

Federal Court



Cour fédérale

Date: 20110120

Docket: T-864-09

Citation: 2011 FC 73

Ottawa, Ontario, January 20, 2011

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

**JAMES BUHLMAN AND
CINDY MAISONVILLE**

Plaintiffs

and

**BRADLEY RICHARD FRANCIS BUCKLEY,
KELLY BUCKLEY, JOE WILLIAM
BUCKLEY AND CAROL J. BUCKLEY**

Defendants

REASONS FOR ORDER AND ORDER

Introduction

[1] James Buhlman and Cindy Maisonville (the “Plaintiffs”) seek summary judgment pursuant to the *Federal Courts Rules*, SOR/98-106 (the “Rules”) against Bradley Richard Francis Buckley, Kelly Buckley, Joe William Buckley and Carol J. Buckley (the “Defendants”). The Plaintiffs seek an Order declaring that their maximum liability for all claims for physical injuries sustained by the Defendants, Bradley Richard Francis Buckley and Joe William Buckley, as a result of a boating

accident that occurred on July 26, 2002, is the sum of \$1,000,000 inclusive of pre-judgment interest and costs.

[2] The motion is brought pursuant to the *Marine Liability Act*, S.C. 2001, c. 6 (the “MLA” or the “Act”), the *Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol of 1996 to Amend the Convention on Limitation of Liability for Maritime Claims* (the “Convention”), and the Rules.

Background

[3] The Plaintiffs are owners and operators of a sport fishing lodge located on Eagle Lake in the town of Vermillion Bay, Ontario. The business is known as “Eagle Lake Sportsmen’s Lodge”. This fishing lodge offers lodging and sports activities, including the use of boats and motors. Eagle Lake is an inland navigable waterway approximately 70 miles long, covering approximately 68,000 acres.

[4] On or about July 22, 2006, Joe William Buckley, his son Bradley Richard Francis Buckley and two children arrived at the Eagle Lake Sportsmen’s Lodge and checked-in. This was not an *ad hoc* arrangement; the arrival of these members of the Buckley family was pursuant to reservations. The holiday package included the use of a seventeen-foot Lund Outfitter boat with a 40 horsepower Yamaha engine attached.

[5] The Lund Outfitter vessel was owned by Eagle Lake Sportsmen’s Lodge and licensed under Canada Department of Transport licence number 12E 22317 with hull identification number

ZLUN0148D999. The 40 horsepower Yamaha motor was leased by the Plaintiffs' business. The tonnage of the Lund vessel and motor was less than 20 tons.

[6] In the evening of July 26, the Buckleys went to the dock for a tour of parts of Eagle Lake. The Defendants, Joe William Buckley and Bradley Buckley went out on the seventeen-foot Lund Outfitter boat under the operation of Joe William Buckley. The Plaintiff Buhlman operated the Crestliner vessel with the two children as his passengers. The Crestliner vessel was approximately seventeen feet long, with a tonnage of less than 20 tons and was registered under Transport Canada license number 09280181, with hull identification number CRC23242J506. The motor attached to the vessel operated by the Plaintiff Buhlman was a 50 horsepower Yamaha engine.

[7] These two vessels, the Lund Outfitter and the Crestliner, were both owned by Eagle Lake Sportsmen's Lodge and used in the Plaintiffs' business. Use of the boats and motor was included in the vacation package purchased by the Defendants.

[8] The two boats travelled to a few fishing spots and engaged in some brief fishing. The boats began to return to the lodge before dark. On the return trip, the Crestliner vessel operated by the Plaintiff Buhlman collided with the Lund Outfitter vessel operated by Joe William Buckley. As a result of the collision, Bradley Buckley suffered serious and catastrophic personal injuries including a severe head injury, fractured skull, extensive scalp lacerations with resulting right leg spasticity and weakness, gait dysfunction, right arm and hand incoordination and weakness. Joe William Buckley was also injured.

[9] On July 25, 2007, an action was commenced in the Ontario Superior Court of Justice, Court file number 5488821, by Bradley Richard Francis Buckley, Kelly Buckley, Joe William Buckley and Carol J. Buckley as Plaintiffs. Bradley Richard Francis Buckley and Kelly Buckley are married to each other. James Buhlman and Cindy Maisonville were named as Defendants.

[10] The Defendant, Joe William Buckley is the father of Bradley Buckley. The Defendant, Carol J. Buckley is the spouse of Joe William Buckley. These Defendants brought their action as plaintiffs before the Ontario Superior Court of Justice, advancing claims in negligence and damages pursuant to the *Family Law Act*, R.S.O. 1990, Chapter F.3. The Buckley family seeks recovery of damages in the area of \$8.2 million, together with pre-judgment interest and costs, in the action filed before the Ontario Superior Court of Justice.

[11] This motion for summary judgment deals only with the issue of limitation of liability and whether the limits of liability set out in subsection 28(1) apply.

Statutory Context and Submissions

[12] Part 3 and Part 4 of the MLA contain provisions concerning the limitation of liability of ship owners for claims arising out of death or personal injury sustained in connection to the operation of a ship. Part 3 is entitled “Limitation of Liability for Maritime Claims” and Part 4 is entitled “Liability for Carriage of Passenger by Water”.

[13] Part 4 of the Act was addressed by Justice Brown of the British Columbia Supreme Court in *Cuppen v. Queen Charlotte Lodge Ltd.* (2005), 32 C.C.L.T. (3d) 103, at paragraphs 88 and 89, which read as follows:

Part 4 of the Act provides for liability for carriage of passengers by water. For Part 4 to apply, the plaintiff must be a passenger for the purposes of the Convention (the Athens Convention, Part 1 of Schedule 2 to the Act). Article 1(4) of the Convention defines a passenger as the person carried in a ship, under a contract of carriage, or one who accompanies a vehicle [sic] or live animal which are covered by a contract for carriage of goods. A contract of carriage is defined as a contract made for the carriage by sea of a passenger. The carrier is defined as a person by or on behalf of whom a contract of carriage has been concluded, whether the carriage is actually performed by him or by a performing carrier.

Part 4 clearly applies to the normal contract of carriage i.e. that of one who is carried from one point to another by a carrier.

[14] The Buckleys were not under a contract of carriage for the purpose of being “carried from one point to another by a carrier”, so Part 4 does not apply. It has also been held that Part 3 applies to pleasure craft, while Part 4 does not; see *Gundersen v. Finn Marine Ltd.* (2008), 302 D.L.R. (4th) 266.

[15] This motion for summary judgment involves the interpretation and application of sections 28 and 29, found in Part 3 of the MLA, which provide as follows:

Liability for ships under 300 tons	Navires d’une jauge inférieure à 300 tonneaux
28. (1) The maximum liability for maritime claims that arise on any distinct occasion involving a ship with a gross tonnage of less than 300 tons, other than claims mentioned in section 29, is	28. (1) La limite de responsabilité pour les créances maritimes — autres que celles mentionnées à l’article 29 — nées d’un même événement impliquant un navire jaugeant moins de 300 tonneaux est fixée

	à :
(a) \$1,000,000 in respect of claims for loss of life or personal injury; and	a) 1 000 000 \$ pour les créances pour décès ou blessures corporelles;
(b) \$500,000 in respect of any other claims.	b) 500 000 \$ pour les autres créances.
Calculation of tonnage	Jauge du navire
(2) For the purposes of subsection (1), a ship's gross tonnage shall be calculated in accordance with the tonnage measurement rules contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969, concluded at London on June 23, 1969, including any amendments, whenever made, to the Annexes or Appendix to that Convention.	(2) Pour l'application du paragraphe (1), la jauge brute du navire est calculée conformément aux règles de jaugeage prévues à l'annexe I de la Convention internationale de 1969 sur le jaugeage des navires, conclue à Londres le 23 juin 1969, y compris les modifications dont les annexes ou l'appendice de cette convention peuvent faire l'objet, indépendamment du moment où elles sont apportées.
Passenger claims, no Canadian maritime document	Créances de passagers — navire sans certificat
29. (1) The maximum liability for maritime claims that arise on any distinct occasion for loss of life or personal injury to passengers of a ship for which no Canadian maritime document is required under Part 4 of the Canada Shipping Act, 2001 is the greater of	29. (1) La limite de responsabilité pour les créances maritimes nées d'un même événement impliquant un navire pour lequel aucun document maritime canadien n'est requis au titre de la partie 4 de la Loi de 2001 sur la marine marchande du Canada, en cas de décès ou de blessures corporelles causés à des passagers du navire, est fixée au plus élevé des montants suivants :
(a) 2,000,000 units of account, and	a) 2 000 000 d'unités de compte;

(b) the number of units of account calculated by multiplying 175,000 units of account by the number of passengers on board the ship.	b) le produit de 175 000 unités de compte par le nombre de passagers à bord du navire.
Passenger claims, no contract of carriage	Créances de passagers sans contrat de transport
(2) Notwithstanding Article 6 of the Convention, the maximum liability for maritime claims that arise on any distinct occasion for loss of life or personal injury to persons carried on a ship otherwise than under a contract of passenger carriage is the greater of	(2) Malgré l'article 6 de la Convention, la limite de responsabilité pour les créances maritimes nées d'un même événement, en cas de décès ou de blessures corporelles causés à des personnes transportées sur un navire autrement que sous le régime d'un contrat de transport de passagers, est fixée au plus élevé des montants suivants :
(a) 2,000,000 units of account, and	a) 2 000 000 d'unités de compte;
(b) 175,000 units of account multiplied by	b) le produit de 175 000 unités de compte par :
(i) the number of passengers that the ship is authorized to carry according to its certificate under Part 4 of the Canada Shipping Act, 2001, or	(i) le nombre de passagers que peut transporter le navire aux termes du certificat requis au titre de la partie 4 de la Loi de 2001 sur la marine marchande du Canada,
(ii) if no certificate is required under that Part, the number of persons on board the ship.	(ii) le nombre de personnes à bord du navire, si aucun certificat n'est requis au titre de cette partie.
Exception	Exception
(3) Subsection (2) does not apply in respect of	(3) Le paragraphe (2) ne s'applique pas :
(a) the master of a ship, a	a) dans le cas du capitaine d'un

member of a ship's crew or any other person employed or engaged in any capacity on board a ship on the business of a ship; or	navire, d'un membre de l'équipage et de toute autre personne employée ou occupée à bord, en quelque qualité que ce soit, pour les affaires de ce navire;
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(b) a person carried on board a ship other than a ship operated for a commercial or public purpose.	b) dans le cas d'une personne transportée à bord d'un navire autre qu'un navire utilisé à des fins commerciales ou publiques.
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Definition of "passenger"	Définition de « passager »
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(4) In subsection (1), "passenger" means a person carried on a ship in circumstances described in paragraph 2(a) or (b) of Article 7 of the Convention.	(4) Au paragraphe (1), « passager » s'entend de toute personne transportée sur le navire dans les cas prévus aux alinéas a) et b) du paragraphe 2 de l'article 7 de la Convention.
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Definition of "unit of account"	Définition de « unités de compte »
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(5) In subsections (1) and (2), "unit of account" means a special drawing right issued by the International Monetary Fund.	(5) Aux paragraphes (1) et (2), « unités de compte » s'entend des droits de tirage spéciaux émis par le Fonds monétaire international.
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[16] Section 28 of the MLA applies only to "maritime claims", as defined in section 24 of the MLA as being "a claim described in Article 2 of the Convention for which a person referred to in Article 1 of the Convention is entitled to limitation of liability".

[17] Article 2, paragraph 1(a) of the Convention provides as follows:

Claims subject to limitation	Créances soumises à la limitation
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1. Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:

(a) claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring **on board** or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom; [emphasis added]

1. Sous réserves des articles 3 et 4, les créances suivantes, quel que soit le fondement de la responsabilité, sont soumises à la limitation de la responsabilité :

a) créances pour mort, pour lésions corporelles, pour pertes et pour dommages à tous biens (y compris les dommages causés aux ouvrages d'art des ports, bassins, voies navigables et aides à la navigation) survenus à bord du navire ou en relation directe avec l'exploitation de celui-ci ou avec des opérations d'assistance ou de sauvetage, ainsi que pour tout autre préjudice en résultant;

[18] The claims for which the Defendants are seeking recovery in the Ontario Superior Court proceedings clearly fall within the scope of Article 2, paragraph 1(a). The injuries sustained occurred both aboard a ship, the Outfitter, operated on inland navigable waters and in direct connexion with the operation of a ship, the Crestliner, in inland navigable waters.

[19] It has been recognized that Canadian maritime law applies to incidents involving non-commercial vessels that occur on wholly inland navigable waterways and in that regard, I refer to the decision in *Whitbread v. Walley*, [1990] 3 S.C.R. 1273 at pages 1294 to 1295.

[20] It is common ground between the parties that the two “ships” involved in the incident were each approximately twenty tons, well within the tonnage referred to in section 28 of the MLA.

[21] The Plaintiffs, James Buhlman and Cindy Maisonville, are “owners” of the Crestliner vessel, as described in Article 1 of the Convention and the Plaintiff Buhlman is an “operator” of that ship. The Plaintiffs Buhlman and Maisonville were also the owners of the Outfitter vessel; however the Defendant Joe William Buckley was the “operator” of that vessel at the relevant time.

[22] It is agreed between the parties that the Buckley Defendants were not “passengers” because they were not present on their “vessel” under “a contract of passenger carriage” as required by Article 7, paragraph 2(a) of the Convention.

[23] Section 28 of the MLA sets out the maximum liability for a maritime claim as being either \$1 million for claims for loss of life or personal injury and \$500,000 for any other claim, other than the claims “mentioned in section 29”.

[24] Subsection 29(1) establishes different limits of liability for passengers travelling under a contract of carriage; see subsections 29(1) and (4).

[25] Subsection 29(2) establishes the limits of liabilities for passengers on board a ship who are not subject to a contract of carriage. Subsection 29(3) creates an exception to the application of subsection 29(2). Subsection 29(3) provides as follows:

Exception	Exception
(3) Subsection (2) does not apply in respect of	(3) Le paragraphe (2) ne s'applique pas :
(a) the master of a ship, a member of a ship's crew or any other person employed or engaged in any capacity on board a ship on the business of a ship; or	a) dans le cas du capitaine d'un navire, d'un membre de l'équipage et de toute autre personne employée ou occupée à bord, en quelque qualité que ce soit, pour les affaires de ce navire;
(b) a person carried on board a ship other than a ship operated for a commercial or public purpose.	b) dans le cas d'une personne transportée à bord d'un navire autre qu'un navire utilisé à des fins commerciales ou publiques.

[26] The parties submit that paragraph 29(3)(b) is the critical issue in the present motion for summary judgment. The Plaintiffs argue that the Buckley Defendants were out on the lake, in a vessel provided as part of their holiday package at the Eagle Lake Sportsmen's Lodge, that is on a ship that was operated for a recreational, not a commercial purpose.

[27] The Plaintiffs in this action argue that when read together, sections 28 and 29 of the Act impose different limitations of liability depending on whether an injured party was being carried under a contract of carriage, that is subject to subsection 29(1) or on a vessel that was operated for a commercial purpose but without a contract of carriage, for example, a whale watching business, subject to subsection 29(2). The Plaintiffs submit that there is another category that is addressed by sections 28 and 29 together, that is the case of gratuitous passengers on a vessel being operated for other than a commercial purpose. They argue that in such a situation, the limitation set out in section 28 applies.

[28] The Plaintiffs further argue that the vessels available at the Eagle Lake Sportsmen's Lodge, including the two vessels involved in the accident on July 22, 2006, are used in the course of a commercial enterprise, that is the operation of the lodge with its associated amenities, including access to water sports on Eagle Lake. At the same time, the Plaintiffs submit that at the time of the incident, the two vessels were being used in the course of a recreational purpose, that is sport fishing.

[29] The Plaintiffs argue that sport fishing, from vessels that are otherwise used in a commercial enterprise, is predominantly a recreational activity and accordingly, subject to the limitation provisions set out in section 28 of the Act.

[30] For their part, the Buckley Defendants agree that the sole issue in this motion is whether the maximum liability available pursuant to subsection 29(2) of the Act applies to the their claim for damages, having regard to the exceptions set out in paragraph 29(3)(b).

[31] The Defendants submit that while the Eagle Lake Sportsmen's Lodge fishing vessels served both a commercial and a recreational purpose, paragraph 29(3)(b) should be read such as if "one" purpose of the two vessels was a commercial purpose, then the greater limitation amount, pursuant to subsection 29(2) is to apply.

Discussion and Disposition

[32] In their submissions, Counsel directed their attention to the nature of the operation of the two pleasure craft, whether it was for a commercial or recreational purpose. With respect, in my opinion, this focus is misplaced. It is not the purpose of the “voyage” that is the subject of sections 28 and 29, but the role of the vessel for which limitation of liability is sought.

[33] The Plaintiffs bring this action not to determine liability but to determine the limitation of their liability in accordance with the Act.

[34] On the facts of this case, Bradley Buckley and Joe William Buckley were not passengers on the vessel operated by the Plaintiff Buhlman. Whether they were on board the Lund Outfitter operated by Joe William Buckley, for a commercial or recreational purpose, is irrelevant in this motion because the motion is a request by the owners and operator of the Buhlman vessel to limit their liability. That liability is argued to be as operators of the Buhlman vessel, not as coincidental owner of the Buckley vessel. The key question is the status of Bradley Buckley and Joe William Buckley *vis-à-vis* the Crestliner vessel.

[35] Sections 28 and 29 address two different scenarios. Section 28 deals with the situation where a claim is “involving a ship with a gross tonnage of less than 300 tons, other than claims mentioned in section 29”. Section 29 deals with claims by passengers, either under a contract of carriage or in the absence of such a contract.

[36] To engage subsection 29(1), the individual claiming damages must be a “passenger” on the vessel said to be negligent or liable. For the purpose of this subsection, “passenger” is defined by reference to Article 7, paragraph 2(a) or paragraph 2(b) of the Convention, namely “under a contract of passenger carriage”, or someone accompanying a vehicle or livestock under a contract for the carriage of goods, respectively. Since neither Bradley Buckley nor Joe William Buckley fit the definition of a “passenger” on the Crestliner vessel, subsection 29(1) does not apply.

[37] It is possible for a person to be on board a ship for a recreational or commercial purpose, in the absence of a contract of passenger carriage. That person is not a “passenger” for the purpose of the Convention or subsection 29(1) of the Act. Subsection 29(2) must be read with that in mind since it applies to “persons carried on a ship other than under a contract of passenger carriage”. In my opinion, the words “persons carried on a ship” refer to passengers in the ordinary sense of the term, but not persons “under a contract of passenger carriage”, that is, “passengers”. In order to engage subsection 29(2) the injured persons must be claiming against the vessel on which they were on board.

[38] Bradley Buckley and Joe William Buckley were not on board the Crestliner vessel. They were not “persons carried on a ship [that is, the Crestliner] other than under a contract of passenger carriage”, as described in of subsection 29(2).

[39] Subsection 28(1) of the Act is broader. It applies to “maritime claims that arise on any distinct occasion involving a ship with a gross tonnage of less than 300 tons, other than claims mentioned in section 29”.

[40] There is no doubt that the Buckleys' claim before the Ontario Superior Court is a "maritime claim" within the meaning of section 28 of the MLA. The definition of "maritime claim" in section 24 of the MLA incorporates by reference Article 2, paragraph 1(a) of the Convention, which speaks of claims for "personal injury... occurring on board or in direct connexion with the operation of the ship".

[41] In my opinion, the words "the ship" mean the ship seeking to limit liability. Bradley and Joe William Buckley were not injured on the Crestliner vessel. They seek recovery for injuries sustained "in direct connexion with the operation" of that vessel.

[42] Since neither Bradley Buckley nor Joe William Buckley were on board on the Crestliner, then section 29 of the Act does not apply. This means that only section 28 applies and liability for the personal injuries will be limited in accordance with that provision. Liability, if any, will be limited to \$1,000,000, pursuant to paragraph 28(1)(a).

[43] The Plaintiffs seek a declaration that their liability is limited to \$1,000,000, inclusive of pre-judgment interest and costs.

[44] I am not persuaded that the limitation of \$1,000,000 should include pre-judgment interest. I regard interest as a separate matter and refer to the decision in *Stockkebye and Hvalsoe v. Gordon and Stamp*; "*The Gertrude*", 6 Asp. M.L.C. 224 where the Court said the following:

...That decision establishes the principle upon which the Admiralty Court proceeds in these cases, viz., that a *restitutio in integrum*

should be made as far as it can be, and that cannot be done unless interest is allowed on the amount that has, *ex hypothesi*, been retained from the plaintiff. That appears to me to be a sound and equitable rule, and if it is not a rule of the common law courts, it is in my judgment to be regretted...

The same principle was adopted and applied in *McCunn v. The London and St. Katharine Docks Co.*; “*The Baron Aberdare*”, 6 Asp. M.L.C. 225.

[45] In the result, the motion for summary judgment is granted and an Order will issue accordingly. Since the Plaintiffs have succeeded upon an argument that they did not raise and the Defendants did not answer, in the exercise of my discretion pursuant to section 400 of the Rules, I make no order as to costs.

ORDER

THIS COURT ORDERS THAT the maximum liability of James Buhlman and Cindy Maisonville for all claims arising out of bodily injuries sustained by Bradley Richard Francis Buckley and Joe William Buckley in a boating accident that occurred on Eagle Lake, District of Kenora, Province of Ontario on July 22, 2006 is \$1,000,000 pursuant to section 28 of the *Marine Liability Act*, S.C. 2001, c. 6, exclusive of pre-judgment interest.

In the exercise of my discretion pursuant to the *Federal Courts Rules*, SOR/98-106, I make no order as to costs.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-864-09

STYLE OF CAUSE: JAMES BUHLMAN AND CINDY MAISONVILLE v.
BRADLEY RICHARD FRANCIS BUCKLEY, KELLY
BUCKLEY, JOE WILLIAM BUCKLEY and CAROL J.
BUCKLEY

PLACE OF HEARING: Toronto, ON

DATE OF HEARING: September 20, 2010

**REASONS FOR ORDER
AND ORDER:** HENEGHAN J.

DATED: January 20, 2011

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