

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TUK TRADERS LTD.,

Plaintiff

- and -

BILL COCKNEY,

Defendant

AND BETWEEN:

BILL COCKNEY, WILLIAM P.
COCKNEY OTHERWISE KNOWN AS
BILL COCKNEY, AS ADMINISTRATOR
OF THE ESTATE OF AGNES CORLENE
COCKNEY, DECEASED,

Plaintiffs, by
Counterclaim

- and -

TUK TRADERS LTD. and
GEORGE WILLIAM CLARKE,

Defendants, by
Counterclaim

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE W. G. MORROW

This action is concerned with events dating back to the winter of 1963-1964. On December 6, 1966, it first came on before me at Inuvik as two Chambers applications, one by the plaintiff corporation asking for an order for removal and sale, and the other by the defendant Cockney asking to have a Default Judgment set aside. At the time I permitted the Default Judgment to be opened up on terms, which terms have been lived up to.

As a result, the case has eventually come to trial, and the circumstances surrounding the trying of the case, if nothing else, serve to illustrate how difficult it is to apply the normal rules and procedures to civil actions in the Northwest Territories. It should be observed that it has taken almost five years to complete the trial.

Because of the vast distances involved in bringing the Court and lawyers and witnesses together with minimum expense to the parties, it has required three separate hearings, two at Inuvik and one at Nicholson Point, in the Territories, and the taking of commission evidence at Vancouver, B. C. Following this, argument was heard at Yellowknife.

While portions of the evidence have given some trouble, the basic facts in the case are relatively simple and straight forward.

Tuk Traders Ltd. is a private company with registered office at Edmonton, Alberta, but entitled to do business in the Northwest Territories. At all times pertinent to the present action there were two shareholders, George William Clarke, president, and his wife, Bonnie Clarke, Secretary-Treasurer. Both, as officers, took an active part in the management and affairs of the company.

The company operated at Tuktoyaktuk, which is a small Eskimo Settlement and Dewline site located on Kugmallit Bay on the

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East side of the mouth of the Mackenzie River where that River empties into the Beaufort Sea (Arctic Ocean). The main business of the company was in selling dry goods, and in buying and selling fur. A coffee shop was run in conjunction.

Commencing about October, 1962, the defendant Bill Cockney was employed, first, as an assistant to Bonnie Clarke, and later, as a clerk. His employment did not require him to serve for regular hours, but certainly he was expected to be available whenever his services were required. This sometimes meant he might have to be in attendance seven days a week, sometimes for twelve hours a day, and many times until midnight. The longer hours were usually at the time the barges had to be unloaded. He was allowed time off to hunt or fish when the season and work permitted.

Bill Cockney is an Eskimo, ^{forty-one} 41 years old, with grade two education. He was born and has lived his entire life along the Arctic coast. During the latter period of his employment, he received \$10.~~00~~ a day pay; was paid each month; and was given a ^{ten} 10 per cent discount on his personal purchases from Tuk Traders Ltd. He testified that he knew about Tuk Traders, but had no understanding of the "Ltd." designation. He stated also that it was two to three months before he found out what wages he was receiving. I believe him.

Mr. Cockney's wife, Lucy Patricia Cockney, has grade eleven education. Also an Eskimo, she has been married to Bill

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Cockney for ^{fourteen} 14 years. There are several children of the marriage. In this action the two youngest, (under school age), are the only ones affected. The others were left in boarding-school at Inuvik. Mrs. Cockney had been out at the Camsell Hospital, in Edmonton, Alberta, for more than two years undergoing treatment for TB, ^{tuberculosis} and had just returned to Inuvik in the fall of 1963. Because of her illness, which had resulted in part of one lung being removed, she had indicated an unwillingness to return to Tuktoyaktuk to live. Her husband had been flown by Mr. Clarke to see her, and apparently as a result of this visit Bill Cockney quit work at Tuk Traders Ltd. effective the end of July, 1963.

Failing to get work at Inuvik, Mr. Cockney approached Clarke, and was re-employed on a temporary basis at \$10.00 per day for part of August.

I now come to one of the areas where there is lack of agreement on the facts. As ^{it is} one of the most important points ^{is} a time in the case, I propose reviewing this part of the evidence in considerable detail.

The ^Plaintiff Clarke testified that at some time early in 1963 he had mentioned setting up an outpost at Anderson River. At this time Cockney indicated he didn't want to go because his wife was expected back from hospital. Apparently there were many such discussions, both with Cockney, and with others. The main theme was the feasibility of setting up such a post ^{at} in Anderson River. Cockney, who was an employee of Tuk Traders at this time,

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was indefinite in his plans ~~at this time~~ because of his wife.

✓ The two men, However, were able to come to an agreement before August 11th. According to Clarke, Cockney said to him that the fur prices looked good, and he wanted to go to Anderson River, but wanted an arrangement for Clarke to fly him out. Clarke testified that he stated to Cockney that it was too late; that there would not likely be any great volume of trading, and it would be unprofitable. He went on to suggest that if Cockney would sell on consignment, and take furs in exchange on a commission basis, then he, Clarke, would consider it, and Cockney would have a chance to trap. At this point Clarke states that Cockney was satisfied, but it remained to satisfy the concern about Mrs. Cockney's health. Clarke maintains that Cockney felt this arrangement was reasonable as he got free flying services and goods on consignment for his trapping. This witness estimated that the value of the free transportation was between \$800.~~00~~ and \$1200.~~00~~.

On the second occasion of giving evidence, namely, in November, and after he had heard Mr. Cockney's evidence, Clarke stated that Cockney approached him to fly him to Anderson River in exchange for a percentage of fur. He agrees that all the trappers expected to be in the Anderson River area would have been outfitted by then. He made it quite clear that the main object of setting up the Anderson River outpost in 1963 was to get a feeling as to whether the people in the area would use the post

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the next year, ^{it} it was an experiment.

The testimony of Mrs. Clarke was taken on commission evidence at Vancouver, she having become separated from her husband by the time of the action. She agrees pretty much with what her husband says. She stated that because Mrs. Cockney would not return to Tuktoyaktuk, Cockney quit his job with them and attempted to find work at Inuvik. Failing in this, he came back to part-time work with them in August, and at this time asked to be taken to Anderson River. Her memory was that her husband had been talking earlier in 1963, to the Eskimos around Tuktoyaktuk about trapping and trading at Anderson River, there being little trapping close to Tuktoyaktuk. She described how the idea had been kicked around, and Cockney suggested that they follow her husband's original idea of setting up a trading-post. She was opposed to it because the season was too late; that there was not enough planning, and that, consequently, it would not be a paying proposition. // She was in attendance at one of the discussions between her husband and Mr. Cockney, but not ^{at} on the last discussion, at which time Mrs. Cockney was present. Her husband explained to her what had been agreed to on this occasion.

She is emphatic that the agreement was ^{five} 5 per cent commission on sales, including goods purchased or used by Cockney himself, and the same commission on furs acquired in exchange. She agrees with Mr. Clarke that there was no offer or agreement to pay \$300.00 a month to Cockney. She agrees also that it was concluded finally, in making the agreement with Cockney, that it didn't ^{not} matter

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whether it paid or not as it was an experiment, and a chance for Cockney to trap.

Her understanding of the deal, therefore, was that Cockney was to operate the post on a commission basis while he was free to trap for himself on a day-line basis. Day-line basis meant he would be home every night.

Mrs. Clarke's recollection was that most of the discussion was devoted to choice of supplies and fur prices. She did hear the men express concern for Mrs. Cockney's health.

Her memory of the reason for the August 18th discussion, which included Mrs. Cockney, was Mr. Clarke's concern for the health of Mrs. Cockney, he not being sure that Mrs. Cockney wanted to go.

Mr. Cockney In testifying stated that he did not speak to Clarke about the Anderson River outpost in the period prior to July, 1963, but that he had overheard Mr. Clarke discussing it with his customers. Apparently Clarke had made considerable money from furs in 1962, and thought an outpost at Anderson River should be set up. Cockney's version was that Clarke had plans to send him to Anderson River, but he, Cockney, was not anxious to go because of his wife.

When, However, ^{where} he was without steady work in August, 1963, he agreed to work for Clarke at Anderson River and to do some trapping at the same time. His understanding was that he would operate an outpost for Clarke at a salary of \$300.~~00~~ per month,

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his former salary, and that to satisfy his wife Clarke would fly in twice a ~~week~~^{month} and, ^{would} provide a radio that could be used to transmit messages in the event of an emergency. Cockney was to be permitted to do some trapping on the side, but only a day-line type, which would keep him close to the post so as to get home each night to service customers. He denies any discussion about being paid on a commission basis. He stated that on August 18 when the arrangement was made the promise of the radio by Clarke reassured Mrs. Cockney.

According to Cockney, he was to pay for his supplies whenever Clarke paid him. He insisted that he finally agreed to go because Clarke promised to pay him, and because he would be permitted to trap at the same time. He did not know whether he was getting a discount on goods or supplies. He was to stay so long as there was trapping, viz., to March. He was to try to get furs from other trappers, and he was to trade supplies for them.

Lucy Cockney, in her testimony, described how she went with her husband to Clarke's house, and how they talked about going to Anderson River. She didn't want to go, but Clarke wanted her husband to go. She told Clarke they would be taking the two small children, and that she had just come from hospital. In giving her best recollection of what was said on that occasion she states:

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16 } He said he will bring the radio there in case we need help, to talk to Tuk or - and he will come every two weeks, and that's when we changed our minds. I said we'll go there if we have a radio and if he will come every two weeks.*

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She heard \$300~~00~~ mentioned as the payment, but paid little attention to the business arrangements, her concern being with the living arrangements, the radio and the plane trips.

In assessing the evidence on this important point in the case I am not unmindful of certain of the surrounding circumstances which were bound to affect the negotiations, and to, in effect, become part of the oral agreement between the parties, whatever that agreement was.

The plaintiff Clarke, a man with a wide experience as a businessman, with a university education, ^{and I know} ~~to~~ quote him: "We had hoped we could re-establish the possibility of operating an outpost in that area so that these major trapping areas would all be tapped", ^{and that he} was looking "to a long-term establishment there". On the other side, ^{is the defendant Cockney} an Eskimo with, ^{Clarke's} grade two education, in his employ on a casual basis, unable to get other employment, with a wife coming home out of hospital, and with no previous experience in handling a trading operation (to the knowledge of Clarke).

It is to be noted here that two of the trappers in the Anderson River area that winter who gave evidence had visited and traded with Cockney. Donald William McLeod explained that Clarke told him that Cockney was going to be there, and that when ^{he was} away his wife would do the trading. He stated further that it ^{was} didn't look to be a well-stocked post for the number of trappers, and for the area. The second trapper, John Franklin Carmichael, described Cockney as having "a little bit of supplies, and Mr.

Clarke told us he was hoping to be starting up a trading-post there." Under cross-examination later, this witness stated that Clarke "promised to run a trading-post there and promised to supply other trappers." Clarke, himself, agreed that the total value of the goods supplied was \$2,500.00. His estimated profit was ^{Two per cent} 10% or \$250.00. If he was right that Cockney was only to receive ^{Five per cent} 5% then, assuming Cockney ate nothing and traded all of the goods, his maximum return on the whole transaction could not have exceeded \$125.00 on the goods and \$125.00 on the furs obtained in exchange.

Both Clarke and his wife knew it was too late to set up an efficient operation, or a profitable one, that year. It is beyond all comprehension that they expected Cockney and his wife, situated as they were, to do any more than make a test or sampling of the Anderson River area so that Tuk Traders could assess the area's trading potential. It is equally incomprehensible to me that they would expect this man to take his family in to this remote area and spend a harsh winter in a small cabin expecting only ^{Five per cent} 5% in return, (less even than the ^{Two per cent} 10% Cockney got while employed in the Tuk store), and whatever could be obtained in the way of trapping on a day-line basis.

I was not impressed by Mr. Clarke as a witness, and the discrepancies in his evidence, ^{which} as are clearly ascertainable from examining the record of the three occasions on which he testified,

bear this assessment out. It may well be that \$300.~~00~~ a month was not spelled out in clear terms, but I am satisfied on the evidence that Cockney was unquestionably left with the impression that in going to Anderson River to set up an outpost he was going as an employee of the Clarkes, and that he was not restricted to what he could make while there. He expected, and had a right to expect remuneration from his employer, and in addition had that most important additional assurance of radio communication and twice-monthly flights. He was not expected to run a profitable enterprise, but was to sample the area and open up the possibilities ^{to} of a trading post in the future years.

^{here} If the contract was, as the Clarke^s ask me to believe it to ^{be}, then I would have to say it smells of the worst kind of exploitation of a native Eskimo by a whiteman. I refuse to believe this, but incline rather to the view that it was a fluid arrangement, just as the other arrangements had been, and ^{that} the unfortunate events that befell the Cockneys by interfering with what might have been normal development, placed the matters in litigation, ^{where} when under happier circumstances there would have been a negotiated settlement.

In consequence, therefore, I conclude that the defendant Bill Cockney was operating the Anderson River outpost for the Clarkes and for their ^e Company Tuk Traders Ltd., and that he was to be paid a fair remuneration for his services.

I am not unmindful of the principles enunciated in respect of quantum meruit in *Andreas v. Clancy* [1950] 1 W.W.R. 657, ^{[1950] 2 D.L.R. 262 (CA)} and *McGugan v. Smith* (1892) 21 S.C.R. 263, ^{affg 21 D.A.R. 542,}

When working at Tuktoyaktuk Cockney was paid ~~\$10.00~~ per day, and received a ^{ten per cent} ~~10%~~ discount on purchases. Clarke suggests ^{five per cent} ~~5%~~ at the Anderson River post. Perhaps this is appropriate when Cockney was allowed the limited privilege of day-line trapping. // I find that the defendant Bill Cockney is entitled to ^a salary at the monthly rate of ~~\$300.00~~ for the period he operated the outpost, which, for convenience, I am calling three and one-half months, making a total remuneration ^{in this regard} ~~here~~ of ~~\$1050.00~~.

There is no real dispute as to the computation made by Tuk Traders Ltd. in its claim less adjustments for the goods. Accordingly, if this were all there was to the case there would be judgment as follows:

Plaintiff Tuk Traders Ltd.	\$ 1105.58
Defendant Bill Cockney	<u>1050.00</u>
Net to Tuk Traders Ltd.	<u>\$ 55.58</u>

^{grossed} The above is unfortunately, not the conclusion of the case. It remains now to consider the Counterclaim, which covers the events after the Cockneys got to Anderson River. // The Counterclaim seeks, among other things:

- \$ 500.00 to cover funeral expenses in respect to Agnes Dorlene Cockney;
- \$ 1200.00 wages (already ^{dealt with} ~~disposed of~~ above);
- \$ 25,000.00 damages for pain and suffering and loss of expectation of life for Agnes Dorlene Cockney

- \$ 5000.~~00~~ general damages for breach of contract;
- \$ 5000.~~00~~ general damages for nervous shock and pain and suffering for Bill Cockney; *and*
- \$ 10,000.~~00~~ exemplary damages.

It now becomes necessary to review the events that followed the agreement arrived at between the parties on August 18, 1963.

After at least one preliminary flight by Clarke and Cockney to examine a cabin reputed to be located on the Anderson River, *at a place* referred to as "the forks", the Cockney family was deposited at the cabin on September 7th. I do not propose to discuss how many trips were made by plane, *it* suffice to say that several trips took place about this date, bringing in material used to make the cabin habitable, bringing in Cockney's sled dogs, and bringing in the supplies.

Anderson River has its beginnings more than *one hundred* ~~100~~ miles inland and flows generally north to enter the Beaufort Sea at Wood Bay, on which is located a ~~Dew~~ *Bar* line site known as ~~Cam~~ *Bar* 4 on Nicholson Peninsula. The area where the cabin was located was at a point along this ~~River~~ *river*, almost equidistant from Tuktoyaktuk and Nicholson Peninsula, about ~~80~~ *sixty* miles inland and about ~~115~~ *less than one hundred and fifty* miles from Tuktoyaktuk. It would be about ~~40~~ *forty* miles south of the tree-line and located near the confluence of the Cornwath and Wolverine Rivers and Anderson River. The ~~River~~ *river* is wide enough here to permit planes to land on floats during the short summer season, and

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on skis during the winter.

On arrival, the Cockneys lived for several days in a tent while the cabin was made fit to live in. At the same time, Cockney had to build a boat, and then use it to lay in a stock of fish to provide food for his dog team during the winter months. There was a second small building used to store the trade goods. The cabin was made of logs and had two wood stoves for heat and cooking. The floor was covered with plywood flown in, and the walls with some type of billboard. Between getting wood, fishing for the dogs, and generally fixing up the cabin, it can be assumed that the Cockneys with their two small children were not permitted to be idle, in the early weeks at any rate.

Some distance away along the river were two trappers and their families. One of them was Donald William McLeod, who described the cabin as pretty rough when he first saw it before it had been fixed up. Suffice^{it} to say that the Cockneys accepted it, and make no real complaint in respect to its comfort^{cal}.

Clarke continued flights in to the Anderson River post until October, 1963. He had a Cessna 180 plane, which could be adapted to wheels, floats, or skis. It was capable of carrying some 1000 pounds per load. It took him seven to eight trips to get the material, stores, dogs and Cockneys in to the post. Clarke was his own pilot, and for the type of flying he was engaged in he could make no charge for freight or passengers and was subject to visual flight rules, ^{that is, he} could only fly when the sky

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was clear of cloud and during daylight, ^{and} he must be able to see the ground at all times. His plane was not equipped with a de-icing device.

The evidence indicates that this plane required ^{six} 6 to ^{eight} 8 inches of ice for ski landings. In the Tuktoyaktuk - Nicholson Peninsula - Anderson River area, the period ^{from} October to November is subject to cloud and fog. The map shows a low range of hills running north and south between Tuktoyaktuk with altitudes of 1050 and 1150 feet above sea-level, but with the average height ^{and the part} closer to 850 feet. Tuktoyaktuk is at sea-level, and the confluence of the Rivers where the cabin was is below 500 feet.

✓ In the Admissions agreed to by Clarke and Tuk Traders Ltd. after a Notice to Admit, the meteorologist puts the ice thickness on the Anderson River as adequate and safe for aircraft by the end of October. The same source shows bad weather pretty well through November 1 to 11~~th~~ in the area concerned, with flying conditions quite hazardous due to icing, but otherwise the "ceilings and visibilities were near V.F.R. (Visual Flight Rules) limits part of the time." November 12 and part of November 13 appear to show clear skies. Donald William McLeod agreed that flying conditions in the area during November and December were poor. The other trapper who testified at the trial, John Franklin Carmichael, stated there was a bit of good weather in October, no storms, but some foggy weather. Clarke, himself, admitted that he could operate from Tuktoyaktuk in the third week of October in

1963. He agrees also that small planes can land one week after freezeup. Cockney states there were days in October and November that were free of cloud.

Clarke made his last pre-freezeup trip in to Anderson River on October 6~~th~~ to 8~~th~~. At that time conditions were so bad in the near freezing water that he had to enlist the assistance of McLeod, who towed his plane across the ice. On his return to Tuktoyaktuk after this trip the plane was pulled out of the water so it could be equipped with skis. During this operation the propeller became bent necessitating it being shipped to Edmonton for repairs. According to Mrs. Clarke, this propeller did not get back to Inuvik until about October 23~~rd~~ or 24~~th~~, ^{and} was not picked up until November 9~~th~~, when it was immediately installed. Mr. Clarke went out to Edmonton on October 23~~rd~~ or 25~~th~~, ^{and} returning ^{ed} November 8~~th~~.

In the latter part of October the Cockneys had gone out to collect wood with the dogteam. The two children had gone along for what Mr. Cockney called a "picnic" in the snow. On the return trip the children and Mrs. Cockney were riding on the loaded sled. Somehow or other, while the sled was descending a hill, it got out of control. Mrs. Cockney jumped clear, and the oldest ^{or} child ^{was} got thrown clear. The youngest ^{or} child, Agnes Dorlene, was not so fortunate and was dragged down hill. In the process she was caught against a tree and was injured. She did not appear to have been hurt too badly at the time, but after about two weeks her condition gradually deteriorated, and she eventually

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The evidence indicated

died on November 8~~th~~. ~~The~~ child had not been a very healthy child, ~~in any event.~~

Shortly after the child's death, Mrs. Cockney became violently ill, and as a consequence Mr. Cockney ceased to go out on his day-line for trapping. It is to be noted that, except for what could be described as basic first aid supplies, such as bandages and iodine and aspirin, some of which ^{were} ~~was~~ borrowed from the McLeods, there were no medical supplies for treatment. Mrs. Cockney had worked at a hospital before marriage, and said she knew how to administer drugs if she had direction.

During the period from the date when Clarke last came in until the death of the child and Mrs. Cockney's ensuing illness the family had run out of certain foodstuffs. Cockney places this date at November 10~~th~~. They had ample moose meat, caribou and fish, so were in no danger of starving. However, the would-be trader was reduced to borrowing some staples from the McLeods; milk, coffee and tea.

Cockney, of course, bases his claim for damages under the various heads referred to ^{previously} ~~above~~ on the fact that Clarke failed to come in with his plane, or provide some other plane from October 6~~th~~ or 8~~th~~ to November 23~~th~~, which was his first trip after freeze-up. He also bases the claim on the lack of medical supplies, and the failure to provide an emergency transmitter as had been promised. It was Clarke's promise of such a radio that tipped the

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balance and got the Cockney's agreement to go to Anderson River in the first place. Cockney claims that the child might have been saved if the plane had come in earlier, or if he could have called for help; that his wife's health might not have so deteriorated; and that certainly he would not have had to suspend his trapping with consequent loss.

Clarke finally came in on November 23rd, and made a complete turn around, taking the ^{ailing} ~~ill~~ Mrs. Cockney out to Inuvik, along with the child's body. ^{Mrs. Cockney} ~~She was~~ Subsequently, operated on for appendicitis and recovered. Cockney stayed on with the older child until just before Christmas when, due to anxiety over this child, he went to Inuvik with Carmichael and McLeod.

On a trip subsequent to November 23rd Clarke did bring a radio that was capable of transmitting and set it up, showing Cockney how to operate it. Cockney was unable to send any messages through it during the whole period he remained there, but nothing really turns on this. Also, a man by the name of Wilbert Chicksi was brought out to assist Cockney ~~and~~ at Cockney's request. In the view I am taking in these proceedings the intrusion of Chicksi did not materially change matters.

It is to be noted that by the middle of October an ~~air~~ ^{the plane} airstrip had been marked out by the Cockneys as was expected by them. By this time, the ice was ^{two and a half} 2-1/2 feet thick. McLeod, who had towed Clarke's plane on his last trip, stated that the River

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was frozen over within ten days. He tested the ice about October 10th, and it was ^{ten} ~~10~~ inches thick by then, ~~✓~~ this was where Cockney had marked out the strip.

During this period the Cockneys were suffering their travail with the sick child and later with the sick mother, doing their chores and carrying out their part of the bargain by trading whenever the opportunity presented itself. Clarke makes no complaint about the records kept by Cockney, nor about the prices he allowed in trade on the furs. His honesty is acknowledged by Clarke.

While the ice was thick enough to take the plane, and there were clear days good enough for flying interspersed through this period of October 10th to November 23rd, and I so find, the expected plane did not come. Cockney quite frankly agreed at the trial that he knew that flying was difficult at this time of the year, but certainly, as a ~~Northener~~ ^{Northener} was ^{to} not acting unreasonably in expecting the plane to come in on one of these days.

At the trial ~~Counsel~~ ^{Counsel} for Clarke suggested that when the plane did not come as expected, Cockney should have headed north to Nicholson Peninsula by dog sled for help. This would have entailed a difficult and perhaps hazardous trip along the snow and ice of Anderson ~~River~~ ^{River}, which could have required upwards of ten days. With the expectation that the promised plane

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might come each day, I do not agree that Cockney should have attempted to go to Nicholson Peninsula by dog sled.

Clarke ~~meanwhile~~ had returned to Tuktoyaktuk and pulled his plane out to place skis on it. At this time the propeller was damaged, as already observed. Mrs. Clarke attributes his delay in getting out to Anderson River to this, more than to the weather. I do not doubt that there were many days in which it was, ^{either} impossible, or too dangerous to fly. I am satisfied, however, that there were enough good days in the period immediately after freeze-up, (in the period after October 15th, or thereabouts), that a plane could have gone to Anderson River. In making this finding I am also taking into consideration the limited light conditions at this time of year, ^{that is,} some two hours of daylight. Clarke's plane was out of commission during the earlier part of this period. But no attempt was made to use some other plane, although Mrs. Clarke in her evidence makes mention that with her husband away she could hire a plane. I am satisfied on the evidence before me that there were days when Clarke could have had a plane go in before he left for Edmonton on October 23 or 25. In his testimony before me he makes no reference to the damaged propeller, but rather blames the weather. Knowing that he had not carried out his part of the bargain about a radio capable of transmitting, knowing that he was expected in immediately after freeze-up, knowing as he did the anxiety shown by the Cockneys because of Mrs. Cockney's

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previous health problem, Mr. Clarke chose to absent himself until at least November 8~~th~~. By then the problems were beyond solution at Anderson River. Even after November 8~~th~~, while he says he made several attempts to get there, (once even getting half-way), I am not too impressed with his effort. The Court, putting in some ^{fifty thousand} 50,000 miles a year on circuit in this country, (often in small planes), is fully aware of the difficulties, but is also cognizant of how a resourceful pilot can go around hills and weather and come in from behind, or follow a river valley to get to his destination.

I conclude, therefore, that the Clarkes and their company failed in their two main commitments to the Cockneys, namely, in ^{not} providing emergency radio equipment and in ^{not} ensuring at least one plane flight to the Anderson River outpost before November 23~~rd~~. I agree that it was not unreasonable under the circumstances for Cockney to leave his outpost in December and not return. What the consequences are from these breaches remains to be discussed.

As a result of the tragic events, which began with the injury to the child, and certainly, after the child's death and while awaiting the arrival of the ever~~x~~expected plane, particularly with his wife ill, Cockney, as might be expected, stuck close to the cabin. After his wife went back he was left with a four-year-old child to care for. He could not be expected to put much time or effort into the day-line trapping. Finally, by leaving in December for good reason, as I have already found, he lost the

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remaining two or three months of the trapping season. This loss was, in my opinion, directly attributable to the breach by his employers. Accordingly, he is entitled to compensation. He seeks \$5000.~~00~~. Examining the evidence, it would appear that for the period he was there he earned in the neighborhood of \$700.~~00~~ from furs taken. Using this as a guide, I estimate he could probably have almost doubled the take if he could have completed the season. Accordingly, under this heading I award him \$600.~~00~~ by way of damages. I make no award for loss of wages during this period as the evidence suggests he obtained new employment at Inuvik sometime before this period would have expired.

The sum of
\$500.~~00~~ *is* has been sought for special damages in connection with, among other things, the funeral expenses. The evidence does not show that Cockney had to pay anything for the funeral, nor was he put to any other expense other than \$54.~~80~~ owing to Father Young to cover board and room after he came in from the post. Under this heading I award him \$64.~~80~~.

✓ Mr. Cockney seeks \$5,000.~~80~~ general damages for nervous shock and pain and suffering. There can be no doubt that this man, during the period from the time his child was first injured until the wife was taken out by plane on November 23~~rd~~, went through a period of tremendous mental anguish. It is my opinion that his employers, while perhaps not to be expected to foresee the death of a child, certainly could be

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expected to foresee the possibility and probability of some medical crisis arising from sickness or injury. The insistence on the radio and the twice-monthly flights as a condition of employment cannot be lost sight of here. The remoteness of damage in this type of case has been discussed in many cases: *Pilkington v. Wood* [1953] Ch. 770; *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* [1949] 2 K.B. 528. Difficulty in assessing damages in these instances is no bar, and it is left to the "good sense of the Court to assess as best it can what it considers to be an adequate recompense for the loss suffered"; ^{see *Cheshire and Fifoot*,} *Law of Contract*, ~~by~~ *Cheshire & Fifoot*, 5th Edition, ~~at~~ page 509; *Chaplin v. Hicks* [1911] 2 K.B. 786. Applying these principles, I award Bill Cockney general damages in the amount of \$1,000.~~00.~~

In respect of the claim for exemplary damages, the claimant must not only show a wrongful act, but he must show that the conduct of the wrongdoer was such as to be considered "high-handed, insolent, vindictive, or malicious, showing contempt ~~or~~ or disregarding every principle which actuates the conduct of gentlemen"; ^(3rd Ed.) 11 *Halsbury's Laws of England*, ~~Third Edition~~, part 391, pages 223 to 225. I can find nothing in the conduct of ^{either} ~~any~~ of the defendants by counterclaim to bring them within this category, and accordingly, this claim is disallowed.

There remains the claim for general damages for pain and suffering and loss of expectation ~~for~~ ^{of} life for the deceased Agnes Dorlene Cockney. On my view of the evidence, I am unable

to say that her injury can be in any way attributable to the Clarkes, or to Tuk Traders Ltd. Similarly, I am unable to say that her death is attributable to either or both, nor can I say she would have lived had there been emergency communication, or had the plane come at the earlier time promised. In the event I may be found to be wrong here, then in anticipation of a possible appeal, ^{had I found otherwise} I would have assessed the full damages under this heading at \$7,500.00.

In the final result there will be Judgment as follows:

In favour of Bill (William P.) Cockney:

(1) Damages for breach of contract	\$ 600.00
(2) Special damages	64.00
(3) General damages	<u>1000.00</u>
	\$1664.00

In favour of Tuk Traders Ltd. :

Net, after ^{amount payable for goods supplied} set-off ^(above)	<u>55.58</u>
Net, to ^{Bill (William P.) Cockney} Cockney against George William Clarke and Tuk Traders Ltd.	<u>\$1608.42</u>

^{in respect to} ~~on~~ its claim up to and including the Default Judgment, the defendant Bill Cockney will have costs in Column 4 in respect to the Counterclaim. There will be ^{set-off} set-off of costs.

W. G. Morrow

W. G. Morrow
J.T.C.

Yellowknife, N.W.T.
8 September, 1970.

~~Counsel for plaintiff: M. M. de Weerd, Q.C.~~
~~Counsel for defendant: B. Purdy.~~

*Mark M. de Weerd, Q.C. for plaintiff (and defendant by counterclaim).
& Brian Purdy for defendant (and plaintiff by counterclaim).*