which she was a passenger. The Stewart vehicle collided with

a vehicle owned by the defendant Melberg Enterprises Ltd. and driven by the defendant Kim Robert Snowdown. Melberg and Snowdown are residents of the Yukon Territory. Patrick Stewart was at the time of his death a resident of Inuvik, N.W.T. Miss Stewart's estate alleges that all three of these defendants were jointly and severally negligent, and that such negligence was the cause of her death.

3 Consequent upon such allegations of negligence causing death, two types of court action often emerge. The first is sometimes termed a "dependants action", in which the spouse, children and/or parents of the deceased person sue the alleged wrongdoer for losses suffered by them as a result of the death. This type of court action was not permitted, historically, at common law; rather it is an action that was created by statute, by the legislators. In this jurisdiction the dependants action was created by the enactment of the Fatal Accidents Act, R.S.N.W.T. 1988 c.F-3.

4 Pertinent excerpts from this legislation are as follows:

1. In this Act,

"administrator" means an administrator appointed by the Supreme Court;

. . .

2. Where the death of a person is caused by a wrongful act, neglect or default that, if death had not resulted, would have entitled the person injured to maintain an action and recover damages in respect of the injury, the person who would have been liable if death had not resulted is liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to culpable homicide.

3. (1) An action brought under this Act
(a) shall be for the benefit of the spouse, parent or child of the person whose death was caused by a wrongful act, neglect or default;
(b) subject to section 8, must be brought by and in the name of the executor or administrator of the deceased.

(2) In an action brought under this Act, a judge may award damages that are proportional to the injury resulting from the death of the deceased to the persons for whom and for whose benefit the action is brought.

. . .

4. (1) In an action brought under this Act a judge may, in addition to damages awarded under subsection 3(2), award damages in respect of
(a) medical or hospital expenses of the person injured that would have been recoverable as damages by that person if he or she had not died; and
(b) the funeral expenses of the deceased incurred by a person for whom or for whose benefit the action is brought.

. . .

6. (1) Only one action lies for and in respect of the same subject-matter of complaint.

(2) An action under this Act may not be brought after two years from the death of the deceased. [emphasis added]

7. (1) The plaintiff shall set out in the statement of claim or deliver with the statement of claim full particulars of the persons for whom and on whose behalf the action is brought.

(2) The plaintiff shall file with the statement of claim an affidavit by the plaintiff stating that to the best of his or her knowledge, information and belief, the persons on whose behalf the action is brought, as set out in the statement or claim or the particulars delivered in accordance with subsection (1), are the only persons entitled or who claim to be entitled to the benefit of the action.

(3) **The judge before whom the action is brought may, if the judge is of the opinion that there is sufficient reason for doing so, dispense with the filing of the affidavit under subsection (1). [sic]**

8. (1) **An action may be brought by all or any of the persons for whose benefit the action would have been if it had been brought by an executor or administrator where**

(a) there is no executor or administrator; or
(b) no action is brought by the executor or administrator within six months after the death of the deceased.

(2) **An action brought under subsection (1) shall be**

(a) for the benefit of the same persons, and
(b) subject to the same regulations and procedure, with such modifications as the circumstances require,

as if the action were brought by an executor or administrator.

. . .

5 The other type of court action which regularly flows from allegations of negligence causing death is what is described as an "estate action". In this action the representatives of the deceased person's estate pursue against the alleged wrongdoer the claim that the deceased person would have been entitled to pursue, for losses and injuries suffered by the deceased personally. Here too, it is not the common law but rather statutory law which permits the continuance of such a remedy notwithstanding the injured party's death. In most Canadian jurisdictions the statute is appropriately entitled the Survival of Actions Act. In the Northwest Territories the statutory provisions are found in sections 31-33 of the Trustee Act, R.S.N.W.T. 1988, c.T-8.

The relevant provisions for purposes of the within matter are in section 31:

31. (1) **The executors or administrators of a deceased person may maintain an action for all torts or injuries to the person or to the real or personal estate of the deceased, except in case of libel and slander, in the same manner and with the same rights and remedies as the deceased would if living have been entitled to.**

(2) **The damages when recovered under subsection (1) form part of the personal estate of the deceased.**

(3) **An action referred to in subsection (1) may not be commenced after <u>two years</u> from the death of the deceased.**

[emphasis added]

6 It will be readily seen that the kinds of damages to be sought in dependants actions and estate actions are quite different. In the statement of claim under attack on this application, the plaintiff attempts to include both types of action.

7 In order to put the various submissions of the defendants' counsel in context, I set forth the relevant portions of the statement of claim filed in this court on June 24, 1993:

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE ESTATE OF CARMELLE STEWART, deceased.
by its Administrator, FRANK STEWART

Plaintiff

- and -

THE ESTATE OF PATRICK EVANS STEWART,
MELBERG ENTERPRISES LIMITED
and KIM ROBERT SNOWDOWN

Defendants

STATEMENT OF CLAIM

1. The Plaintiff, Frank Stewart, (hereinafter called the "Plaintiff Administrator") resides in the Town of Inuvik, in the Northwest Territories, and is the father of the deceased, CARMELLE STEWART.

2. The Defendant, PATRICK EVANS STEWART, (hereinafter called the "Defendant Stewart") is deceased and his estate is represented by the Public Administrator of the Northwest Territories.

3. The Defendant, MELBERG ENTERPRISES LIMITED, (hereinafter called the "Defendant Melberg") is a company incorporated under the laws of the Yukon Territory.

4. The Defendant, KIM ROBERT SNOWDOWN, (hereinafter called the "Defendant Snowdown") whose occupation is unknown to the Plaintiff, resides in the City of Whitehorse, in the Yukon Territory.

5. On or about the 28th day of June, 1991, CARMELLE STEWART (now deceased) was a passenger in a 1984 GMS Suburban, Northwest Territories licence 30631, proceeding in a southerly direction on the Klondike Highway at or near kilometre 209 near the Village of Carmack, in the Yukon Territory, when that vehicle, owned and negligently driven by the Defendant Stewart, collided with a Caterpillar road packer belonging to the Defendant Melberg and operated by the Defendant Snowdown.

6. As a result of the collision, Carmelle Stewart was killed and the Plaintiff Estate of Carmelle Stewart sustained injury, loss and damage.

7. The said collision and resulting fatality and loss were caused totally or in part by the negligence of the Defendant Stewart, particulars of which include:

. . .

8. The Plaintiff further states that the said collision and fatality and loss were caused totally or in part by the negligence of the Defendant Snowdown, particulars of which are as follows:

. . .

9. The Plaintiff states that the Defendant Melberg is vicariously liable for the

negligence of its employee, the Defendant Snowdown.

10. The Plaintiff further states that the said collision and resulting fatality and loss were caused totally or in part by the negligence of the Defendant Melberg, particulars of which include:

. . .

11. As a result of the said collision and the negligence of the Defendants, jointly and severally, the deceased, Carmelle Stewart, lost the expectation of life she then had and her Estate thereby suffered loss and damage.

12. As a further result of the negligence of the Defendants, the Plaintiff has incurred special damages to be proved at the trial of this action.

13. The Plaintiff pleads and relies upon the provisions of the Fatal Accidents Act, R.S.N.W.T., c.F-3, 1988 and amendments thereto.

14. The Plaintiff relies on Rule 38(h) of the Supreme Court Rules of the Northwest Territories to allow for service of the Defendants *ex juris*.

15. The Plaintiff proposes that the trial of this action be held at the Courthouse in the City of Yellowknife, in the Northwest Territories.

WHEREFORE THE PLAINTIFF CLAIMS AGAINST THE DEFENDANTS,

. . .

An initial reading of this pleading reveals some concerns:

(1) Although the style of cause and the first paragraph imply that Frank Stewart is the administrator of Carmelle Stewart's estate he did not in fact have that status at the time of the filing of the statement of claim. He was in due course, on December 24, 1993, granted Letters of

Administration by Order of a judge of this court (Supreme Court File #ES 00308).

(2) The allegations in the substantive portions of the pleading (paragraphs 1 through 12) purportedly disclose an estate action (as opposed to a dependants action). It is the estate that has allegedly suffered losses and damage. Nowhere in the pleading is it alleged that Frank Stewart as a dependant father has suffered any loss. Yet in paragraph 13 the statement of claim indicates that the plaintiff relies on the Fatal Accidents Act.

(3) Although pleading the Fatal Accidents Act, the plaintiff has failed to comply with the provisions of that statute in the statement of claim, specifically s.7 requiring the statement of claim to contain, or to be accompanied by, full particulars of the dependant or dependants for whom the action is commenced. Also, the affidavit required by subsection 7(2) has not been provided nor has a request been made for an order dispensing with the filing of that affidavit.

(4) In paragraph 14 the plaintiff indicates he is relying on Rule 38(h) as grounds for permitting ***ex juris*** service of the statement of claim. That Rule states **"service on a defendant out of the jurisdiction of any document by which any proceeding is commenced may be effected without order wherever . . .**

(h) the action is founded on a tort committed within the jurisdiction . . ."

Yet the only tort alleged in the statement of claim is one ostensibly committed outside the jurisdiction, i.e., in the Yukon Territory.

YUKON LEGISLATION:

9 In the Yukon, dependants actions are permitted by the Fatal Accidents Act, R.S.Y. 1986, ch.64. The limitation period for commencing such an action is within one year of the date of death of the family member.

10 Estate actions in the Yukon survive the death of the injured party by virtue of the Survival of Actions Act R.S.Y. 1986, ch.166. The limitation period under this statute also appears to be one year from the date of death. There is a further

significant difference in the Yukon legislation governing estate actions inasmuch as the statute limits the type of damages which may be recovered, in particular, damages for loss of expectation of life are not recoverable. Section 5 of that statute provides:

> **Where a cause of action survives for the benefit of the estate of a deceased person, only damages that have resulted in actual pecuniary loss to the deceased person or the estate are recoverable and, without restricting the generality of the foregoing, the damages recoverable shall not include punitive or exemplary damages or damages for loss of expectation of life, for pain and suffering or for physical disfigurement.**

YUKON COURT ACTION:

11 On the present application it was disclosed, by affidavit evidence, that the plaintiff herein filed a statement of claim in the Supreme Court of the Yukon Territory on June 25, 1993 in essentially the same form as filed herein. Paragraph 11 of the Yukon statement of claim read:

> **11. As a result of the said collision and the negligence of the Defendants, jointly and severally, the deceased, Carmelle Stewart, lost the expectation of life she then had and her Estate thereby suffered loss and damage.**

12 On December 6, 1993, the plaintiff, no doubt then realizing that damages for loss of expectation of life were not recoverable in the Yukon, filed an amended statement of claim in which, ***inter alia***, paragraph 11 was amended to read:

> **11. As a result of the said collision and the negligence of the Defendants, jointly and severally, the deceased, Carmelle Stewart, and her Estate thereby <u>suffered pecuniary loss including but not limited to pre- and post-death loss of earnings and profits and expenses.</u>**

13 It is asserted in the affidavit of Whitehorse solicitor Richard A. Buchan, filed in support of the defendants' application, that "the Yukon action has been prosecuted actively by the Plaintiff and is currently the subject of an interlocutory appeal". This court has not been advised of the nature of that appeal or of the interlocutory order appealed from.

THE DEFENDANTS' APPLICATION

14 On January 21, 1994, the defendants Melberg and Snowdown filed a Notice of Motion seeking an Order of the Court:

> (1) setting aside the ***ex juris*** service of the statement of claim on those defendants, and setting aside the statement of claim itself as against those defendants, or

(2) striking out the statement of claim as against those defendants as not disclosing a cause of action against those defendants, or

(3) declining jurisdiction over this action or alternatively staying the action, or

(4) declaring that the law of the Yukon governs the within action in respect to liability, damages and limitation periods.

15 The Notice of Motion states that the grounds for the application are:

(a) the action is not founded on a tort committed within the jurisdiction.

(b) the plaintiff has no lawful authority to commence or continue the action.

(c) this court is not a ***forum conveniens*** for the action.

(d) the action is governed by the ***lex loci delicti commissi*** which:

(i) bars the action outside the limitation period of one year, and

(ii) bars recovery of damages for loss of expectation of life.

16 At this point the defendants have not filed a statement of defence. The Rules of Court permit the defendants to make these applications without entering a defence

or submitting to the jurisdiction of the Court:

41. Application may be made by a defendant to set aside a statement of claim served outside the jurisdiction without entering a defence or demand of notice thereto and on such application if it appears to the court that such action should not have been commenced under this Order, the court shall set aside the issue of the statement of claim and the service thereof so far as such defendant is concerned and may order the plaintiff to pay the costs of such defendant.

35. A defendant before delivering a defence may apply to the court to set aside the service of the statement of claim upon him, to discharge or set aside the order authorizing such service or to set aside the statement of claim, in the ground of irregularity or otherwise, and the application shall not be deemed to be a submission to the jurisdiction of the court.

17 The applications of the defendants Melberg and Snowdown were set to be heard in chambers on February 24, 1994. On February 15, 1994, the defendant estate of Patrick Stewart joined in the application of the defendants Melberg and Snowdown on the issues of ***forum non conveniens*** and choice of law.

THE AMENDED STATEMENT OF CLAIM:

18 On February 21, 1994 the plaintiff filed an amended statement of claim pursuant to Rule 124B:

124B.(1) A party may, without the leave of the court, amend any pleading of his once at any time before the pleadings are

closed and, where he does so, he shall deliver the amended pleading to the opposite party.

. . .

125. Where any party has amended his pleading under Rule 124 the opposite party may, within 15 days after the delivery to him of the amended pleading, apply to the court to disallow the amendment or any part thereof and the court may disallow it or allow it subject to terms as to costs or otherwise.

19 Two changes appear in the amended statement of claim. Firstly, whereas paragraph 11 of the initial pleading alleged damage arising from loss of expectation of life, the new paragraph 11 reads:

20 11. As a result of the said collision and the negligence of the Defendants, jointly and severally, the deceased, Carmelle Stewart, lost the expectation of life she then had, and her Estate thereby suffered actual pecuniary loss, including but not limited to pre- and post-death loss of earnings and profits and expenses, particulars of which may be provided by the Plaintiffs.

21 Secondly, it will be recalled that in paragraph 14 the plaintiff, as authority for ***ex juris*** service, placed reliance on Rule 38(1)(h) - tort committed within the jurisdiction. In paragraph 14 of the amended statement of claim the plaintiff now relies on two additional grounds set forth in Rule 38(1)(c) and 38(1)(j). These provisions are:

38.(1) Service on a defendant out of the jurisdiction of any document by which any proceeding is commenced or of notice thereof may be effected without order wherever

. . .

(c) any relief is sought against any person domiciled or ordinarily resident within the jurisdiction,

. . .

(h) the action is founded on a tort committed within the jurisdiction,

. . .

(j) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction,

(2) Every statement of claim served out of the jurisdiction without leave, shall state specifically upon which of the above grounds that it is claimed that service is permitted under this Rule.

22 The plaintiff, not surprisingly, countered by adding to the various forms of relief in his application heard in chambers on February 24 a request that the court disallow this amendment which request is permitted pursuant to Rule 125 cited above.

DISCUSSION:

23 I propose to deal with the various issues raised in the defendants' application under the following headings:

(1) service ***ex juris***

(2) plaintiff's status, or capacity to sue

(3) failure to comply with Fatal Accidents Act

(4) choice of forum

(5) choice of law

SERVICE ***EX JURIS:***

24 The Rules of Court, specifically subrule 38(1), permit a plaintiff to effect service of a statement of claim on a defendant out of the jurisdiction, without court order, if the plaintiff's action comes within one of the enumerated categories of court action.

25 On this chambers application the plaintiff submits that his action comes within one or more of the following three categories:

(1) actions in which relief is sought against any person domiciled or ordinarily resident within the jurisdiction (paragraph 38(1)(c);

(2) actions which are founded on a tort committed within the jurisdiction (paragraph 38(1)(h);

(3) actions in which any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction (paragraph 38(1)(j).

26 A review of the statement of claim and the affidavit material on file readily leads to the conclusion that the plaintiff's action is indeed within category (1) and category (3) but that its purported inclusion in category (2) is at least problematic. The plaintiff need only come within one category.

27 The Yukon defendants' real complaint on this aspect of their application however is notsomuch that the plaintiff's action does not fit any of the categories in subrule 38(1) but that the plaintiff has, in his statement of claim, failed to comply with subrule 38(2).

28 For purposes of these reasons only, I find that the plaintiff did indeed fail to comply with subrule 38(2) at the time of filing his statement of claim in June 1993 in omitting reference to either category 38(1)(c) or category 38(1)(j) in the statement of claim. But what is the effect of this non-compliance --- does it render the statement of claim a nullity or is it a mere irregularity that can be cured?

29 Defendants' counsel cites the cases of Selan v. Neumeyer (1959) 29 W.W.R. 542 (Man.Q.B.), Krueger v. Raccah (1981) 128 D.L.R. (3d) 177 (Sask.Q.B.), and Kangles v. Canadian Pacific Hotels Ltd. [1976] 6 W.W.R. 94 (Sask.Q.B.) in support of his submission that non-compliance with subrule 38(2) renders the service ex juris, and the action, a nullity. I do not find that those cases are of assistance to the

defendants in making that submission. In Selan the court confirmed that service ***ex juris*** had been properly made and the issue of nullity vs. irregularity did not arise directly in that case. The two Saskatchewan cases - Krueger and Kangles -concerned a procedural regime where it was necessary for a plaintiff to obtain special leave of the court to commence an action in respect of a tort committed outside the province of Saskatchewan. In each case the plaintiff had failed to obtain the special leave and in each case the court held the plaintiff's action was a nullity that could not be cured ***nunc pro tunc***. The procedural regime in existence in the Northwest Territories does not require special leave and is substantially different in that respect.

30 In my view the failure by the plaintiff herein to comply with Subrule 38(2) (or more accurately, the failure to state correctly the grounds on which service ***ex juris*** is based) is a mere irregularity that is capable of being cured, and indeed has now been cured by the amended statement of claim.

31 I cannot see how the Yukon defendants have been prejudiced in any way by this late compliance with subrule 38(2). The litigation is at an early stage and those defendants are now fully aware of the grounds on which the plaintiff claims that service ***ex juris*** is permitted under the Rules of Court.

32 In denying the Yukon defendants' request to set aside the issuance of the

statement of claim and service ***ex juris*** upon them for noncompliance with subrule 38(2) I find support in Rule 515:

> **515. Unless the court so directs non-compliance with these Rules does not render any act or proceeding void, but the act or proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with.**

PLAINTIFF'S STATUS, OR CAPACITY TO SUE:

(a) Estate Action:

3 The estate action against the defendants is only permitted by virtue of s.31 of the Trustee Act. That section provides that "the executors or administrators of a deceased person" may maintain the action but must commence it within two years of the date of death. "Administrator" is not defined by the statute (see, by comparison, the Fatal Accidents Act where administrator is defined as "an administrator appointed by the Supreme Court").

34 The style of cause and the first paragraph of the statement of claim allege that the plaintiff is the administrator of the deceased person's estate.

5 The plaintiff concedes, however, that he did not in fact have such status at the

time of commencing the estate action. He was granted letters of administration only six months later, on December 24, 1993. Can this subsequent grant of status "relate back" to the commencement of the estate action so as to allow it to continue? I have not been provided with any statutory or case law authority to support such a proposition, nor can it be founded in logic, in my view.

36 The notion of "relating back" was expressly rejected by the Appellate Division of the Supreme Court of Alberta in Public Trustee of Alberta v. Larsen et al (1964) 49 W.W.R. 416, a case which for purposes of this discussion is indistinguishable from the within estate action, and for that reason I find that decision to be highly persuasive.

37 As the provisions of the Trustee Act give the cause of action to the administrator of the estate, there is no status to sue until a grant of administration has been obtained. The limitation period for commencing the estate action had already expired in December 1993 when the grant of administration was obtained by Frank Stewart. To allow this subsequent grant to give life to an unauthorized lawsuit would be prejudicial to the defendants inasmuch as it would deprive the defendants of the benefit of a limitation period laid down by the statute.

38 The plaintiff cites s.32 of the Judicature Act, R.N.S.W.T. 1988, c.J-1 in

submitting that this court should allow the action to continue now that Frank Stewart has in fact been appointed administrator, notwithstanding the expiry of the limitation period. That section reads:

> **s.32 Where an action is brought to enforce any legal or equitable right, the court may permit the amendment of any pleading or other proceeding in respect of that action on terms as to costs or otherwise that it considers just notwithstanding that, between the time of the issue of the statement of claim and the application for amendment, the right of action would, but by reason of action brought, have been barred by any statute or Act, if the amendment does not involve a change of parties other than a change caused by the death of one of the parties.**

39 There is no request before the court by the plaintiff to further amend his statement of claim, so this section can hardly be of assistance to him.

40 Further, the plaintiff referred to the cases of Manitoba Public Insurance Corporation v. Loney (1986) 41 Man.R. 280 (Man.Q.B.), Baer v. Hofer et al (1991) 73 Man.R. 145 (Man.C.A.) and K.F.L. Holdings Ltd. v. William Stewart Properties Ltd. (1982) 23 Alta.L.R. (2d) 248 (Alta.Q.B.) in responding to this aspect of the defendants' application. However, in each of those cases the court allowed an amendment to the statement of claim of a plaintiff who had status to commence a lawsuit at the time of its commencement, and those cases are clearly distinguishable for that reason.

41 I therefore am obliged to find that the defendants have a valid point, and that the estate action must be struck for the reason that the plaintiff did not have status to bring it.

(b) Dependants Action:

42 The failure of the plaintiff to obtain a grant of administration prior to commencing the dependants action is not, however, fatal to that action, by reason of the different legislation which governs a dependants action.

43 The Fatal Accidents Act (see s.3 quoted earlier in these reasons) does not require that the dependants action <u>necessarily</u> be brought by the Court-appointed administrator. That statute (s.8) contemplates any dependant of the deceased person bringing the action in the absence of an executor or administrator having been appointed, or in default of the appointed executor or administrator having commenced such action.

44 In the present case, the statement of claim (in paragraph 1) clearly indicates that the plaintiff is a parent of the deceased Carmelle Stewart and, as such, a person who is entitled to bring an action under the Fatal Accidents Act against the defendants. There is no question about the plaintiff having the status to sue under

that statute.

<u>FAILURE TO COMPLY WITH FATAL ACCIDENTS ACT</u>:

45 Counsel appearing on this application on behalf of the plaintiff conceded that the statement of claim, as a pleading, has its shortcomings. I agree. It is far from being a model of good draftsmanship.

46 Firstly, the style of cause incorrectly describes the plaintiff (Frank Stewart) as the administrator of his daughter's estate (as discussed earlier). Further, the style of cause does not describe Frank Stewart as plaintiff in his own right, or in any other capacity (e.g. parent).

47 Next, the statement of claim does not comply with the specific statutory requirements of s.7 of the Fatal Accidents Act, the very statute which the plaintiff states in paragraph 13 he relies on, inasmuch as the plaintiff does not set out anywhere in the statement of claim or deliver therewith the full particulars of the person or persons for whom the action is brought.

48 More importantly, nowhere in the statement of claim (or in the amended statement of claim) is it alleged that anyone --- spouse, parent or child of the

deceased Carmelle Stewart --- has incurred injury that resulted from the death of Carmelle Stewart. That is, there is no allegation of entitlement to general damages which may be awarded by a court to a dependant in this statutory action.

49 In paragraph 12 of the statement of claim, there is a very general statement that the plaintiff (whoever that might be) has incurred special damages and it is conceivable that these refer to the special damages which are recoverable pursuant to s.4 of the Fatal Accidents Act.

50 It is the defendants' submission that the statement of claim does not disclose a cause of action pursuant to the Fatal Accidents Act and ought to be dismissed.

51 Taking into consideration, ***inter alia***, the finality of a finding that there is no cause of action disclosed in the pleading, I am unable to make such a finding. Notwithstanding the deficiencies validly raised by the defendants, in my view the bare essentials are present in the pleading to give the foundation to this statutory action. The plaintiff states that he is the father of Carmelle Stewart whose death was caused by the negligence of the defendants. He seeks, in the prayer for relief, general damages of $50,000. He says he relies on the Fatal Accidents Act (which a reader will realize authorizes a court action for the benefit of a family member of a deceased person whose death has resulted in injury to the family member). He also says he has

incurred special damages. A cause of action pursuant to the Fatal Accidents Act is thus disclosed or revealed by this pleading, albeit barely.

52 I cannot see that the defendants have been prejudiced by this absence of more than the barest of essentials. It is open to the defendants to apply for particulars, pursuant to the Rules of Court. If the plaintiff's non-compliance with the provisions of s.7(1) and s.7(2) of the Fatal Accidents Act continues, it is open to the defendants to seek a court order compelling production of the particulars and the affidavit contemplated by those subsections.

CHOICE OF FORUM:

53 The Yukon defendants, joined by the defendant Patrick Stewart Estate, request that this action be stayed by court order on the grounds that the Northwest Territories are a ***forum non conveniens***.

54 Where a plaintiff has chosen a forum and a defendant prefers another forum, there arises for the court an issue of determining the appropriate forum and the test to be applied is that of ***forum conveniens***, the forum which is more suitable for the ends of justice. United Oilseed Products Ltd. v. Royal Bank of Canada [1988] 5 W.W.R. 181 (Alta.C.A.).

55 Where a forum possesses jurisdiction over a defendant as of right, it is for the defendant to show that there is another available forum which is clearly or distinctly more suitable. Where the jurisdiction over the defendant does not exist as of right, the burden is on the plaintiff to show that the forum chosen is the more suitable forum. United Oilseed, at p. 191, Frymer v. Brettschneider and Shechtman (1992) 10 O.R. (3d) 157 (Ont.Ct., Gen.Div.).

56 In the present case, this court has jurisdiction as of right over the defendant Estate of Patrick Stewart, a defendant that was served within the jurisdiction, and therefore it is for that defendant to satisfy the court that the Yukon is clearly the more appropriate forum. However, as the Yukon defendants were served ***ex juris*** and have not attorned to the jurisdiction of this court there is an onus on the plaintiff to show that the Northwest Territories is the more appropriate forum for a court action against those defendants.

57 The court therefore must consider the relevant factors weighing for and against each forum. In looking at the relative advantages and disadvantages, there is no immediately obvious answer. The plaintiff estate is domiciled in the Northwest Territories. One of the defendants is domiciled in the Northwest Territories. The other two defendants (represented by one counsel) are domiciled in the Yukon. The motor vehicle accident occurred in the Yukon and presumably there are witnesses to

the accident, and the surrounding circumstances, resident in the Yukon (although the plaintiff says that the fatal trip of the Stewart vehicle commenced in the N.W.T. and presumably there could also be witnesses resident in the Northwest Territories to give evidence as to liability). Evidence as to damages, in this action pursuant to the Fatal Accidents Act, presumably exists in the Northwest Territories. There is more than a minimal connection to each forum.

58 Although there is a ***lis alibi pendens*** in the Yukon, the plaintiff in an affidavit to this court undertakes to discontinue the Yukon action if allowed to proceed with the within action, thus removing any unnecessary inconvenience and expense to the defendants in defending parallel lawsuits.

59 The arguments submitted on behalf of the defendant Estate of Patrick Stewart fail to persuade me that the Yukon is the more appropriate forum for the action as against that defendant. It is inherently reasonable that the plaintiff would pursue his dependants action in this jurisdiction against the driver of the vehicle in which his daughter was killed, when that driver was her uncle and both resided in the same small community in the Northwest Territories prior to the accident.

60 And I am of the view that it is only practical and a matter of common sense that the plaintiff bring one court action against all alleged tort-feasors at the same

time, rather than pursuing the N.W.T. defendant in this jurisdiction and the other defendants in the Yukon court in a separate action.

61 Taking everything into consideration, I find that I am unable to exercise my discretion to stay the within action on the ground of ***forum non conveniens***, for I conclude that the Northwest Territories is the more suitable forum for the ends of justice. This jurisdiction is the natural forum for the plaintiff; this is not a case where the plaintiff has merely come to this jurisdiction to serve his own ends. With respect, I am not satisfied that the Yukon court can try this case "more suitably or appropriately for the interests of all parties and for the ends of justice." Amarualik v. Barker [1992] N.W.T.R. 186 (N.W.T.S.C.); McElheran v. Great Northwest Insulation Ltd. [1989] N.W.T.R. 160 (N.W.T.S.C.).

CHOICE OF LAW

62 At the hearing of this application it was suggested on behalf of the plaintiff that it is premature for the court on this chambers motion to determine which law applies to the issues in the within action, that this is a determination which should be left for the trial judge after hearing the evidence presented at trial. I find that there is merit in this submission.

63 There has been much debate in recent years in the reported judgments of Canadian courts and in academic writings about the continued application of a decision of the Supreme Court of Canada fifty years ago in MacLean v. Pettigrew to modern problems of choice of law in torts. See in particular Grimes v. Cloutier (1989) 69 O.R. (2d) 641 (Ont.C.A.); Prefontaine Estate v. Frizzle (1990) 65 D.L.R. (4th) 275 (Ont.C.A.); Williams v. Osei-Twum (1992) 11 O.R. (3d) 737 (Ont.C.A.); Gagnon v. Gagnon and Lavoie (1992) 15 C.C.L.T. (2d) 41 (Ont.C.A.); Tolofson v. Tolofson and Jensen (1992) 9 C.C.L.T. (2d) 289 (B.C.C.A.); Swan, "Choice of Law in Torts: A Nineteenth Century Approach to Twentieth Century Problems" (1989) 10 Adv.Q. 57; Swan, "Choice of Law in Tort - A Renvoi" (1993) 15 Adv.Q. 356; Castel, "Canadian Conflict of Laws", 3rd ed. (1994), at pp. 637-646.

64 In MacLean v. Pettigrew [1945] 2 D.L.R. 65 the plaintiff was a gratuitous passenger in a vehicle operated by the defendant. Both were domiciled in Quebec. The accident occurred in Ontario. Under Ontario law a gratuitous passenger could not sue his driver. Careless driving was, however, punishable under Ontario's motor vehicle legislation. The plaintiff sued in the Quebec courts, and the trial judge, appeal court, and Supreme Court of Canada held that the plaintiff was entitled to do so, and that the law of Quebec was to govern. The Court quoted with approval the rule set up by Dicey, Conflict of Laws, 5th ed.: (at p. 77 of MacLean decision):

"An act done in a foreign country is a tort, and actionable as such in England, if it is both

(1) wrongful, i.e., non-justifiable, according to the law of the foreign country where it was done; and

(2) wrongful, i.e., actionable as a tort, according to English law, or, in other words, is an act which, if done in England, would be a tort."

65 If (without deciding the point) MacLean v. Pettigrew is to be followed in this case, the Court will have to examine the actual conduct of the defendants (particularly the conduct of the Yukon defendants) to ascertain whether it comes within the category of conduct in the two clauses of the Dicey rule. This cannot be done simply by reading the plaintiff's pleading but rather must be based on the facts of the case as gleaned from the evidence (or an agreed statement of facts).

66 In Grimes v Cloutier the plaintiff, a resident of Ontario, was injured in an auto accident in Quebec due to the negligence of the defendants, the driver and owner of a second motor vehicle. Both defendants were residents of Quebec. The action was specifically barred in Quebec pursuant to automobile insurance legislation. In an action on an agreed statement of facts, the Ontario trial judge held that Ontario law applied and awarded judgment to the plaintiff. In over-ruling this decision, the Ontario

Court of Appeal stated that because the defendants were residents of Quebec, it would not be just to apply Ontario law. MacLean v. Pettigrew was only to apply when all parties to the litigation are residents of the forum.

67 Of note here is that the choice of law issue in Grimes was determined with the benefit of an agreed statement of facts.

68 In Gagnon v. Gagnon and Lucas the plaintiffs were residents of Ontario and were injured in a motor vehicle accident in Quebec. They commenced a lawsuit in Ontario against their own driver G (resident of Ontario) and the other Driver L (resident of Quebec). G defended, and also claimed over against L. The plaintiffs discontinued their main action as against L after the decision in Grimes v. Cloutier.

69 In upholding the trial judge's decision to allow the plaintiffs to proceed against G, the Ontario Court of Appeal stated that the action between the plaintiffs and G was on all fours with MacLean v. Pettigrew and was allowable in the Ontario forum with Ontario law to apply.

70 The Gagnon case came before the trial judge on the basis of an agreed statement of facts. Among the major factors considered by the trial judge was the fact that the plaintiffs were injured during "a trip in a car licensed in Ontario which

began in Ontario and it was intended that it end in Ontario".

71 There was a similar factual underpinning to the choice of law decision of the B.C.C.A. in Tolofson v. Jensen and Tolofson. The plaintiff, a child resident in British Columbia, drove with his father, T, in his father's vehicle to Saskatchewan where their vehicle was involved in an accident with the vehicle of the defendant J, a resident of Saskatchewan. The plaintiff sued both T and J in the British Columbia courts. The B.C.C.A. followed MacLean and Gagnon in confirming the trial judge's decision on the choice of law issue in favour of British Columbia law. Relevant to this determination was the fact that the trip taken by the plaintiff and his father was one "in a car licensed in British Columbia, began in British Columbia and was intended that it end in British Columbia".

72 In the present case the plaintiff admittedly, just prior to the hearing of the defendant's application herein, filed his sworn affidavit in which he states, ***inter alia***, "the occupants of the vehicle began their trip in the Northwest Territories and they were supposed to be returning to Inuvik after their visit to Whitehorse". Mr. Stewart does not indicate the basis of his knowledge of the alleged actions and intentions of the vehicle's occupants. These allegations were not admitted by the defendants, nor were they tested by cross-examination or otherwise. In my view this is an insufficient or unsatisfactory basis for a finding of fact to support a choice of law determination.

73 Another aspect of the matter which requires an examination of the actual facts is the submission made by the plaintiff's counsel that the ***locus delicti commissi*** is not necessarily Yukon or only the Yukon. Counsel points to the allegations of Patrick Stewart's negligence in subparagraphs 7(g) and 7(h) of the statement of claim:

. . .

(g) operating a motor vehicle without any or any effective brakes, and

(h) driving while his ability to drive was impaired by alcohol, drugs or fatigue

and submits that it is possible that the evidence will show that these acts of negligence occurred or also occurred in the Northwest Territories.

74 Further, I cannot ignore the fact that the within lawsuit is not merely a tort action based on the law of negligence. It is a statutory action and only one component involves the tort of negligence. To be successful the plaintiff must also present evidence of injury suffered by him, the type of injury contemplated by the Fatal Accidents Act, injury which presumably occurred in the Northwest Territories. It may be, depending on the actual facts, that it is the place where the damage was suffered by the plaintiff that is determinative of the choice of law question. See Moran v. Pyle [1974] 2 W.W.R. 586 (S.C.C.).

75 All of this is to say that the court must be provided with a factual foundation to support any determination of a choice of law question, either by evidence at trial, an agreed statement of facts, or otherwise. The applicants herein have not provided such a foundation and they are accordingly not entitled to the declaration sought.

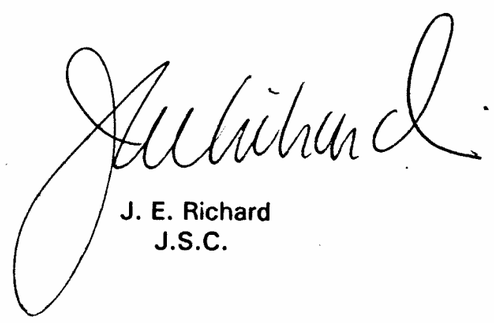
76

CONCLUSION:

77 The application of the defendants to dismiss the estate action commenced by Frank Stewart is granted. Counsel for the plaintiff should amend the statement of claim, including the style of cause, in accordance with that decision and otherwise as indicated by these reasons.

78 The balance of the relief requested by the defendants is denied.

79 Costs of this application will be in the cause.



J. E. Richard
J.S.C.

CV 04743

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE ESTATE OF CARMELLE STEWART, deceased, by its administrator, Frank Stewart

Plaintiff

- and -

THE ESTATE OF PATRICK EVANS STEWART, MELBERG ENTERPRISES LIMITED AND KIM ROBERT SNOWDOWN

Respondent

Reasons for Judgment of the Honourable Mr. Justice J.E. Richard

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