Date: May 30 1997
Docket: CV 06582

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARJORIE ROSS

Plaintiff

- and -

FORD MOTOR COMPANY OF CANADA, LIMITED/FORD DU CANADA LIMITEE, and KINGLAND FORD MERCURY SALES LTD.

Defendants

Application by defendants to dismiss action as an abuse of process. Granted.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on May 22, 1997

Reasons filed: May 30, 1997

Counsel for the Plaintiff: Paul A. Bolo

Counsel for the Defendant (Ford): Michael A. Kirk

Counsel for the Defendant (Kingland): Johnson Billingsley

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REASONS FOR JUDGMENT

[1] The defendants bring applications to dismiss this action on the basis that it constitutes an abuse of process.

[2] The plaintiff suffered bodily injuries in an automobile accident in Quebec in 1994. She describes herself as a resident of the Northwest Territories but with a "secondary residence" in Quebec. It is alleged that the accident occurred when the parking brake on her vehicle failed and the vehicle rolled over her as she was standing outside the vehicle. The vehicle was manufactured by the defendant Ford and sold to the plaintiff by the defendant Kingland (a Northwest Territories company).

[3] The plaintiff's claim for damages sounds in both tort and contract. She alleges negligence and breach of the warranty of fitness in the manufacture of the vehicle as against Ford. She alleges negligence and breach of contract as against Kingland, not just in being the seller of the vehicle, but also in failing to detect defects in the parking brake system when the plaintiff specifically complained to them about defects.

[4] This action was commenced on August 9, 1996. Prior to that, in May of 1995, the plaintiff commenced an action claiming damages as against Ford in the Province of Quebec. That claim as well advanced what I would label as a products liability claim. The defendant Ford moved to strike the plaintiff's claim on the basis that Quebec law

precluded a private cause of action. The motion was granted by a judgment of Frechette J. of the Quebec Superior Court on September 18, 1995.

[5] It is common ground that under Quebec law the plaintiff is precluded from bringing an action for damages. Her sole recourse is to apply for compensation to the Régie de l'assurance automobile du Quebec under that province's public insurance scheme. The Quebec *Automobile Insurance Act*, R.S.Q., c. A-25, provides as follows in s.83.57:

> 83.57 Compensation under this title stands in lieu of all rights and remedies by reason of bodily injury and no action in that respect shall be admitted before any court of justice.

[6] The Quebec Act defines "accident" as "any event in which damage is caused by an automobile" (s.1). It also provides for compensation to accident victims who are not resident in Quebec (s.9), although for non-residents compensation is to be determined on the basis of fault, as opposed to residents who are treated on a purely no-fault basis. The Act, however, grants jurisdiction to the Régie and only if there is a dispute between the Régie and the victim does the matter get submitted to a court. In striking out the plaintiff's claim in the Quebec action, Frechette J. held that only the Régie is competent to hear the claim for damages. There is no evidence before me as to whether the plaintiff has filed a claim with the Régie.

[7] The defendants, on the motions before me, raise the same points. Essentially they argue that Quebec law applies to this action and, since the law of that province bars all rights of action, it would be an abuse of the process of this court to proceed with this action in this jurisdiction. The defendant Ford raises the further argument that the issue is *res judicata* as a result of the judgment delivered by Frechette J. of the Quebec Superior Court. That judgment was not appealed.

[8] Does the law of Quebec apply to this cause of action? In my opinion, based on the principles enunciated by the Supreme Court of Canada in *Jensen v Tolofson*, [1995] 1 W.W.R. 609, the answer is "yes".

[9] The *Jensen* case was reviewed and applied by Schuler J. of this court in *Stewart v Stewart Estate* (CV 04743; June 14, 1996). *Jensen*, as well as *Stewart*, involved claims arising out of motor vehicle accidents which occurred in a jurisdiction other than the one in which the actions were brought. Both cases held that, as a general rule, the law to be applied is the law of the place where the wrong occurred,

the *lex loci delicti*, even though the persons claiming damages were resident in the jurisdiction where the action was brought.

[10] Counsel for the plaintiff argues that it cannot be said that the wrong occurred in Quebec in this case. The claim is framed generally on the basis of products liability. The vehicle was purchased in this jurisdiction (although there is no evidence as to where it was manufactured) and inspections of it were also done in this jurisdiction.

[11] Even if I assume that the allegations of fact in the Statement of Claim can be proven, I must still ask where the wrong occurred. Counsel for Kingland submits that a wrong occurs when all elements of a cause of action come together: (i) a duty of care; (ii) a breach of that duty; and (iii) damages. He argues that it was only when the accident occurred that the cause of action arose. And, since the accident occurred in Quebec, that is where the cause of action lies. Support for the defendant's position can be found in the comments of Viscount Simonds in *Overseas Tankship (U.K.) Ltd. v Morts Dock & Engineering Co. Ltd. (The Wagon Mound)*, [1961] A.C. 388 at 425, quoted with approval by Dickson J. (as he then was) in *Moran v Pyle*, [1974] 2 W.W.R. 586 (S.C.C.), at 595:

> It is, no doubt, proper when considering tortious liability for negligence to analyse its elements to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage. But there can be no liability until the damage has been done. *It is not the act but the consequences on which tortious liability is founded*. Just as (as it has been said) there is no such thing as negligence in the air, so there is no such thing as lability in the air. (The emphasis is by Dickson J.)

[12] Further support for this submission can also be found, in my view, in the comments of LaForest J. in *Jensen* at 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 axiomatic 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. Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. There territorial considerations may become muted; they may 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.

[13] It seems to me that in this case the "defining activity that constitutes the wrong" (as phrased above) is, if the allegations of fact made by the plaintiff are deemed true, the failure of the parking brake. That event took place in Quebec as did the resulting injury.

[14] Counsel for the plaintiff concedes that if this were a conventional automobile accident claim, the principles of *Jensen* would make Quebec law applicable. But, he argues that the contractual aspect puts this case outside of the *Jensen* rationale. It seems to me, however, that there is no rational distinction, in principle or in practice, between this case and a straightforward tort claim.

[15] First, as noted in Linden's *Canadian Tort Law* (5th ed.), at pages 535 - 536, products liability claims can encompass two different avenues of recovery, one on the basis of contract theory (breach of warranties) and one on tort theory (negligence). The Statement of Claim in this case alleges both. There is nothing wrong with such

concurrent claims. The general rule that emerged from the Supreme Court of Canada decision in *Central Trust Co. v Rafuse*, [1986] 2 S.C.R. 147, is that, where a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort. There is nothing in the pleadings or in the evidence before me to suggest any contractual limitations. The acts alleged in this case may amount to a breach of duty in both contract and tort. Furthermore, the quantification of damages would be the same under both aspects of the claim in this case.

[16] Second, even if one classifies this claim solely as faulty manufacture, the wrong may still not occur until damage is inflicted. This point was also made by Dickson J. in *Moran* (at 594):

> . . . For myself, I have great difficulty in believing that a careless act of manufacture is anything more than a careless act of manufacture. A plaintiff does not sue because somebody has manufactured something carelessly. He sues because he has been hurt. The duty owed is a duty not to injure.

Granted *Moran* was a tort case but the comments are equally applicable to the contractual claim for the faulty manufacture of the vehicle (as against Ford) and the sale and faulty inspection of it (as against Kingland).

[17] Finally, as submitted by counsel for both defendants, the policy reasons for the rule in *Jensen* are equally pertinent in this case. The plaintiff chose to maintain a residence, albeit a "secondary" one, in Quebec and she took the vehicle there. The "event" occurred in Quebec and the injuries were suffered there. This particular case seems to fit the underlying policy outlined by LaForest J. in *Jensen* (at 628):

> I have thus far framed the arguments favouring the *lex loci delicti* in theoretical terms. But the approach responds to a number of sound practical considerations. *The rule has the advantage of certainty, ease of application and predictability. Moreover, it would seem to meet normal expectations. Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly.* The government of that place is the only one with power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs. If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at lease

> generally, respected. Stability of transactions and well grounded legal expectations must be respected. Many activities within one state necessarily have impact in another, but a multiplicity of competing exercises of state power in respect of such activities must be avoided. (emphasis added)

[18] I note as well that the applicable Quebec provision, quoted earlier, states that compensation under the statute stands "in lieu of all rights". Presumably this would encompass all rights under either the law of torts or contract.

[19] Counsel for the plaintiff says that these applications are premature. He submits that at this stage there is a lack of evidence which would allow the court to weigh all the factors which may be relevant to a determination of the applicable law. I do not agree. It seems to me that where the vehicle was manufactured or sold or even inspected are not the determining factors in this analysis. In that aspect this case is similar to the fact situation in the *Moran* case referred to earlier. That case was a Saskatchewan action seeking damages for the death by electrocution of the plaintiff in Saskatchewan caused by a faulty lightbulb manufactured in Ontario.

[20] I note that in the pleadings, both those filed here and in the Quebec action, the plaintiff made the point that the hospital and health care costs were paid by the Territorial health insurance scheme. The action commenced here seeks recovery of the subrogated health care costs. The fact that there is this "territorial" interest in this litigation does not alter the applicability of Quebec law. I am not familiar with all the provisions of the Quebec legislation, but I see no reason why in principle the subrogated health care claim could not be recoverable in Quebec. In a recent judgment by the Alberta Court of Appeal, *Cowley v Brown* (No. 95-16134; May 6, 1997), a subrogated claim by one province's health plan was held to be recoverable in an action commenced in the other province where the accident occurred.

[21] The *lex loci delicti* was invoked as a principle of Canadian law in the interests of order. LaForest J. conducted an exhaustive analysis of the reasons for and against the rule, including the question of whether exceptions should be made in those cases where the litigants are resident in the forum where the proceedings are taken (as opposed to the place where the event occurred). He came down decisively in favour of a rule that is certain. In this he was supported by a majority of the judges of the Court in *Jensen*.

[22] Is there some significance that Quebec has a civil law system different from that of the common law system in this jurisdiction? I think not. Arguably the

underlying principles of contract and tort law are similar in both systems. The significant point, however, is that the preclusion of a right of action in Quebec is due to a statute. Several common law provinces also have "no fault" statutes. Thus there is no distinction based on the systems of law in the two jurisdictions. It just reflects the fortuitous circumstance arising from the fact that the event on which the cause of action is based arose in a jurisdiction that has such legislation.

[23] These applications are brought on the basis of the applicable law, not on some basis of *forum non conveniens*. In my opinion the *lex loci delicti* applies, that being the law of Quebec, and it provides a complete bar to the plaintiff's claim for damages. Allowing these proceedings to continue would therefore constitute an abuse of process.

[24] This conclusion applies to both defendants. The defendant Ford, however, also based its application to dismiss on the principle of *res judicata*, and specifically the rule of issue estoppel. This was not available to Kingland because Kingland was not a party to the Quebec proceedings.

[25] The requirements for the application of the rule of issue estoppel were outlined by O'Leary J.A. in *420093 B.C. Ltd. v Bank of Montreal* (1995), 174 A.R. 214 (C.A.) at 220:

> A prior judicial decision will not raise an estoppel by *res judicata,* either issue estoppel or cause of action estoppel, unless (i) it was a final decision pronounced by a court of competent jurisdiction over the parties and the subject matter, (ii) the decision was, or involved, a determination of the same issue or cause of action as that sought to be controverted or advanced in the present litigation; and (iii) the parties to the prior judicial proceeding or their privies are the same persons as the parties to the present action or their privies.

It was also noted in that case that an attempt to relitigate issues already decided may be declared to be an abuse of process and barred even where estoppel is not available (at 228). O'Leary J.A. made specific reference to a number of cases where only one of the parties to the later action was a party to the earlier one.

[26] In my opinion all of the criteria for issue estoppel are met insofar as the defendant Ford is concerned. The issues before the Superior Court of Quebec were whether Quebec law applied to this claim and did it bar a private action. The issues before me are the same. Not having been appealed, the judgment of the Quebec

court is deemed conclusive on the issues of law determined by it. Insofar as this action is an attempt to relitigate the issues, it constitutes an abuse of process.

[27] The defendants' motions are granted. This action is dismissed. Costs may be spoken to if the parties are unable to agree.

J. Z. Vertes
J. S. C.

Dated at Yellowknife this 30th day of May, 1997

Counsel for the Plaintiff: Paul A. Bolo

Counsel for the Defendant (Ford): Michael A. Kirk

Counsel for the Defendant (Kingland): Johnson Billingsley

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