[ENGLISH TRANSLATION]

Date: 20060622

Docket: T-2215-00

Citation: 2006 FC 798

Ottawa, Ontario, June 22, 2006

PRESENT: The Honourable Madam Justice Johanne Gauthier

BETWEEN:

CHANTAL NORMANDEAU

And

MICHEL LAPOINTE

And

MICHEL LAPOINTE, in his quality as the executor and liquidator of

THE ESTATE OF SÉBASTIEN LAPOINTE

Applicants

And

THE ESTATE OF BASTIEN LÉVESQUE

And

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

And

THE OWNERS AND ALL OTHERS WITH AN INTEREST

IN THE SHIP “BRIER MIST”

Defendants

Docket: T-2012-03

BETWEEN:

AURISE LANDRY on her own behalf and in her capacity as guardian of her minor daughters

MAGGIE LANDRY-LÉVESQUE and ALEXE LANDRY-LÉVESQUE

And

MARIE-ÈVE CHEVAIRE

Plaintiffs

And

HER MAJESTY THE QUEEN OF CANADA

Defendant

REASONS FOR ORDER AND ORDER

[1] Her Majesty the Queen in Right of Canada (the defendant) is asking the Court to allow her motion for summary judgment and dismiss the plaintiffs' actions in these two consolidated cases because they are time-barred.

[2] The parties agree that section 649 of the *Canada Shipping Act,* S.C. 1985, c. 9, amended by S.C 1998, c. 16, sec. 17, abr. by S.C. 2001 c. 6, sec. 125 (the Act)[1], as it existed on November 27, 1998[2], set a limitation period of two (2) years from the date of death for the actions brought by the dependents of Sébastien Lapointe and Bastien Lévesque, both of whom died when the ship "Brier Mist" sank on this date.

[3] At the hearing, the defendant agreed that her motion did not apply to the claim of Sébastien Lapointe's estate. The latter's right to institute proceedings on behalf of the deceased and claim damages on his behalf is not based on sections 646 et seq. of the Act, but rather on an amendment of the Common Law by the Supreme Court of Canada in *Ordon Estate v. Grail,* [1998] 3 S.C.R. 437.

[4] As my colleague Justice François Lemieux pointed out in *Nicholson v. Canada*, [2000] F.C.J. No. 211 at paragraph 65, this action, known as a survival action, is very different than a dependant's fatal accident claim provided for in sections 646 et seq. of the Act.

[5] It is also understood that this motion does not apply to the action in warranty brought by the Bastien Lévesque estate against the defendant in T-2215-00.

Background

[6] The “Brier Mist” was built in 1981 and was registered at the port of Yarmouth in Nova Scotia. It consisted of a single fish hold with a hatch on the after deck of the vessel.

[7] The vessel was inspected at least five times by Transport Canada Marine Safety Inspectors. The last inspection was conducted on August 8, 1997. When Bastien Lévesque purchased the “Brier Mist” in 1998, the vessel had a Transport Canada ship inspection certificate that was valid until August 8, 2001.

[8] After purchasing the vessel, Mr. Lévesque made a number of modifications to the “Brier Mist.” Among other things, some equipment was added and other equipment was moved to facilitate fishing from the stern.

[9] On November 27, 1998, the “Brier Mist” sank off Rimouski causing, among other things, the disappearance and death of young Sébastien Lapointe, an 18-year-old apprentice-fisherman, son of Chantal Normandeau and Michel Lapointe, two plaintiffs in T-2215-00. The owner and captain of the ship, Bastien Lévesque also disappeared and was deemed dead when the accident occurred. His widow, Aurise Landry and her children are the plaintiffs in T-2012-03.

[10] Following the sinking, the Transportation Safety Board (TSB) and the Quebec Coroner’s Office investigated the accident. The TSB issued its report on March 8, 2001,[3] and Coroner Jean-François Dorval issued his report on December 15, 1999.

[11] On March 26, 1999, Bastien Lévesque’s brother wrote the Chairman of the Transportation Safety Board of Canada (TSB) requesting that research on the wreckage of the “Brier Mist” be resumed in order to determine the actual causes of the shipwreck. There is no indication that such research was done.

[12] On November 24, 2000, the plaintiffs filed their original submission in T-2215-00. They were instituting proceedings against, among others, the estate of Bastien Lévesque as well as a “Jean Doe and/or Jean Doe Inc.” described in paragraph 5 of the submission as the shipyard or the individual who made or contributed to the modifications made in 1998.

[13] On December 12, 2002, the wreck of the “Brier Mist” was finally located by Sureté du Québec divers, and the video recording they brought back indicated that the hull had not suffered any damage before the ship sank.

[14] Nine months later, the plaintiffs in T-2215-00 were granted leave to add the defendant as a party, and they filed a re-amended submission on October 28, 2003. On October 27, the estate of Bastien Lévesque added the defendant as a party in T-2215-00, and on October 28 the plaintiffs filed a new action against the defendant in T-2012-03.

[15] In their submissions, the plaintiffs allege that the defendant is responsible for the actions and omissions of Transport Canada employees, who:

i) Did not note or report that the fish hold was not watertight during their various inspections of the "Brier Mist" and;

ii) Advised Bastien Lévesque that it was not necessary to inspect the vessel following the modifications that he made after purchasing it in 1998.

[16] In support of her motion, the defendant filed a brief affidavit from Jacques Martin, a manager in the Occupational Safety and Programs Division at Transport Canada. The purpose of this affidavit was essentially to file Jean-François Dorval's Coroner's Report and the TSB report and to establish their respective publication dates.

[17] The plaintiffs filed the affidavit from counsel Jean-François Bilodeau, who attached as exhibits a large volume of documentation generated in the context of proceedings in these two cases, including:

i) An affidavit from the plaintiff Chantal Normandeau dated February 20, 2002, filed during the challenge against a previous motion for summary judgment brought by the defendant, the estate of Bastien Lévesque, in T-2215-00;

ii) An affidavit from Aurise Landry dated September 29, 2003, filed in support of the application for leave to implead and institute proceedings against the defendant in T-2012-03;

iii) The transcript of Aurise Landry's two examinations for discovery, dated October 7, 2002 and July 30, 2004;

iv) Two affidavits of documents of the defendant dated April 30, 2004 and September 23, 2004, and;

v) Various documents produced by the defendant.

[18] At the hearing, the defendant sought and was granted leave to amend her defence in order to plead the limitation period.

Issues

[19] The defendant submits that the text of section 649 of the Act is clear. Parliament chose to adopt a specific event in time, the time of death of Sébastien Lapointe and Bastien Lévesque, as the starting point of the applicable limitation period. Correspondingly, the Court must dismiss the actions of the dependents, which are obviously time-barred, since the actions were brought against the defendant more than five years after those deemed deaths[4].

[20] According to the defendant, the Supreme Court of Canada recently stated in *Ryan v. Moore*, [2005] 2 S.C.R. 53, that it is not permissible to resort to the judge‑made discoverability rule when Parliament has explicitly linked the limitation period to a fixed event "unrelated to the injured party's knowledge or the basis of the cause of action."

[21] Alternatively, the defendant argues that if the Court decided to apply the discoverability rule, the actions of the dependants would still be time-barred since, according to the defendant, they knew or ought to have known all the relevant facts of their cause of action against the defendant at the latest when Jean-François Dorval's Coroner's Report was published on December 15, 1999, more than two years before the submission was filed in T- 2012-03 and more than two years before the defendant was added in T-2215-00.

[22] According to the defendant, the evidence on the record is sufficient to enable the Court to exercise its jurisdiction under subsection 216(3) of the *Federal Courts Rules* SOR/98-106 (the Rules) and rule on this question of fact or mixed fact and law.

[23] With respect to the interpretation of section 649 of the Act, the defendant argues that this is not an issue or, if it is one, it concerns a point of law that the Court may determine under paragraph 216(2)(b) of the Rules.

[24] The plaintiffs raised numerous issues in their factum and at the hearing. First, they indicated that the Court should follow Judge François Lemieux's decision in *Nicholson*, above, since it dealt with the interpretation of section 649[5] and applied to the judge‑made discoverability rule. In their view, this issue is complex and contentious. Accordingly, it should not be decided without a trial.

[25] They also argued that the pre-trial judge would have to rule on other issues such as:

i) Does the Court have inherent equitable jurisdiction to extend the limitation period under section 649, notwithstanding the absence of a specific statutory provision to that effect?

ii) Given that the defendant was substituted for the defendants Jean Doe and Jean Doe Inc., was the limitation period interrupted when the action was filed in November 2000?

iii) Has the defendant waived her right to plead or is she precluded from pleading that the actions are time-barred, given her participation in other interlocutory motions, as well as her conduct during the TSB investigation and since the institution of procedures?

Analysis

[26] In *Nicholson*, above, the defendant submitted the same arguments on the interpretation of section 649 of the Act to Judge François Lemieux. In that case, the defendant filed a motion for summary judgment to dismiss the action of the widow and children of a sailor who died in another marine accident because it was time-barred. In that case, the plaintiffs alleged negligence on the part of the Coast Guard in approving the construction plans for a vessel that had no central bulkhead, no alarm in the hold, or a fixed pumping system.

[27] The Court, after having considered all relevant case law at the time, found in paragraph 39 that "the discoverability rule is an interpretative tool for the construing of limitations statutes" and that it may not extend the period the legislature has prescribed when the

time runs from the date of an event which clearly occurs." The Court continued its train of thought, saying:

35 Counsel, on behalf of Her Majesty, argued section 649 of the Act, when properly construed, triggered the plaintiff's obligation to initiate proceedings one year from the "death of the deceased" an event unconnected with the state of their knowledge as to whether they had a cause of action. This submission, in my view, is unrealistic and must be rejected because it fails to reflect the specific cause of action here based on statutory negligence related to regulatory duties and approvals by the Canadian Coast Guard of which the plaintiffs could have no knowledge.

[28] By reasons of judicial comity, the Court is bound to follow this previous decision, unless it is manifestly wrong because it failed to consider legislation or binding authorities which would have produced a different result or it is distinguishable on material facts (*Monemi v. Canada*, [2004] F.C.J. No. 2004 at paragraph 25; *Glaxo Group Ltd. v. Canada*, [1995] F.C.J. No. 1430; *Bell v. Cessna Aircraft* (1983), 149 D.L.R. (3d) 509, at page 511).

[29] Nothing in the 1998 amendment to section 649 of the Act justifies different reasoning than François Lemieux's. However, the defendant submitted that the recent decision of the Supreme Court of Canada in *Ryan*, above, changed the situation, and that on this basis, the Court must reach a different conclusion than the one in *Nicholson*.

[30] In *Ryan*, above, the Supreme Court of Canada had to interpret a provision of the *Survival of Actions Act*, R.S.N.L. 1990, c. S-32. Section 5 of the Act provided that in the event of the death of one of the parties to an action, the estate of the deceased must start its action within one year after the date of death or within six months after the estate's letters of administration have been granted.

[31] As Judge Michel Bastarache pointed out, this Act does not create a cause of action. It grafts its provision onto an existing cause of action, one which is complete in all of its elements before the operation of the *Survival of Actions Act*. It has the effect of shortening the time period within which the action could be taken because "an action founded in tort may only be taken by or against the estate of a deceased person if it is commenced within that period of time that is common to both limitation periods" (paragraph 18-19).

[32] It is in this context that Bastarache J. at paragraph 31 repeats the Ontario Court of Appeal's comments in *Waschkowski v. Hopkinson Estate* (2000), 46 O.R. (3d) 370, particularly those of Rosalie Abella J.A. (then a judge of the Court of Appeal), who concluded at paragraph 16 of this decision that the discoverability rule did not apply to the Ontario statutory provision (s. 38(3) of the *Trustee Act*, R.S.O. 1990, c. T.23), whose purpose was the same as section 5 of the *Survival of Actions Act*.

[33] As Bastarache J. noted at paragraph 34 of *Ryan*, the *Survival of Actions Act* is itself a legislative exception to a common law rule, which, in another context, was set aside by the Supreme Court of Canada in *Ordon Estate*, above.

[34] As the plaintiffs pointed out, the provision under consideration in *Ryan,* above, is different from the provision before me today.

[35] In *Ryan,* above, the Supreme Court of Canada did in fact note this distinction when discussing the Nova Scotia Court of Appeal's decision in *Burt v. LeLacheur* (2000), 189 D.L.R. (4th) 193 (paragraphs 29–30 of *Ryan*, above).

[36] In that case, after considering Abella J.'s reasoning in *Waschkowski,* above, the Court of Appeal held that the discoverability rule applied to section 10 of the *Fatal Injuries Act*, R.S.N.S. 1989, c. 163, which is a provision that is essentially similar to section 649 of the Act.

[37] In *Ryan,* at paragraph 30, Bastarache J. indicated that:

30 In *Burt*, the death of a person for which an action can be brought under the *Fatal Injuries Act* does not merely refer to the time of death as provided in the *Survival of Actions Act*, but to a "wrongful" death. It is not an event totally unrelated to the accrual of the cause of action. Hence, the death of the person there is in fact a "constituent elemen[t] of the cause of action", contrary to the present case.

[38] It is clear from these comments and from the Nova Scotia Court of Appeal's decision in *Burt,* above, that the Court has no good reason not to follow Judge François Lemieux's reasoning in *Nicholson*, above. In fact, this case law confirms the soundness of his analysis.

[39] The Court finds that, in order to determine whether the actions of dependants are time-barred, it must apply the discoverability rule and that it will therefore need to determine when the plaintiffs became aware of the facts of the cause of action against the defendant.

[40] In this regard, the Court notes that in *Nicholson*, Judge François Lemieux was able to rule on this question quite easily because it was not at issue. The parties appeared to have agreed that the plaintiffs acquired this knowledge on November 18, 1992. In that case, the plaintiffs' main argument was that, although they knew that they had a cause of action against the defendant since November 18, 1992, they had been victims of a legal complication caused by a change in the law regarding the limitation period applicable to their actions.

[41] As I pointed out, this case is distinct in that the plaintiffs dispute that they were, or could have been, aware of all the material facts relating to their cause of action prior to October or December 2002.

[42] Before addressing this issue, the Court notes that, in *Nicholson*, the Court rejected the plaintiffs' argument that it had inherent jurisdiction to extend the limitation period stipulated in section 649 of the Act. The parties did not submit any arguments that would allow the Court come to a different conclusion on this issue. It is clear that Lemieux J. considered the Ontario Court of Appeal's decision in *Ordon Estate v. Grail*, [1996] O.J. No. 3659, on which the plaintiffs base their argument (see paragraphs 38-41 of *Nicholson,* above).

[43] Nor is it useful to deal in detail with the argument based on rule 77 of the Rules. The description of the hypothetical defendant Jean Doe did not have anything to do with the defendant, nor with the cause of action instituted by the plaintiffs in October 2003.

[44] The Court is of the opinion that it should not decide on the exact date upon which the limitation period started, given that the discoverability rule applies. It is therefore not appropriate to make detailed comments on the evidence submitted by both parties because this is the trial judge's task.

[45] The principles applicable to summary judgment have not been debated before me. They were described in *Granville Shipping Co. v. Pegasus Lines Ltd*., [1996] 2 F.C. 853, which was affirmed by the Federal Court of Appeal in *Itv Technologies Inc. v. Wic Television Ltd.*, 2001 FCA 11, (2001) 11 C.P.R. (4th) 174.

[46] Recently, in *Macneil v. Canada*, [2004] F.C.J. No. 201, 2004 FCA 50, the Federal Court of Appeal reconsidered the scope of the powers conferred by subsection 216(3) of the Rules, especially in the context of a motion to dismiss an action because it was barred by a limitation period, and where there was an issue of discoverability.[6]

[47] I have performed a detailed review of the evidence before me in light of this case law.

[48] I am satisfied that the plaintiffs have established that there is an issue (see paragraph 44, above). For example, it is clear from Chantal Normandeau's February 20, 2002 affidavit and the responses to the commitments received from the estate of Bastien Lévesque, that the plaintiffs in T-2215-00 did not know until October 2002 that, contrary to what the Coroner stated in his report (page 7 paragraph 2), Captain Lévesque had notified Transport Canada regarding the modifications to his vessel. It would be inappropriate at this stage to find that this fact, which was explicitly alleged in the re-amended submission, was not relevant or necessary to establish the cause of action against the defendant.

[49] With respect to the action in T-2012-03, Maryse Landry argued in her affidavit that it was only after the wreck was discovered in December 2002 that she was able to confirm that the accident actually occurred because the hold hatches were not watertight, rather than because of her spouse's negligence. Although she did say in her examination that she always had the inner conviction that her husband had not been negligent, she also said she had no evidence in this regard and that Transport Canada had put forward many possible causes of the sinking.[7] When considering the arguments submitted by the plaintiffs, it is obvious that this is a complex issue.

[50] As Judge J. Edgar Sexton pointed out in paragraph 34 of *Macneil,* above, the Ontario Court of Appeal had already ruled twice that, on motions for summary judgment where there is an issue of "discoverability" under the *Limitations Act,* R.S.O. 1990, c. L-15, a motions judge should not make findings of fact (see *Aguoinie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A. Ont.); *Smyth v. Waterfall et al.* (2000), 50 O.R. (3d) 481 (C.A. Ont.), to similar effect, see *LaPierre Estate v. Fort Simpson Hospital*, [2005] N.W.T.J. No. 36; *Norn v. Stanton Regional Hospital*, [1998] N.W.T.J. No. 88).

[51] The Court is persuaded in this case that it would not be fair and equitable to rule on this issue without a trial. It is satisfied that it is preferable to consider this defence in the context of all the actions.

ORDER

For these reasons, the motion is dismissed with costs.

"Johanne Gauthier"

Judge

Appendix 1

Canada Shipping Act, R.S.C. 1985, c. 9, amended by S.C 1998, c. 16, sec. 17, abr. by S.C. 2001, ch. 6, s. 125.

646. Where the death of a person has been caused by a wrongful act, neglect or default that, if death had not ensued, would have entitled the person injured to maintain an action in the Admiralty Court and recover damages in respect thereof, the dependants of the deceased may, notwithstanding his death, and although the death was caused under circumstances amounting in law to culpable homicide, maintain an action for damages in the Admiralty Court against the same defendants against whom the deceased would have been entitled to maintain an action in the Admiralty Court in respect of the wrongful act, neglect or default if death had not ensued.

646. Si la mort d'une personne a été occasionnée par une faute, une négligence ou une prévarication qui, si la mort n'en était pas résultée, aurait donné droit à la blessée de soutenir une action devant la Cour d'Amirauté et de recouvrer des dommages-intérêts à cet égard, les personnes à charge du défunt peuvent, nonobstant son décès, et bien que sa mort ait été occasionnée dans des circonstances équivalant en droit à un homicide coupable, soutenir une action pour dommages-intérêts devant la Cour d'Amirauté contre les même défendeurs à l'égard desquels le défunt aurait eu droit de soutenir une action devant la Cour d'Amirauté en ce qui concerne cette faute, cette négligence ou cette prévarication, si la mort n'en était pas résultée.

647. (1) Every action under this Part shall be for the benefit of the dependants of a deceased person, and except as provided in this Part shall be brought by and in the name of the executor or administrator of the

647. (1) Toute action sous l'autorité de la présente partie doit être à l'avantage des personnes à charge du défunt et doit, sous réserve des autres dispositions de la présente partie, être

deceased [...].

649. Not more than on action lies for and in respect of the same subject-matter of complaint, and every action must be commenced not later than two years after the death of the deceased.

intentée par l'exécuteur testamentaire ou l'administrateur du défunt en son nom [...].

649. Une seule action est recevable à l'égard de la même plainte, et toute action de ce genre doit être intentée dans les deux ans qui suivent le décès du défunt.

Federal Courts Rules, SOR/98-106

216. (1) Where on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

(2) Where on a motion for summary judgment the Court is satisfied that the only genuine issue is

(*a*) the amount to which the moving party is entitled, the Court may order a trial of that issue or grant summary judgment with a reference under rule 153 to determine the amount; or

(*b*) a question of law, the Court may determine the question and grant summary judgment accordingly.

(3) Where on a motion for summary judgment the Court decides that there is a genuine issue with respect to a claim or defence, the Court may nevertheless grant summary judgment in favour of any party, either on an issue or generally, if the Court is able on the whole of the evidence to find the facts necessary to decide the questions of fact and law.

216. (1) Lorsque, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

(2) Lorsque, par suite d'une requête en jugement sommaire, la Cour est convaincue que la seule véritable question litigieuse est :

a) le montant auquel le requérant a droit, elle peut ordonner l'instruction de la question ou rendre un jugement sommaire assorti d'un renvoi pour détermination du montant conformément à la règle 153;

b) un point de droit, elle peut statuer sur celui-ci et rendre un jugement sommaire en conséquence.

(3) Lorsque, par suite d'une requête en jugement sommaire, la Cour conclut qu'il existe une véritable question litigieuse à l'égard d'une déclaration ou d'une défense, elle peut néanmoins rendre un jugement sommaire en faveur d'une partie, soit sur une question particulière, soit de façon

générale, si elle parvient à partir de l'ensemble de la preuve à dégager les faits nécessaires pour trancher les questions de fait et de droit.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2215-00

STYLE OF CAUSE: CHANTAL NORMANDEAU ET AL v. THE ESTATE OF BASTIEN LÉVESQUE ET AL

DOCKET: T-2012-03

STYLE OF CAUSE: AURISE LANDRY ET AL v. HER MAJESTY THE QUEEN

REASONS FOR ORDER AND ORDER BY MADAM JUSTICE

GAUTHIER

DATED: June 22, 2006

APPEARANCES:

Louis Buteau	FOR THE PLAINTIFFF
Jean-Robert Noiseux	FOR THE DEFENDANT HER MAJESTY THE QUEEN
Damien St-Onge	FOR THE DEFENDANT THE ESTATE OF BASTIEN LÉVESQUE

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Ottawa, Ontario	

St-Onge & Assels FOR THE DEFENDANT THE ESTATE OF

New Carlisle, Quebec BASTIEN LÉVESQUE

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[1] All relevant provisions are reproduced in Appendix 1.

[2] This provision has been part of the *Marine Liability Act*, S.C. (2001), c. 6 since August 8, 2001. Like the former provision, the new section 14 provides that the limitation period for an action brought by a dependant is two years from the date of death.

[3] Prior to issuing its final report, on November 2, 1999, the TSB sent Aurise Landry and Transport Canada a draft report on the "Brier Mist" accident.

[4] The bodies of these two victims were not found and/or identified.

[5] This provision, as it read before the 1998 amendment, set the limitation period to twelve (12) months after the date of death, instead of two (2) years.

[6] The Federal Court of Appeal specifically rejected the position taken by Justice Leigh F. Gower in *Malcolm v. Kushniruk*, [2005] Y.J. No. 79 at paragraph 8, cited by the defendant.

[7] See Graeme Mew, *The Law of Limitations*, 2nd ed., Markham, Ont., Butterworths, 2004, at p. 53, paragraph 2.2.1.