Docket: CA161675
Date: 20000728

NOVA SCOTIA COURT OF APPEAL

[Cite as: *Burt v. LeLacheur*, 2000 NSCA 90]

Glube, C.J.N.S., Chipman and Cromwell, JJ.A.

BETWEEN:

FLORA BURT and **SHELLEY DAWN SEWARD**

Appellants

- and -

HOWARD LeLACHEUR

Respondent

REASONS FOR JUDGMENT

Counsel:	Gerald A. MacDonald, for the appellants Paul D. McLean, for the respondent
Appeal Heard:	June 13, 2000
Judgment Delivered:	July 28, 2000
THE COURT:	Appeal allowed in part with costs plus disbursements in the cause per reasons for judgment of Chipman, J.A.; Glube, C.J.N.S. and Cromwell, J.A. concurring.

Chipman, J.A.

[1] This is an appeal from a decision of Wright, J. in chambers dismissing the appellants' application to strike a paragraph from the respondent's defence pleading limitation, and from his decision dismissing the appellants' action in consequence thereof.

[2] On August 12, 1972, the appellant, Flora Burt, was married to Vincent LeLacheur and lived with him in Louisdale, Richmond County. On the afternoon of that day, her husband returned from work and left in his vehicle, accompanied by the respondent, to go to Port Hawkesbury. The respondent was Vincent LeLacheur's nephew. The appellant, Flora Burt, did not know who was driving her husband's vehicle, but it was her understanding that it was her husband. Her husband had the keys to the vehicle. Later in the day she learned that there had been an accident and that her husband was killed. She was distraught, heavily sedated, and hospitalized. She had little recollection of the immediate time period following the accident due to the heavy sedation and her state of mind. She gave birth to the appellant, Shelley Dawn Seward, on September 15, 1972, and upon her release from hospital went to live with relatives. Some time later she remarried.

[3] In February of 1997 the appellant, Flora Burt, was advised by her niece, Kelly LeLacheur, that the respondent had told his uncle that he, in fact, was driving the vehicle on August 12, 1972, at the time of the accident resulting in Vincent LeLacheur's death. She was also told that he advised the RCMP in Sydney of that fact. This was the

first intimation she had that the respondent admitted being the driver of the vehicle at the time of the accident. She had never previously had reason to suspect that it was not her husband who was driving.

[4] The appellants subsequently sought legal advice and commenced this proceeding under the **Fatal Injuries Act** on July 18, 1997. The originating notice was served on the respondent on November 4, 1997. On February 18, 1998, a defence on the respondent's behalf was filed by Judgment Recovery N.S. Ltd. pleading in §2 that the action was statute barred. Reference was made to the provisions of the Statute of Limitations, but it has been taken by the parties to include reference to s. 10 of the **Fatal Injuries Act**, which provides that every action brought thereunder shall be commenced within twelve months after the death of the deceased person.

[5] The appellants' application to strike the plea of limitations was filed on September 24, 1999. It was made pursuant to Rule 14.25 of the **Civil Procedure Rules** or in the alternative as an application under s. 3(2) of the **Limitation of Actions Act** to disallow the limitation defence. The application was heard by Wright, J. on October 7, 1999. Before the chambers judge was an affidavit of the appellant, Flora Burt, an affidavit of counsel for the respondent to which was attached a copy of the discovery transcript of the appellant Flora Burt, and an affidavit of the manager of Judgment Recovery N.S. Ltd.

[6] By his decision released on November 2, 1999, Wright, J. dismissed the application to strike the defence of limitations, and further dismissed the appellants' action on the ground that it was barred by s. 10 of the **Fatal Injuries Act**. There was, he further held, no evidence to suggest that there had been any fraudulent concealment on the respondent's part respecting the facts surrounding the accident.

[7] There are two issues on this appeal: (1) whether Wright, J. was correct in refusing to disallow the defence based on limitation; and (2), whether Wright, J. was correct in dismissing the appellants' action on the application before him.

Issue 1

[8] On the application before Wright, J. the appellants relied on the discoverability rule which is a rule of interpretation applied by courts in construing limitation provisions. See **Kamloops v. Nielson**, [1984] 2 S.C.R. 2, and **Central Trust Company v. Rafuse**, [1986] 2 S.C.R. 147. Briefly, the rule is that where a limitation period can be construed as running from the accrual of the cause of action or from the occurrence of some component element thereof time will not run until the plaintiff has discovered, or ought by the exercise of reasonable diligence to have discovered, the material facts upon which the cause of action is based. The rule has no application where a limitation period runs from a fixed event unrelated to the accrual of the cause of action. The reason for the rule is the unfairness that would result from holding that a limitation period barred a cause of action before the plaintiff knew or ought to have known there was a cause of action.

[9] In coming to the conclusion that the discoverability rule was of no assistance to the appellants in meeting a defence based on s. 10 of the **Fatal Injuries Act**, Wright, J. referred with approval to the following passage from the decision of Twaddle, J. A. on behalf of the Manitoba Court of Appeal in **Fehr v. Jacob** (1993), 5 W.W.R. 1 at p. 6:

> In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed. (Emphasis added)

[10] Wright, J. also referred to the decision of this court in **Sawh v. Petrie** (1987), 76 N.S.R. (2d) 223 where Matthews, J.A. said at p. 234:

> The principle or rule as expressed in **Kamloops** and **Central Trust** is applicable where the enactment speaks of the tolling of prescription after the cause of action arose. It is not applicable here where the tolling begins "after the date in the matter complained of such professional services . . . terminated".

[11] Wright, J. observed that s. 10 of the **Fatal Injuries Act** identifies a specific period for the tolling of prescription, i.e. the date of death of the deceased person. It is, he said, without regard to the injured party's knowledge.

[12] The question is whether Wright, J. was correct in holding that the discoverability rule does not apply to s. 10 of the **Fatal Injuries Act**. The rule is one of construction to be applied by courts in addressing limitation periods. Some recent examples of its application provide insight into how far courts will lean to give it effect.

[13] In **Kamloops, supra** and **Central Trust v. Rafuse, supra** the Supreme Court of Canada held that in cases where a statute of limitations provided that actions were barred after the expiration from a certain time after the cause of action arose, time ran not from when the damage came into existence but from when the material facts on which the cause of action was based were discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. The Court in **Kamloops** also applied the discoverability rule to a notice provision in the legislation requiring that notice be given to the municipality within two months from the date the "damages were sustained".

[14] In **Desormeau v. Holy Family Hospital,** [1989] 5 W.W.R. 186, the Saskatchewan Court of Appeal addressed the issue of the application of the discoverability rule to a limitation period respecting actions against hospitals and other professionals within three months "from the date on which the damages are sustained" unless the court, on application not later than one year from that date, permits the claim to be made. The applicant underwent treatment at the respondent hospital for a growth in a sinus area. He alleged that he was not aware that the growth was potentially cancerous until some six months after the last treatment. His application for an extension of time was dismissed. On an appeal to the Saskatchewan Court of Appeal, an application to introduce fresh evidence was granted and the appeal was allowed. Sherstobitoff, J.A., on behalf of the court, referred to such authorities as **Kamloops v. Nielson, supra** and **Central Trust v. Rafuse, supra**, and said at p. 191:

> There is no principled reason why the same discoverability rule should not apply to the limitation period in this case, notwithstanding that the legislation in the cases above cited termed the starting date for calculation of the limitation period to be the date the cause of action arose, while the legislation in this case termed the starting date to be the date on which the damages were sustained. Exactly the same reasoning applies: the absurdity and injustice of an action being barred by a limitation period before the right of action is known to, or capable of being discovered with reasonable diligence by, the person suffering the loss requires the courts to apply the discoverability rule.

[15] In **M.(K.) v. M.(H.)**, [1992] 3 S.C.R. 6, the Supreme Court of Canada applied the discoverability rule in a case of incest, an assault and battery governed by a limitation period that commenced to run from "when the cause of action arose". The court held that time should begin to run only when the plaintiff was reasonably capable of discovering the wrongful nature of the perpetrator's acts and their connection to her injuries.

[16] In **Novak v. Bond** (1999), 172 D.L.R. (4th) 185, the Supreme Court of Canada interpreted a statutory provision enacting the discoverability rule. While the court was unanimous as to the test to be applied in interpreting the provision, there was disagreement between the majority and the minority as to the application of the test.

[17] In **Peixeiro v. Haberman**, [1997] 3 S.C.R. 549, the issue was whether an action was barred, by s. 206(1) of the **Ontario Highway Traffic Act** which provided a limitation period of two years from the time "when the damages were sustained". Under Ontario's no-fault scheme, an action could not be brought for damages for personal injuries unless the plaintiff's injuries met a defined threshold relating to permanence. The respondent was injured in a two-car accident in October of 1990, in which he and

the appellant were drivers. The respondent consulted his physician and was advised that he had soft-tissue injuries from a form of contusion to the right side of his back. X-rays disclosed nothing unusual. In January of 1992 the respondent was involved in a second accident. His resultant injuries were again diagnosed as being soft tissue in nature. In June of 1993, however, a CT scan was performed which revealed a disc protrusion in the respondent's spine. He commenced an action against the appellant in July of 1994, more than two years after the collision giving rise to the injuries. A motion was launched to determine whether the claim was barred by the two-year limitation period. The Chambers judge ruled that the action was barred and this decision was reversed by the Ontario Court of Appeal.

[18] On appeal to the Supreme Court of Canada, the court held that the discoverability principle applied to avoid the injustice of precluding an action before a person was aware the injuries sustained met the statutory requirement. Time under s. 206(1) did not begin to run until it was reasonably discoverable that the injury met the relevant threshold. Major, J. on behalf of the court referred in §37 with approval to the passage quoted above from **Fehr v. Jacob, supra**, and stated that the discoverability rule is an interpretative tool for the construing of limitation statutes which ought to be considered each time a limitations provision is an issue. He continued at §38:

> The appellant submitted here that the general rule of discoverability was ousted because the legislature used the words "damages were sustained", rather than the date "when the cause of action arose". It is unlikely that by using the words "damages were sustained", the legislature intended that the determination of the starting point of the limitation period should take place without regard to the injured party's knowledge. It would require clearer language to displace the general rule of discoverability. The use of the phrase "damages were sustained" rather than "cause of action arose", in the context of the HTA, is a

> distinction without a difference. The discoverability rule has been applied by this Court even to statutes of limitation in which plain construction of the language used would appear to exclude the operation of the rule. Kamloops, supra, dealt in part with s. 739 of the Municipal Act, R.S.B.C. 1960, c. 255, which required that notice should be given within two months "from and after the date on which [the] damage was sustained". However, this Court applied the discoverability rule even with respect to this section: see Kamloops, supra, at pp. 35-40. (emphasis added)

[19] Although Major, J. refers to the rule as an interpretative tool to be applied in each case, he also said at §36:

> Since this Court's decisions in [**Kamloops** and **Central Trust V. Rafuse**] discoverability is a general rule applied to avoid the injustice of precluding an action before the person is able to raise it.

[20] Thus, the discoverability rule was applied to preclude the injustice of preventing a cause of action from being asserted before the plaintiff was aware, or could with the exercise of reasonable diligence have been aware, of its existence. The court rejected the argument that the legislation at issue provided a fixed date and was not subject to the discoverability rule.

[21] In **Norn v. Stanton Regional Hospital**, [1998] N.W.T.R. 355, 26 (S.C.) Vertes, J. of the Northwest Territories Supreme Court, dismissed an application in chambers by the defendant seeking summary judgment because an action was commenced beyond the period of two years from the date of death of a deceased, the time prescribed in s. 6(2) of the **Fatal Accidents Act** of the Northwest Territories for bringing an action. The limitation period in that act was in terms similar to that found in s. 10 of the **Fatal Injuries Act**, that is, that it was expressed in terms of the death of the deceased - the very death that gave rise to the cause of action. This is the only case in Canadian

jurisprudence to which our attention has been drawn where an attempt has been made to apply the discoverability principle to such language. Vertes, J. referred to the application of the principle at §9 of his decision:

> ... Counsel submitted that there must be some knowledge on the part of a plaintiff that the death was "caused by a wrongful act, neglect or default" before the limitation period starts to run. It is, in other words, only with the knowledge that a cause of action exists that the time can start to run against the plaintiff. Otherwise, even though one may be aware of the death, one may never have a chance to go to court because one did not know, within the time limit, that a cause of action existed. I think a good argument can be made that s. 2 creates the statutory cause of action (since such an action does not exist independently of statute) and has nothing to do with the limitations period stipulated in s. 6 of the Act. But, for reasons that follow, I need not come to a definitive answer on this point.

[22] After referring to **Peixeiro** and **Fehr, supra**, Vertes, J. addressed the question whether the court in **Peixeiro** had ruled that the discoverability rule had no application to statutes with time running from a fixed period. Vertes, J. said at §15:

> 15. If there is a contradiction here then, with respect, it is for the Supreme Court to sort out, not I on a summary judgment application. I note, however, that already one Court of Appeal judgment has referred to Peixeiro as deciding that the discoverability rule is a rule of general application: Aguonie v. Galion Solid Waste Material Inc. (1998), 156 D.L.R. (4th) 222 (Ont. C.A.), at pages 230 - 231. I also note that at least one commentator suggests that, by the recognition of knowledge of any condition precedent to the action as a factor, the Supreme Court has confirmed the application of the discoverability rule to questions of causation. B. Legate, in her recent article "Limitation Periods in Medical Negligence Actions Post-Peixeiro", (1998) 20 Advocates' Quarterly 326, wrote as follows on the impact of Peixeiro on the application of the discoverability rule to the causation element as part of a cause of action (at page 334):
>
> > The Supreme Court of Canada has reframed and clarified the rule in Peixeiro by confirming its applicability to conditions precedent to an action being successful. Each element of the cause of action must therefore be known to the plaintiff or with reasonable diligence known to her. Fault, causation and damage are each elements of the cause of action.
>
> 16. If Ms. Legate is correct in these views, then she would appear to support the submission of plaintiffs' counsel that, even though the date of death is known, the limitation period is subject to the plaintiff's knowledge that they have a cause of action, i.e., their knowledge of the causation element, that being equated to a condition precedent to commencing action.

[23] Vertes, J. was satisfied that the matter was not one to be dealt with on a summary judgment application, but should proceed to trial. One of the issues for trial was the very same issue as that with which we are confronted.

[24] In **Grenier et al. v. Canadian General Insurance Company** (1999), 43 O.R. (3rd) 715 (C.A.) a judgment in an action arising out of a motor vehicle collision was obtained by the plaintiffs against B, who they believed was uninsured. The limitation provision for commencing an action against the automobile insurer of a judgment debtor provided that the action was barred "after the expiration of one year from the final determination of the action against the insured". The plaintiffs learned, after the expiration of the time limit, that B was in fact insured, and brought an action against the insurer. A motion was made to determine the applicability of the limitation period. The motions judge held that the discoverability rule applied to s. 258(2) of the **Insurance Act** and hence operated to postpone the running of the limitation period until the plaintiff was aware the judgment debtor was insured. On appeal to the Ontario Court of Appeal the appeal was dismissed. In giving the reasons of the court, Morden, A.C.J.O. referred to **Peixeiro, supra**, and **Fehr, supra**. He concluded that **Fehr** was distinguishable because there the event which triggered the running of time was the termination of services, which was not a constituent element of the plaintiff's cause of action. Judgment against an insured person was a constituent element of the cause of action against the insurer created by the **Insurance Act**. Under the discoverability rule the triggering event does not come into existence until the plaintiff has, or reasonably

should have, knowledge not only that he or she has a judgment but also that it is a judgment against an insured person. Morden, A.C.J.O. continued on p. 6:

> Canadian General submits that the limitation provision in this case is like that in *Fehr* and in other cases like it (see, for example, *Martin v. Perrie*, [1986] 1 S.C.R. 41, 24 D.L.R. (4th) 1, and *Snow v. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182, 29 C.R.R. (2d) 336 (Nfld. C.A.)) and that its wording prevents the application of the discoverability rule to it. The triggering event for the commencement of the running of the limitation period in *Fehr* was the date when the professional services terminated. The termination of services is, of course, not part of the plaintiff's cause of action. With respect, I do not think that the triggering event in s. 258(2) of the *Insurance Act* - the final determination of the action against the insured - is the same as that in *Fehr*. It is a constituent element of the cause of action which is created by s. 258(1) - a judgment against a person insured by a motor vehicle liability policy. Under the discoverability rule this triggering event does not come into existence until the plaintiff has, or reasonably should have, knowledge not only that he or she has a judgment but, also, that it is a judgment against an insured person.
>
> Although the discoverability rule is a rule of interpretation and not a general substantive rule, it is a strong rule. In Peixeiro, Major J. said that it applies to statutes of limitation "in which plain construction of the language used would appear to exclude the operation of the rule". This does not mean that it would apply to a provision the wording of which could not reasonably accommodate the rule's application. For the reasons I have given, I think that the terms of s. 258(2), when read with s. 258(1), afford reasonable accommodation for the application of the rule.
>
> There is an additional feature of this case which supports the application of the rule. The cause of action in question is a statutory cause of action and it is reasonable to think that the legislature assumed with respect to both s-ss.(1) and (2) of s. 258 that the plaintiff, in obtaining judgment, knows, or reasonably should know, that the person against whom he or she obtains the judgment is "an insured" as described in s. 258(1). A failure to apply the discovery rule to the interpretation of s. 258(2) would frustrate the clear legislative intent and policy of s. 258(1). The legislative intent would not have been to impose a limitation period that would expire before the plaintiff could reasonably have knowledge of the cause of action which the legislature created for him or her: cf. Urie v. Thompson, 337 U.S. 163 (1949) at p. 169.

[25] **Peixeiro, supra,** was applied by Morden, A.C.J.O., on behalf of the Ontario Court of Appeal as authority for the proposition that the discoverability rule is a rule of interpretation, and not a general substantive rule. I would note, however, that in **Central Trust v. Rafuse** LeDain, J, speaking on behalf of the Supreme Court of Canada, expressed the application of the rule more broadly at p. 36:

> I am thus of the view that the judgment of the majority in Kamloops laid down a general rule that a cause of action arises for purposes of a limitation period when the material

> facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence, and that that rule should be followed and applied to the appellant's cause of action in tort against the respondents under the Nova Scotia Statute of Limitations, R.S.N.S. 1967, c. 168. . . .

[26] Although the statute before the court in **Central Trust** provided that time ran from when the cause of action arose, it will be recalled that one of the provisions considered by the court in **Kamloops** provided that time ran from the date on which the “damage was sustained”. See §13 and 18 *ante.*

[27] In **Aguonie v. Galion Solid Waste Material Inc.** (1998), 38 O.R. (3rd) 161, the Ontario Court of Appeal applied the discoverability rule to the limitation period under s. 61(4) of the **Family Law Act** providing that no action could be brought "after the expiration of two years from the time the cause of action arose". The Court held that in such circumstances the application of the discoverability rule was not restricted to cases where there was a delayed manifestation of the cause of injuries or where the negligence of the defendant had not become manifest until the occurrence of some event. It was a rule of general application, and it applied to a case where the claimant did not discover the existence of a potential tortfeasor until a later date. Only then did time start to run. Not only does the discoverability rule apply to the identity of the tortfeasor but to the acts or omissions of a potential tortfeasor identifying him or her as such. The rule applies to all cases where issues as to when the cause of action arise for the purposes of starting a limitation period. See the decision of Borins, J. (*ad hoc*) on behalf of the court at pp. 169-170.

[28] In Ontario the discoverability rule has been incorporated by statute in s. 17 of the *Health Disciplines Act*, R.S.O. 1990, c.H.4, and **Peixeiro, supra,** was further judicially applied to that legislation in **Findlay v. Holmes** (1998), 111 O.A.C. 319 (C.A.), and **Soper v. Southcott** (1998), 39 O.R. (3d) 737 (C.A.). See also **Salvador v. Mather** (1999), 41 O.R. (3d) 289 (Gen. Div.).

[29] The most recent decision is that of the Ontario Court of Appeal in **Waschkowski v. Hopkinson Estate**, [2000] O.J. No. 470 (C.A.). At issue was a limitation period providing that an action should not be brought against the estate of a deceased person after the expiration of two years from the death of the deceased. After referring to the decision of Major, J. in **Peixeiro, supra**, Abella, J.A., speaking for the court, observed that Major, J.'s analysis shows that the application of the discoverability rule depends on the wording of the limitation period. The limitation period in the statute before the court ran from a death, as distinguished from cases where the period ran from the time the damage was sustained or the time the cause of action arose. There was no temporal elasticity possible when the pivotal event is the date of a death. Accordingly, an action commenced outside that time limit was held to be barred.

[30] It is to be noted that the death from which time ran in **Waschkowski, supra**, was a death, not of a person under such circumstances as to give rise in itself to a cause of action, but rather the death of a party against whose estate a cause of action was

permitted to continue by statute. Abella, J.A., speaking for the Ontario Court of Appeal said at §8:

> (8) In s. 38(3) of the Trustee Act, the limitation period runs from the death. Unlike cases where the wording of the limitation period permits the time to run, for example, from "when the damage was sustained" (Peixeiro) or when the cause of action arose (Kamloops), there is no temporal elasticity possible when the pivotal event is the date of a death. Regardless of when the injuries occurred or matured into an actionable wrong, s. 38(3) of the Trustee Act presents their transformation into a legal claim unless that claim is brought within two years of the death of the wrongdoer or the person wronged.

[31] As Abella, J.A. said at §16, the state of knowledge of an injured person was not germane when a death occurred. However, the death referred to in the legislation before the court was not an event upon which the cause of action was founded.

[32] It did not really matter, in my view, whether the estate was that of a plaintiff or a defendant. The **Trustee Act** of Ontario was legislation relating to the survival of a cause of action that could otherwise have existed and not to the creation of an entirely new cause of action. To this extent, **Waschkowski** is distinguishable from the case before us.

[33] Likewise such cases as **Fehr v. Jacob, supra, Sawh v. Petrie, supra, Marshall v. Parker**, (1998) N.S.J. No. 518 (S.C.), **H. (V.A.) v. Lynch**, [1999] 3 W.W.R. (Alta. Q.B.); **Snow v. Kashyap** (1995), 125 Nfld. & P.E.I.R. 182 (Nfld. C.A.), and **Langenhahn v. Czyz** (1998), 158 D.L.R. (4th) 615 (Alta. C.A.) are distinguishable. They are distinguishable because in the legislation at issue in each of them time ran from an event not related in any way to the accrual of the cause of action.

[34] Thus, there is a vast body of case law which supports the proposition that the discoverability rule does not apply where the period of limitation runs from a fixed point in time, unrelated to events of which the plaintiff must be aware in order to form the basis of a cause of action. Wright, J. concluded that this was one of those cases. The question is whether he was correct in so doing.

[35] Section 3 of the **Fatal Injuries Act** provides:

> Where the death of a person has been caused by such wrongful act, neglect or default of another as would, if death had not ensued, have entitled the person injured to maintain an action and recover damages in respect thereto, in such case, the person who would have been liable if death had not ensued shall be liable to an action of damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to a crime.

[36] Section 10 of the **Act** provides:

> Not more than one action shall lie for and in respect to the same subject-matter of complaint and every such action shall be commenced within twelve months after the death of the deceased person.

[37] In **Fehr, supra**, the statement of the discoverability rule approved by the Supreme Court of Canada in **Peixeiro, supra**, included the following words:

> ... when time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge made discoverability rule applies ...

[38] In my opinion, the death for which an action can be brought under the **Fatal Injuries Act** is not merely the death of a person but a "wrongful death", as contemplated in s. 3 of the Act. It is not an event totally unrelated to the accrual of the

cause of action. It is, to use the words of Morden, A.C.J.O., in **Grenier, supra**, "a constituent element" of the cause of action.

[39] In **Peixeiro, supra** the limitation period ran from the time "the damages were sustained". There was a statutory scheme limiting causes of action to injuries of a specified nature. The cause of action did not arise until the injury met the statutory criteria. The discoverability rule operated to postpone the running of time until the material facts underlying the cause of action were known or ought to have been known by the plaintiffs. As Major, J. said at §38, the Supreme Court of Canada has applied the rule even to statutes of limitation in which the plain construction of the language used would appear to exclude its operation. At §43 he said:

> 43 As a matter of law, I do not think that the existence of a cause of action was reasonably discoverable until the respondents learned that Mr. Peixeiro had a herniated disc. Therefore, the respondents' action is not statute-barred, as it was started within two years of the time when they learned that they had a cause of action.

[40] In **Grenier, supra** the limitation period ran from "the final determination of the action against the insured". Under the discoverability rule as applied by the court, the triggering event did not come into existence until the plaintiff knew, or ought reasonably to have known, not only that there was a judgment, but that the judgment debtor was an insured person.

[41] Accepting that the rule is one of interpretation and not a general substantive rule, a desire to avoid an interpretation which would unfairly preclude the plaintiff from asserting the cause of action is evident in the cases. The Legislature is presumed not to

have intended that the period should run without regard to the plaintiff's knowledge or presumed knowledge.

[42] Is the language of s. 10 of the **Fatal Injuries Act** clear enough to "displace the general rule of discoverability" (Major, J. in **Peixiero, supra** at p. 38)?

[43] In this case, the cause of action is, as in **Grenier**, a statutory cause of action. While at first blush it seems that time runs simply from a fixed point, in reality there is more to it than that. The death of Vincent LeLacheur alone is not enough to found a cause of action. It must be shown to be a death within the meaning of s. 3 of the **Fatal Injuries Act**, i.e. a "wrongful death". Only then is there a statutory cause of action. The reasoning in **Peixeiro** and **Grenier** draws me to the conclusion that the triggering event here does not come into existence until the person for whose benefit the action is brought knows or ought to know that the death is a wrongful one. The wording of s. 10 of the **Fatal Injuries Act** is not, to use the words of Morden, A.C.J.O., "a provision the wording of which could not reasonably accommodate the application of the discoverability rule". Taking the **Fatal Injuries Act** as a whole, I consider that the limitation provision in s. 10 implies knowledge or presumed knowledge on the part of the claimant.

[44] On the true construction of s. 10 of the **Fatal Injuries Act**, time does not run from a fixed point unconnected to the cause of action created by s. 3, but from the plaintiff's

knowledge, reasonably presumed, of its essential elements - a wrongful death caused by the defendant. It would be an injustice if a claimant could be barred before acquiring knowledge of the wrongdoer's identity. Thus before time runs, the claimant must have sufficient knowledge of the death in question to put him or her on inquiry as to whether it was a wrongful death. The precise amount of knowledge necessary to trigger the running of time must be determined by the trial judge who applies the legislation, using the discoverability rule, to the facts as found. Here there is a real issue whether the claimants discovered or should have discovered the identity of a possible tortfeasor.

There was no argument before us respecting the application of the discoverability rule to the various individuals for whose benefit a class action such as that created by the **Fatal Injuries Act** can be brought, and we should not address that issue. Nor were we invited to decide, nor should we decide, who bears the burden of proving knowledge and lack of due diligence in the application of the rule.

[45] The discoverability rule, both judge-made and statutory, has substantially and permanently changed the landscape of limitation law in Canada.

[46] If the discoverability rule applies to a limitation period running from "when the damages were sustained" (**Peixeiro**) and from "the final determination of the action against the insured " (**Grenier**), I think it is not unreasonable to apply it to the period one year after the death so as to start time running only when the claimant knows or ought to know that the death might be a wrongful one. This, having in mind the statutory scheme of the **Fatal Injuries Act**, is no greater a stretch of the language than was

made by the courts in **Peixiero**, **Grenier** and other cases, all for the purpose of preventing a potential injustice.

[47] We must avoid the accusation of usurping the role of the Legislature, but in my opinion to apply the discoverability rule here is consistent with what has already been done before. On the true consideration of s. 10 of the **Fatal Injuries Act**, time does not run simply from a fixed event, but from constituent elements of the cause of action created by the statute.

[48] I see no risk that this interpretation of s. 10 of the **Fatal Injuries Act** will result in an opening of flood gates. In the majority of cases, after a death, it would soon be seen to be obvious to those for whose benefit an action might thereby result, that the potential for such an action was there so as to start the clock running.

[49] Having found that the discoverability rule applies, does it follow that the order of Wright, J. dismissing the application to disallow the limitation decision should be set aside?

[50] The application of the discoverability rule calls for a resolution of the issue whether or not the appellants knew or should have known, more than one year before the commencement of their action, that Howard LeLacheur was operating the vehicle. They must, of course, establish much more to show that the death was a wrongful one entitling them to damages.

[51] In my opinion, the application of the discoverability rule does not preclude the respondent from pleading that the action is barred by reason of s. 10 of the **Fatal Injuries Act**.

[52] A motion such as was brought before Wright, J. is appropriate where a court is asked to exercise its jurisdiction under s. 3, and can exercise it, in a summary manner. The application of the discoverability rule here requires findings of fact relating to when the claimants knew or ought to have known the key facts respecting the remedy sought. Summary procedure is inappropriate here because the issues of knowledge and due diligence can only be properly resolved after a trial.

[53] I would therefore affirm in the result Wright, J.'s refusal to disallow the respondent's plea of limitation, but with a declaration that the discoverability rule is applicable to the interpretation of s. 10 of the **Fatal Injuries Act**.

Issue 2 - Dismissal of the Appellants' Action

[54] It follows from what I have said that the action should not have been dismissed. In so doing, Wright, J. appeared, with the concurrence of counsel, to have taken the view that the words of s. 3(2) of the **Limitations Act** "should allow actions to proceed" led to the dismissal of an action when the defence was not disallowed.

[55] In his reasons for dismissing the action, Wright, J. referred to the appellants' argument that the charge of fraudulent concealment applied to defeat the limitations defence. He said:

> In my view, the plaintiffs have failed to establish that they are entitled to rely on the application of the fraudulent concealment principle. It is neither pleaded in the Statement of Claim, nor is there anything approaching a satisfactory evidentiary basis before me upon which a claim for fraudulent concealment can be made out. To date, there has been no discovery or interrogatories or any other sort of pre-trial procedures involving the defendant, Howard LeLacheur, although I understand Mr. LeLacheur has not been cooperative in participating in this litigation. At the same time, neither has he been examined on discovery through notice. The fact of the matter is that we have nothing in the way of evidence from Howard LeLacheur, nor do we have evidence from any of the family members through whom this chain of communication came, nor from the R.C.M.P. to whom this statement was allegedly made by Howard LeLacheur.
>
> At the same time, we have admissions by the plaintiff, Flora Burt, in her discovery examination which took place on October 29, 1998 of her failure to make any inquiries about the accident of any sort to anyone, family members, R.C.M.P., or whomever. At no time did she make any inquiries to anyone until she says she was contacted in February of 1997 by a family member passing on the revelation from Howard LeLacheur as to the identity of the driver at the time of the accident.

[56] Wright, J. then referred to the discovery of the appellant Flora Burt, held October 29, 1998, in which she said she made no inquiries as to who was driving the vehicle. I would note in passing, however, that she also said when asked why, that she was "too sick at the time, I guess". She was never contacted by the police regarding the accident. It would not be unreasonable to expect them to advise her if the respondent, rather than her husband, were driving her husband's vehicle. Wright, J. made no finding referring to the state of knowledge of the appellant, Shelley Dawn Seward.

[57] The picture is clearly incomplete, and can only be resolved following a trial. The fragmentary material before Wright, J. was inadequate upon which to make a determination either of the application of the discoverability rule or of the principle of

fraudulent concealment. Such an application as was before Wright, J. is not a substitute for a trial when there are issues to be tried. See **Hill v. Bridgemohan et al**. (1998), 163 N.S.R. (2d) 369 (NSCA) at 371-372; **Norn, supra** at §17; and **Aguonie, supra**, pp. 9-11.

[58] I would set aside that part of Wright, J.'s order dismissing the action.

[59] The costs of this appeal should be in the cause. I would fix them at $1,500.00 plus disbursements.

Chipman, J.A.

Concurred in:

Glube, C.J.N.S.

Cromwell, J.A.