SUPREME COURT OF NOVA SCOTIA

Citation: Malcolm v. Shubenacadie Tidal Bore Rafting Park Ltd., 2014 NSSC 217

Date: 20140709
Docket: Hfx No. 415787
Registry: Halifax

Between:

Connor Joseph Malcolm by his Litigation Guardian Angela Malcolm

Plaintiff

v.

Shubenacadie Tidal Bore Rafting Park Limited

Defendant

Judge:	The Honourable Justice Michael J. Wood
Heard:	March 27, 2014, in Halifax, Nova Scotia
Written Decision:	July 9, 2014
Counsel:	Barry J. Mason, for the Plaintiff Eric Machum and Kyle Ereaux (articled clerk), for the Defendant

By the Court:

[1] In August, 2008, twelve year old, Connor Joseph Malcolm, and his mother went on an excursion on the Shubenacadie River which was operated by the defendant, Shubenacadie Tidal Bore Rafting Park Limited. Apparently, Connor fell out of the defendant's Zodiac and suffered injuries which required treatment at the IWK Health Centre.

[2] On May 23, 2013, Connor's mother, Angela Malcolm, acting as his litigation guardian, commenced legal proceedings against Shubenacadie Tidal Bore Rafting Park Limited alleging that his injuries were caused by their negligence.

[3] The defendant has brought this motion to strike out the action on the basis that the applicable limitation period had expired and the claim is out of time. The motion is made pursuant to *Civil Procedure Rule 13.04* which deals with summary judgment on evidence.

[4] The plaintiff argues that the resolution of the limitation issue will require an assessment of evidence which takes it outside the scope of matters which can be determined under Rule 13.04.

THE LAW

Summary Judgment

[5] The parties have no disagreement with respect to the law relating to summary judgment in Nova Scotia. In *Coady v. Burton Canada Company*, 2013 NSCA 95, the Nova Scotia Court of Appeal outlined the test to be applied. According to that decision, the first inquiry to be made is whether the applicant for summary judgment has satisfied the court that there is no genuine issue requiring trial. The Court of Appeal described this initial onus in para. 38 of the *Coady* decision as follows:

> 38 This was Burton's motion for summary judgment. Burton had the burden of satisfying Justice Warner that there were no genuine issues of material fact requiring a trial. That is stage 1 in the analysis. During this stage there was no burden upon Mr. Coady to do anything. Burton had the onus of satisfying the

> Chambers judge that summary judgment was a proper question for consideration. In order to do that Burton bore the evidentiary burden of showing that there was no genuine issue of material fact which would necessitate a trial. It failed to do so.

[6] If the applicant has met this threshold, the court will then consider the relative merits of the party's claims and defences. In order to avoid summary judgment, the responding party must provide evidence which shows that they have a "real chance of success" with their claim or defence.

Limitation Period

[7] The *Marine Liability Act*, SC 2001, c 6 includes provisions dealing with liability for carriage of passengers by water. It incorporates by reference the *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974*. This *Convention* is set out in Schedule 2 of the *Marine Liability Act*.

[8] Article 16 of the *Athens Convention* includes limitation provisions which are as follows:

> ARTICLE 16
>
> TIME-BAR FOR ACTIONS
>
> 1. Any action for damages arising out of the death of or personal injury to a passenger or of the loss or damage to luggage shall be time-barred after a period of two years.
>
> 2. The limitation period shall be calculated as follows:
>
> (a) in the case of personal injury, from the date of disembarkation of the passenger;
>
> (b) in the case of death occurring during carriage, from the date when the passenger should have disembarked, and in the case of personal injury occurring during carriage and resulting in the death of the passenger after disembarkation, from the date of death, provided that this period shall not exceed three years from the date of disembarkation;

> (c) in the case of loss of or damage to luggage, from the date of disembarkation or from the date when disembarkation should have taken place, whichever is later.
>
> 3. The law of the court seized of the case shall govern the grounds of suspension and interruption of limitation periods, but in no case shall an action under this Convention be brought after the expiration of a period of three years from the date of disembarkation of the passenger or from the date when disembarkation should have taken place, whichever is later.
>
> 4. Notwithstanding paragraphs 1, 2 and 3 of this Article, the period of limitation may be extended by a declaration of the carrier or by agreement of the parties after the cause of action has arisen. The declaration of agreement shall be in writing.

[9] There have been a number of decisions which have considered whether boating accidents are governed by federal or provincial limitation provisions. In *Ordon Estate v. Grail*, [1998] 3 SCR 437, the Supreme Court of Canada held that fatal claims arising out of incidents which occur on vessels in navigable waters within Ontario were to be dealt with in accordance with federal maritime law and were subject to the limitation provisions of the *Canada Shipping Act.* The Court carried out a detailed constitutional analysis in concluding that federal law prevailed over provincial legislation.

[10] In *MacKay v. Russell*, 2007 NBCA 55, the New Brunswick Court of Appeal considered a claim for personal injuries suffered by a passenger on a whale watching excursion in the Bay of Fundy. The Court was asked to determine whether the claim was governed by the New Brunswick *Limitations of Actions Act* or the provisions of the *Athens Convention* as incorporated in the *Marine Liability Act*. The Court applied the rationale in the Supreme Court of Canada decision in the *Ordon Estate* and concluded that federal law applied.

[11] The Quebec Court of Appeal came to the same conclusion in *Frugoli v. Services aeriens des Cantons de l'Est inc.,* 2009 QCCA 1246. The plaintiffs in that case were the estates of two individuals who drowned while on a hunting expedition in northern Quebec. The court decided that those actions were governed by federal maritime law, including the limitation provisions of the *Athens Convention* as incorporated in the *Marine Liability Act*. Quebec limitation legislation did not apply.

[12] I am satisfied that the applicability of the federal limitation provisions to the activities of the defendant on the Shubenacadie River is settled. The plaintiff argued that the constitutional analysis of the Supreme Court in the *Ordon Estate* case, as well as the Quebec Court of Appeal in *Frugoli* should be revisited in light of the recent decision of the Supreme Court of Canada in *Marine Services International Limited v. Ryan Estate*, 2013 SCC 44, which considered the test to be applied in determining whether a provincial law should be applied to an area of federal legislative authority. To the extent that the Supreme Court has reframed the constitutional test, this does not undermine the rationale for the earlier decisions dealing with the application of the *Athens Convention*. The important objective of uniformity in Canadian maritime law and in the international community of maritime states should not be undermined by the application of individual, and different, provincial statutory regimes.

[13] In 2009, the *Marine Liability Act* was amended to add s. 37.1, which had the effect of excluding "adventure tourism" activities from the part of the *Act* which incorporated the *Athens Convention*. The activities which were exempted from the legislation would appear to include excursions such as those offered by the defendant. The plaintiff argued that this provision should be applied to the events in August, 2008 when Connor Malcolm was injured. Counsel for the plaintiff provided no authority for this proposition. The defendant relies on the Supreme Court of Canada decision in *Quebec (Attorney General) v. Healey*, [1987] S.C.J. No. 4, which quoted at para. 25 the following passage from Maxwell on the *Interpretation of Statutes*:

> **25** And at p. 216:
>
> > One of the most well-known statements of the rule regarding retrospectivity is contained in this passage from the judgment of R. S. Wright in Re Athlumney, [1989] 2 Q.C. 551, at pp. 551, 552: "Perhaps no rule of construction is more firmly established than this -- that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.

[14] Limitation periods are considered to be substantive and not procedural in nature. I accept the principle expressed in the above quotation that such legislation should not be applied retrospectively. This means that at the time of Connor Malcolm's injury, the substantive law governing his claim, including the applicable limitation period, was the *Marine Liability Act* as it existed at the time.

[15] The plaintiff argued that even if the *Athens Convention* applied, there was a discretion in the court to postpone or suspend the running of the limitation. There were several alternative bases advanced as possible authority for such a discretion. The first was that s. 4 of the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258 applied. This section says that the limitation period for a claim by an infant is postponed until they attain the age of nineteen years.

[16] The plaintiff also suggested that the court has an inherent jurisdiction under the *Marine Liability Act* to suspend or extend the limitation period. Alternatively that plaintiff argued that failure to recognize the legal disability of a minor potentially infringes the child's right to "justice and fairness" under the *Canadian Charter of Rights and Freedoms* and that to rectify this violation the discoverability principle should be applied to the determination of the limitation period.

[17] On the basis on the decision in *Ordon Estate*, and the cases which follow, it is clear that constitutionally the *Nova Scotia Limitation of Actions Act* has no application. This includes s. 4 and so that provision is not part of federal maritime law and cannot affect the *Athens Convention* limitation calculation.

[18] With respect to a general ability to extend the *Athens Convention* limitation, the courts in both *MacKay* and *Frugoli* considered the issue and concluded that there was no such discretion.

[19] Since limitation periods are creatures of statute, the determination of the date on which the period starts to run and when it expires must be made based upon the legislation's language. If there is no provision for postponement or suspension of the limitation found in the legislation, then no such authority exists. Where the limitation period is said to commence when the cause of action arises, courts have determined that the discoverability principle applies. The cause of

action accrues when the plaintiff is aware of all of its elements, including damages. When the cause of action begins to run from a fixed event, the discovery principle does not apply.

[20] In this case, the limitation period under the *Athens Convention* starts upon disembarkation of the passenger. That is an ascertainable date and the discovery principle has no application.

[21] The *Athens Convention* and the *Marine Liability Act* do not contain any provision which says that limitation periods for infants are postponed until they attain majority. Without such language, there is no basis to apply such an interpretation and defeat the clear language of the statute.

[22] Counsel for the plaintiff has provided no case authority for the *Charter* argument which he made and I do not see any merit in it. The *Charter* does not provide authority for the court to rewrite Canadian maritime law as set out in the *Marine Liability Act*.

[23] My conclusion is that the limitation provisions applicable to the plaintiff's claim are those found in Article 16 of the *Athens Convention*, which are incorporated in the *Marine Liability Act*. The period begins to run on the date of the passenger's disembarkation. The time period may only be suspended or extended in accordance with the terms of that Article. Nova Scotia legislation has no application, nor does the discoverability principle.

ANALYSIS

[24] The first step in the summary judgment analysis is a determination of whether the defendant has shown that there is no material issue requiring trial. Since the motion is based exclusively on the alleged expiry of a limitation period, the question of materiality must be considered in that context.

[25] It is clear that an expired limitation period is a suitable issue for determination on a summary judgment motion. This was confirmed by the Honourable Justice Hood in *Lemieux v. Halifax International Airport Authority*, 2011 NSSC 396. It is interesting to note that this case involved interpretation of the *Montreal Convention* governing international carriage by air, which is roughly

equivalent to the *Athens Convention* dealing with carriage by water. In her decision, Justice Hood dismissed the plaintiff's argument that the equitable jurisdiction to extend limitations found in s. 3 of the Nova Scotia *Limitation of Actions Act* should apply to federal aviation law. She granted the motion for summary judgment and dismissed the plaintiff's claim on the basis of the expiry of the limitation period in the *Montreal Convention*.

[26] In this case, the facts needed to consider the limitation issue are very limited. There is no dispute with respect to the date of disembarkation, which was August 29, 2008. The date of commencement of the proceeding (May 23, 2013) is apparent from the face of the notice of action. There is also no disagreement that Angela Malcolm signed a document entitled "Waiver, Release and Indemnity" prior to boarding the defendant's raft. That document (the "Waiver") included the following clause:

> This Waiver and any rights, duties and obligations as between the parties hereto shall be governed by and interpreted solely in accordance with the laws of the province of Nova Scotia, the courts of the province of Nova Scotia shall have exclusive jurisdiction with respect to the subject matter hereof.

[27] I am satisfied that there is no evidentiary issue requiring trial with respect to determining the applicable limitation period and its expiry. As a result, I will consider the second part of the test for summary judgment, and that is whether the plaintiff has established that he has a real chance of success.

[28] Section 1 of Article 16 of the *Athens Convention* says that for a personal injury claim, it will be time-barred after a period of two years. According to clause (2)(a) of Article 16, the limitation period shall be calculated from the date of disembarkation, which means that it expired on August 29, 2010.

[29] Section 3 of Article 16 says that the law of the court seized with jurisdiction shall govern the grounds of suspension and interruption, but in no case will the limitation period extend beyond three years from the date of disembarkation. This provision provides a basis for suspension or extension of the limitation period, however, the absolute expiry would be August 29, 2011.

[30] At the conclusion of the hearing, I requested that counsel provide further written submissions on the effect of the Waiver signed by Ms. Malcolm on August 29, 2008 and, in particular, cl. 4 which specifies the governing law.

[31] Counsel for the plaintiff submitted that the Waiver was an agreement to contract out of the *Athens Convention* so that provincial laws applied or, alternatively, a declaration by the defendant to extend the limitation period pursuant to cl. 4 of Article 16 of the *Convention*.

[32] The defendant said that the parties could not contract out of federal maritime law because it was, in fact, part of the laws of the province of Nova Scotia. With respect to cl. 4 of Article 16, they say that there was no declaration by the defendant to extend the limitation period made after the cause of action arose.

[33] I agree with the defendant that the governing law clause of the Waiver does not amount to a declaration to extend a limitation period pursuant to cl. 4 of Article 16. Such a declaration would have to be much clearer and, in my view, expressly refer to the extension of a limitation period. A general statement that the laws of the province of Nova Scotia apply is not sufficient.

[34] The defendant's position that the laws of Nova Scotia incorporate federal maritime law, including the *Athens Convention* relies on the Supreme Court of Canada decision in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, and in particular para. 87 which reads as follows:

> **87** The plaintiffs next submit that even if the claims are maritime matters, the law of Newfoundland applies because treaties and related laws make Newfoundland the proper legal forum and provide for the operation of Newfoundland law on the continental shelf. The difficulty with this submission is that assuming Newfoundland law to apply, Newfoundland law includes federal law and the principle that Canadian maritime law applies to maritime matters:
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> > Once it has been determined that a matter is governed by constitutionally valid federal law, as in this case, then the relevant legal unit is Canada and not a particular province. Federal law is not foreign law vis-à-vis the law of a province since it is an integral part of the law of each province and territory

(ITO, supra, at p. 777, per McInyre J.)

> Since the claims advanced relate to maritime matters, the law of Newfoundland mandates the application of Canadian maritime law, not the Newfoundland Contributory Negligence Act.

[35] It is the defendant's submission that when the Waiver says that the laws of Nova Scotia shall apply, this incorporates, rather than excludes, Canadian maritime law and the *Athens Convention*. On the basis of the Supreme Court of Canada decision in *Bow Valley Husky*, I agree with that submission.

[36] I have carefully considered all of the arguments advanced on behalf of the plaintiff and have concluded that he has not demonstrated that his claim has a real chance of success in the face of the limitation provisions of the *Athens Convention* as incorporated in the *Marine Liability Act.*

CONCLUSION

[37] For the reasons outlined above, I believe that the defendant's motion for summary judgment on evidence pursuant to *Civil Procedure Rule 13.04* must be granted. The defendant has demonstrated that there is no material issue requiring trial with respect to the limitation question. The evidence and argument advanced by the plaintiff does not demonstrate that his claim has a real chance of success.

[38] The result of the summary judgment motion is that the plaintiff's action must be dismissed and I will grant an order to that effect. I will accept written submissions from the parties in the event that they are unable to reach an agreement on costs.

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Wood, J.