CV 04743

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

FRANK STEWART

Plaintiff

- and -

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

Defendants

Defence application for a declaration that Yukon Territory law applies to this action, thereby seeking order to dismiss this action as commenced outside limitation period

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REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE V.A. SCHULER

Heard at Yellowknife, Northwest Territories
on April 11, 1996

Reasons filed: June 14, 1996

Counsel for the Plaintiff:	Noel Sinclair
Counsel for the Defendants Melberg and Snowdown:	Peter Fuglsang
Counsel for the Defendant The Estate of Patrick Evans Stewart:	Gerald McLaren

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REASONS FOR JUDGMENT

1 This is an application by the Defendants for a declaration that the law of the Yukon Territory applies in the within action and an order dismissing the action as having been commenced outside the relevant limitation period.

2 An Agreed Statement of Facts was filed on the application. Other than those portions of it which deal with the laws of the Yukon, it reads as follows:

> 1. Carmelle Stewart was killed in a motor vehicle accident (the "accident") which occurred at kilometre 304 on the Klondike Highway, 30 miles south of the community of Carmacks, in the Yukon Territory, on June 28, 1991.
>
> 2. The accident involved an automobile owned and being driven by Patrick Evans Stewart, now deceased, in which Carmelle Stewart was a passenger, and a road packer, owned by the Defendant, Melberg Enterprises Limited ("Melberg"), and operated by the Defendant, Kim Robert Snowdown ("Snowdown"), in the course of his normal employment duties, as an employee of Melberg.
>
> 3. At the time of the accident:
>
> (a) Frank Stewart, Carmelle Stewart and Patrick Evans Stewart were residents and domiciled in Inuvik, in the Northwest Territories;
>
> (b) Patrick Evans Stewart was the holder of a valid Northwest Territories drivers licence;

> (c) A permit and number plates has been issued in respect of the automobile in which Carmelle Stewart was a passenger, under the provisions of the Northwest Territories *Motor Vehicle Act*;
>
> (d) Melberg was a corporation in good standing, incorporated under the laws of the Yukon Territory, carrying on business in the Yukon, with a registered office in the City of Whitehorse, in the said Territory;
>
> (e) Melberg did not carry on business in the Northwest Territories, nor did it have any assets, agents or any business office in the Northwest Territories.
>
> (f) Snowdown was a resident of, and domiciled in, the Yukon Territory.
>
> (g) Snowdown was the holder of a valid operator's licence;
>
> (h) The road packer had been purchased by Melberg in the Yukon Territory, and had been stationed and operated there since the said purchase. It was insured by Melberg pursuant to the *Insurance Act* of the Yukon Territory;
>
> (i) The automobile in which Carmelle Stewart was a passenger was insured pursuant to a Northwest Territories standard automobile policy issued to Patrick Evans Stewart, in accordance with the *Insurance Act* of the Northwest Territories;
>
> . . .
>
> 4. The Plaintiff, Frank Stewart, is the father of the deceased, Carmelle Stewart, and was and continues to be resident and domiciled in the Northwest Territories.
>
> 5. The Defendant, the Estate of Patrick Evans Stewart, is the Estate of Patrick Evans Stewart, deceased, and is administered by the Public Trustee of the Northwest Territories.
>
> 6. The Statement of Claim in the parallel Yukon action was filed June 25, 1993, which action has since been discontinued.
>
> 7. The Statement of Claim in this action was filed June 24, 1993.

3 The claim by the Plaintiff is in negligence. The Plaintiff claims as a dependent of the deceased, Carmelle Stewart, pursuant to the provisions of the *Fatal Accidents Act*, R.S.N.W.T. 1988, c.F-3, for damages for funeral expenses, loss of housekeeping services,

loss of care and companionship and loss of past and future financial support as set out in the Amended Amended Statement of Claim.

4 The Defendants rely on the decision of the Supreme Court of Canada in *Jensen* v. *Tolofson*, [1995] 1 W.W.R. 609. It is argued that *Jensen* v. *Tolofson* has decided that (i) the law to be applied in a motor vehicle accident case is the *lex loci delicti*, or the law of the place where the wrong occurred and (ii) that statutory limitation periods provide a substantive defence to an action.

5 On behalf of the Plaintiff, it is argued that the circumstances of his claim bring it within the exceptions to the general rule as settled by *Jensen* v. *Tolofson* and that the place where the wrong occurred in this case should be seen as the place where the damages occurred, which the Plaintiff says is the Northwest Territories.

6 *Jensen* v. *Tolofson* and its companion case, *Lucas (Litigation Guardian of)* v. *Gagnon*, were both cases arising out of motor vehicle accidents which occurred in a province other than the one in which the action was brought. *Jensen* v. *Tolofson* involved a claim by a plaintiff passenger who was resident in British Columbia against his father driver, also a resident of British Columbia and against the Saskatchewan resident driver of the other vehicle. The accident took place in Saskatchewan and the Plaintiff sued his father and the Saskatchewan driver in British Columbia. The Supreme Court of Canada applied the *lex loci delicti*, being Saskatchewan law.

7 Accordingly, the Saskatchewan limitation rule applied and the plaintiff's action was statute-barred.

8 In *Lucas (Litigation Guardian of)* v. *Gagnon*, the plaintiff passengers and their driver, all of whom resided in Ontario, were injured in a motor vehicle accident in Quebec. The driver of the other vehicle was a Quebec resident. The Plaintiffs sued their driver and the Quebec driver in Ontario. The Plaintiffs discontinued their claim as against the Quebec driver, but the Ontario driver maintained a cross-claim against the Quebec driver. The Supreme Court of Canada decided that Quebec law applied and its no-fault insurance scheme barred the action.

9 There are three main principles which generally come into play when a case involves a foreign element, as does this one. These are:

(1) jurisdiction;

(2) forum;

(3) choice of law.

(1) Jurisdiction:

10 J.G. Castel in Canadian Conflict of Laws, 3rd ed. (Butterworths, 1994), defines jurisdiction as follows, at page 189:

> Judicial jurisdiction as it relates to the conflict of laws is the power and authority of a court to hear and determine an issue upon which its decision is sought in a case involving at least one legally relevant foreign element. This power and authority have their source in the sovereignty of the state that created the court. Thus, the local law of each province or territory or the federal law will determine whether a court has jurisdiction to hear a case involving at least one legally relevant foreign element.

(2) Forum:

11 A court which has jurisdiction to entertain a proceeding may nonetheless refuse to exercise such jurisdiction on the basis that it is *forum non conveniens* and there exists some other forum more convenient and appropriate for the pursuit of the proceeding and for securing the ends of justice (Castel, page 280). The *lex fori* is the local or domestic law of the forum.

12 It has already been decided in this action by Richard J., hearing an earlier application, that the Northwest Territories is the *forum conveniens* for this action: *Stewart Estate* v. *Stewart Estate*, [1994] N.W.T.R. 276.

3. Choice of Law:

13 The court which is the *forum conveniens* must choose which substantive law applies to a case involving a foreign element. In many, if not most, cases, this will involve a choice between the *lex fori* and the *lex loci delicti*.

14 In the application heard by Richard J., he denied a request for a declaration that the law of the Yukon governs this action in respect to liability, damages and limitation periods, on the basis that the applicants had not provided a factual foundation to support the determination of a choice of law question. For purposes of the instant application however, the Agreed Statement of Facts referred to above was filed. I simply point out that it does not include reference to the alleged actions and intentions of the Stewart vehicle's occupants and allegations relating to lack of effective brakes and impairment of

ability to drive, which were discussed in the application before Richard J. and referred to in his judgment.

15 Counsel for the Plaintiff argues that three elements must exist before there is a wrong: (i) a standard of care, (ii) breach of that standard of care and (iii) damages. In this case, he says, only (i) and (ii) occurred in the Yukon. He says the damages occurred or arose only in the Northwest Territories. He argues that this case ought therefore to fall within the exceptions referred to by the Supreme Court of Canada in *Jensen* v. *Tolofson*. He refers also to the case of *Moran* v. *Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, [1974] 2 W.W.R. 586 and submits that the principles in that case do not seem to have caused concern to LaForest J., writing for the majority in *Jensen* v. *Tolofson*, and ought therefore to be considered as approved.

16 *Moran* v. *Pyle* was not, however, a case where the court was called upon to determine the choice of substantive law to be applied. Rather, as stated by Dickson J. in his reasons in that case, it presented in a jurisdictional context the question of the place of commission of a tort.

17 In *Moran* v. *Pyle*, the deceased was electrocuted in Saskatchewan while removing a lightbulb manufactured in Ontario. The manufacturer sold its products to distributors only and not directly to consumers. It had no agents or salesmen within Saskatchewan.

18 The cause of action in *Moran* v. *Pyle* was founded on the *Fatal Accidents Act* of Saskatchewan. The Act applied only to a wrongful act, neglect or default committed in

Saskatchewan. So the place of the wrong had to be determined before it could be determined whether the Act would apply.

19 The Supreme Court considered the argument that only the alleged careless manufacture of the lightbulb occurred in Ontario, but the resultant damage occurred in Saskatchewan, which was therefore, it was submitted, the place of the tort.

20 The court approved the "real and substantial connection" test, whereby a tort is regarded as having occurred in any legal unit substantially affected by the defendant's activities or their consequences and the law of which is likely to have been in the reasonable contemplation of the parties. That test was then applied to the tort of careless manufacture and a rule formulated that where a defendant carelessly manufactures a product in jurisdiction X which enters into the normal channels of trade, and that defendant knows or ought to know that as a result of his carelessness a consumer may be injured and it is reasonably foreseeable that the product would be used in jurisdiction Y, then if the plaintiff suffered damage in jurisdiction Y, the latter jurisdiction is entitled to exercise judicial jurisdiction over the foreign defendant.

21 The Court in *Moran* v. *Pyle* accordingly concluded that the Saskatchewan court had jurisdiction to entertain the action. No ruling was sought or made as to what law would apply to the issues in the case.

22 Counsel for the Plaintiff in this case relies on *Moran* v. *Pyle* in arguing that (i) one must look at the three elements of standard of care, breach and damages in order to

determine the place of a tort and (ii) the real and substantial connection test should apply to determine the *lex loci delicti*. He argues that the Plaintiff in this case was not wronged until the deceased Carmelle Stewart failed to return home to the Northwest Territories to perform the functions for the loss of which he claims damages.

23 Counsel urges me to interpret certain words of LaForest J. in *Jensen* v. *Tolofson* as indicative of tacit agreement with what was said in *Moran* v. *Pyle*. Specifically, he points to the following statement by LaForest J.:

> In Canada, a court may exercise jurisdiction only if it has a "real and substantial connection" (a term not yet fully defined) with the subject matter of the litigation; see *Moran* v. *Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 [1974] 2 W.W.R. 586]; Morguard, supra; and *Hunt*, supra. This test has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest.

24 But *Moran* v. *Pyle* concerned only the Saskatchewan court's jurisdiction to entertain an action involving a foreign element. LaForest J. then went on to pose the real question: once a court has properly taken jurisdiction, what law should it apply?

25 In addressing that question, Mr. Justice LaForest said the following (at pp 627 - 628):

> From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems automatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti.* There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong.

26 Counsel for the Plaintiff urges me to interpret the above, using what was said in *Moran* v. *Pyle*, as meaning that the wrong takes place where the damages are suffered.

27 As I have said, *Moran* v. *Pyle* dealt with jurisdiction over an action, not the choice of the law to be applied to the facts in the action. I do not interpret the words of LaForest J. as meaning that the principles in *Moran* v. *Pyle* are applicable to the choice of law determination. Although I agree that LaForest J. leaves open the possibility that in some situations the consequences of an act might be held to constitute the wrong, I conclude that he did not include in that possibility damages arising from motor vehicle accidents. LaForest J. more likely, in my view, had in mind facts such as existed in *Moran* v. *Pyle*. In that case, no wrong had occurred in the foreign jurisdiction. The careless manufacture of the lightbulb did not become a wrong until the lightbulb electrocuted the deceased. That took place in Saskatchewan.

28 Can the same be said about the facts as set out in the Agreed Statement of Facts in the case before me? I turn first to the words of LaForest J. found after the passage quoted just above:

> Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. There territorial considerations may become muted; they make conflict and other considerations may play a determining role. But that is not this case. Though the parties may, before and after the wrong was suffered, have travelled from one province to another, the defining activity that constitutes the wrong took place wholly within the territorial limits of one province, in one case, Quebec, in the other Saskatchewan, and the resulting injury occurred there as well. That being so it seems to me, barring some recognized exception, to which possibility I will turn later, that as Willes J. pointed out in *Phillips* v. *Eyre*, supra, at p. 28, "civil liability arising out of a wrong derives its birth from the law of the place [where it occurred], and its character is determined by that law". In short, the wrong is governed by that law. It is in that law that we must seek its defining character; it is that law, too, that defines its legal consequences.

29 In this case, the defendants Melberg and Snowdown were residents of the Yukon Territory. The defendant Estate of Patrick Evans Stewart steps into the place of the deceased Mr. Stewart, who had travelled from his residence in the Northwest Territories to the Yukon. To this extent, in my view, the case cannot be distinguished from Tolofson. Counsel for the Plaintiff argued that the Estate, which is administered by the Public Trustee of the Northwest Territories, provides a substantial connection to the Northwest Territories. Even if a substantial connection was the test for the choice of law, the case is still no different from *Jensen* v. *Tolofson*, where one of the defendants was resident in British Columbia, where the action was brought. Does the fact that at least one defendant is resident in the jurisdiction where the action is brought change things? The answer must be in the negative based on *Jensen* v. *Tolofson*.

30 The more difficult issue raised by counsel for the Plaintiff is whether the fact that the Plaintiff's claim is under the *Fatal Accidents Act*, and not merely in negligence, distinguishes it from *Jensen* v. *Tolofson*.

31 The Plaintiff's claim is as a dependent of the deceased, Carmelle Stewart, for damages for funeral expenses, loss of housekeeping services, loss of care and companionship and loss of past and future financial support.

32 The *Fatal Accidents Act* provides in section 2 that:

> 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.

33 Obviously, there must be a wrongful act, neglect or default which caused the death before there can be an action for damages.

34 Surely the wrongful act or neglect is the negligence of the defendants, resulting in the death of Ms. Stewart. For purposes of this decision only, I will assume negligence on the part of the defendants. That negligence, resulting in the death, is the "defining activity that constitutes the wrong", to use the words of LaForest J. Those events took place in the Yukon.

35 Counsel for the Plaintiff says, however, that the Plaintiff was not wronged until the deceased did not return home to do the housekeeping, provide companionship, etc. I disagree. The Plaintiff was wronged when the deceased was killed in the accident. That is when her care and services became unavailable to him.

36 In my view, the situation is no different than when a Plaintiff in the *Jensen* v. *Tolofson* circumstances survives an accident with serious injuries. Assume Plaintiff X claims for loss of future income. Based on the argument advanced by counsel for the Plaintiff in this case, one could say that with respect to his claim for loss of future income, Plaintiff was not wronged until he returned to his home province and found he could not perform the job he had before the accident.

37 In *Jensen* v. *Tolofson*, the Plaintiff sought damages for head injuries which affected his learning capacity. I suppose that an argument could have been made that he did not

suffer those damages until he returned home and found that he could not keep up in school.

38 I use these examples as illustrative of what I think is the problem with the argument counsel has advanced. It seems to me that in these examples the wrong is done when and where injury or death occurs. That is clearly ascertainable. Otherwise, one might have a number of different jurisdictions in which it could be claimed the wrong occurred.

39 Counsel for the Plaintiff also argues that *Jensen* v. *Tolofson* leaves the door open to exceptions to the lex loci delicti rule. He says that the Plaintiff's claim should come within those exceptions.

40 LaForest J. carefully considered the rationale for exceptions from the *lex loci delicti*. He considered the issues of public policy and unfairness and whether these should give rise to exceptions. I think that it is worth noting that in this case, the only relevant difference in the law as between the Yukon and the Northwest Territories is the applicable statutory limitation period, which is one year in the Yukon and two years in the Northwest Territories. A shorter limitation period under the *lex loci delicti* than under the *lex fori* was one of the grounds argued in *Jensen* v. *Tolofson* and rejected by LaForest J.

41 The decision of Laforest J. emphasizes the need for the law to be clear. He considered whether exceptions should be made to the rule of lex loci delicti and noted that "...if not strictly narrowed to situations that involve some timely and close relationship between the parties, an exception could lead to injustice" (p.636). In the end,

however, he observed that there is little to gain and much to lose in creating an exception to the *lex loci delicti* rule in relation to domestic litigation. He spoke for the majority. Only Major J., with Sopinka J. concurring, left open the possibility of recognizing an exception to the *lex loci delicti* rule in interprovincial litigation in circumstances in which the rule would work an injustice. In my view there is in any event no injustice in the circumstances of this case that would justify an exception.

42 Counsel for the Plaintiff suggested as an alternative that I could dismiss the action as against the Yukon defendants, Melberg and Snowdown, on the basis of the *lex loci delicti*, but hold that the *lex fori* applies to the defendant Estate of Patrick Evans Stewart by reason of its real and substantial connection to the Northwest Territories. I have already said that a real and substantial connection to the Northwest Territories is not a sufficient basis upon which to depart from the *lex loci delicti*.

43 There is a further problem with this submission. The defendant Estate has claimed indemnity and contribution from the Yukon defendants. If I dismiss the Plaintiff's claim against those defendants, the Estate may still seek to add them as third parties. Would the *lex fori* then apply to the Estate and the *lex loci delicti* to Melberg and Snowdown? Only one law can apply and the need for certainty is precisely what the rule in *Jensen* v. *Tolofson* is intended to fulfill.

44 Based on *Jensen* v. *Tolofson*, it is therefore the *lex loci delicti*, the law of the Yukon, which must apply in this case.

45 In *Jensen* v. *Tolofson* it was also decided that statutes of limitation are to be regarded as substantive. The *Fatal Accidents Act* of the Yukon, R.S.Y. 1986, C-64 provides that no action shall be brought beyond one year from the date of death of the person in respect of whom the action is brought. The date of the death of Carmelle Stewart was June 28, 1991. The within action was commenced by Statement of Claim filed on June 24, 1993, outside the one year limit. The action is therefore statute-barred and is dismissed.

46 The law relevant to this application was settled by the decision in *Jensen* v. *Tolofson* only after this action had been commenced. Counsel are to be commended for bringing the issue forward in such an expeditious manner. My inclination is to order that each party bear their own costs, but counsel may, if they wish, speak to that issue within 60 days of the filing of these Reasons for Judgment.

V.A. Schuler

J.S.C.

Dated at Yellowknife, Northwest Territories
this 14th day of June, 1996

Counsel for the Plaintiff:	Noel Sinclair
Counsel for the Defendants Melberg and Snowdon:	Peter Fuglsang
Counsel for the Defendant The Estate of Patrick Evans Stewart:	Gerald McLaren

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