SUPREME COURT OF YUKON

Citation: *Carlick v. Canada (Attorney General)*, 2012 YKSC 92

Date: 20121205
S.C. No. 10-A0085
Registry: Whitehorse

Between:

ELYCIA CARLICK

Plaintiff

And

THE ATTORNEY GENERAL (CANADA), ROB MACDOUGAL, JASON MACDONALD, TERRA TAYLOR, JEFF MORAN, BEN DOUGLAS, PHIL WHILES and VINCE GAGNON, members of the ROYAL CANADIAN MOUNTED POLICE

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

Susan Roothman — Counsel for the Plaintiff
Jonathan Gorton — Counsel for the Defendants

REASONS FOR JUDGMENT
(Summary Judgment Application)

INTRODUCTION

[1] The defendants apply for summary judgment under Rule 18(6) to dismiss the plaintiff's claim under the *Fatal Accidents Act*, R.S.Y. 2002, c. 86. The claim alleges the wrongful death of Grant Edwin McLeod who died on August 30, 2008, while being arrested by the RCMP in Whitehorse. The *Fatal Accidents Act* has a limitation period of one year from the death of the deceased to commence the action. The plaintiff commenced her court action on August 27, 2010, which is beyond the limitation period,

unless the discoverability rule applies to extend the period. If this rule applies, the one-year limitation period would not begin until the material facts underlying the cause of action were reasonably discoverable.

[2] For the reasons that follow, I have concluded the rule of discoverability may apply to the *Fatal Accidents Act*, although a determinative ruling on this issue is not appropriate in the context of a summary judgment application. However, I have also found that the material facts upon which this cause of action is based were discoverable by reasonable diligence within the one-year limitation period from Mr. McLeod's death, and the discoverability rule does not assist the plaintiff in any event. I find the plaintiff's wrongful death claim is statute-barred.

[3] The claim for misfeasance in public office remains, as it was not part of this application for summary judgment.

BACKGROUND

[4] Grant Edwin McLeod died on August 30, 2008, while being arrested by the RCMP in Whitehorse. The plaintiff, the daughter of Mr. McLeod, alleges that the RCMP "restrained Mr. McLeod inappropriately, with excessive and deadly force under the circumstance, strangled him and failed to provide timely first aid care …" The plaintiff commenced her claim under the *Fatal Accidents Act* on August 27, 2010.

[5] Section 8(4) of the *Fatal Accidents Act* sets a limitation period of one year from the date of death:

> 8(4) Except if it is expressly declared in another Act that it operates despite this Act, an action, … may be brought under this Act within one year after the death of the deceased, … no such action shall be brought thereafter.

[6] The statutory cause of action is set out in ss. 2(1) and (2) as follows:

> 2(1) If the death of a person is caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the deceased to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, is liable for damages, despite the death of the deceased, even if the death was caused in circumstances amounting in law to culpable homicide.
>
> (2) Subject to subsection (5), the liability for damages under this section arises on the death of the deceased.

[7] In s. 1 of the *Fatal Accidents Act*, "deceased" means a person whose death has been caused as mentioned in subsection 2(1).

[8] Counsel for the defendants, while not conceding that the rule of discoverability applies to the one-year statutory limitation period, submits that the cause of action of the plaintiff ought to have been known, or at the very least, was reasonably discoverable well within the limitation period of one year. In other words, the defendants say that even if the rule of discoverability applies, there is no factual basis to apply it.

[9] The RCMP informed the plaintiff of her father's death on September 1, 2008. She was also provided details from the RCMP news release that stated:

> "On Saturday, August 30, 2008, a Whitehorse man died following an altercation with RCMP officers from Whitehorse Detachment."

[10] The news release indicated that Mr. McLeod had been placed under arrest, at which time he resisted the officers and an altercation took place. It was also stated that within minutes of being handcuffed, he went into medical distress. Mr. McLeod became unresponsive and died shortly after at the Whitehorse General Hospital.

[11] Dr. Charles Lee conducted the autopsy on September 3, 2008, and provided his Autopsy Report to the RCMP on November 21, 2008. The Autopsy Report indicated cocaine intoxication as the principal cause of death but stated that pre-existing heart

disease, acute cocaine intoxication and “the stress of being subdued” were contributing factors. Counsel for the plaintiff received the Autopsy Report from the Coroner in electronic format on July 22, 2009, and hard copy on August 4, 2009.

[12] The Coroner provided counsel for the plaintiff with a vetted copy of the RCMP investigation on July 22, 2009, which included:

a) A final copy of Dr. Lee’s Autopsy Report, which the Coroner had sent to the RCMP on November 21, 2008;

b) A copy of a document entitled “Time Line of Events”, setting out all of the circumstances surrounding the death of Grant McLeod, including the nature of the force used to restrain him;

c) Copies of statements by all police officers involved in taking Grant McLeod into custody; including reports and statements from the defendants Cpl. Rob MacDougal, Cst. Jason MacDonald, Cst. Terra Taylor, Cst. Jeff Moran, Cst. Ben Douglas, Cst. Phil Whiles, and Cst. Vince Gagnon; and

d) Copies of statements of civilian witnesses, including statements from attending paramedic Cailin McComb and a report of an interview with the attending ER Physician, Dr. Pronovost.

[13] The “Commentary” section of the Autopsy Report contains the following:

> The circumstances surrounding the death were provided to me by the Yukon Coroner’s Preliminary Death Report, and hospital medical records. The autopsy showed numerous minor injuries of the face, neck, and extremities. The neck injuries included neck muscle hemorrhages and a fracture of the right laryngeal horn, consistent with neck compression. This could be due to use of a neck hold. Scattered petechiae in the eyes were noted. The airway itself was patent, with no swelling or hemorrhage of the mucosal surfaces. Most of the facial injuries were located on the prominences of the face, typical of striking a flat surface such as a wall or floor.

> Overall, many of the injuries are consistent with being in an altercation, and are not life-threatening. Other external findings noted were extensive needle tracks on the arms and legs, consistent with chronic intravenous drug abuse.
>
> …
>
> Cocaine is a powerful vasoconstrictor and stimulant, and can lead to critical ischemia of the organs including the heart. The presence of fibrosis in the heart is consistent with previous ischemic injury due to chronic cocaine use. Such fibrosis would place him at increased risk of sudden death. The combination of the pre-existing heart disease, acute cocaine intoxication, and the stress of being subdued all likely contributed to his death. However, since all of these were as a result of his cocaine intoxication, the underlying cause of death is cocaine intoxication. (my emphasis)

[14] Counsel for the plaintiff submits that the earliest that the circumstances of Mr. McLeod's wrongful death were discoverable was during the coroner's inquest held on September 14 – 18, 2009, when she learned the details of the RCMP arrest of Mr. McLeod. The RCMP evidence at the coroner's inquest indicated that Mr. McLeod was placed in a prone position with one RCMP member on Mr. McLeod's back, one member placing his knee on Mr. McLeod's head and a third member placing his knee on his right shoulder. The arrest also included a neck hold and three applications of the carotid control technique, which involved putting pressure on Mr. McLeod's carotid arteries in his neck to subdue him.

[15] Counsel for the plaintiff was retained to act on behalf of Mr. McLeod's family at the inquest. The affidavit of a lawyer from the same office indicates counsel for the plaintiff was acting for the family in May 2009 but does not indicate the date or nature of the retainer. There is no affidavit from the plaintiff.

[16] Counsel for the plaintiff also stated that she did not receive instructions from the plaintiff to proceed with further investigation into the death until after the inquest had concluded.

[17] Counsel for the plaintiff first contacted Dr. John Butt, a forensic pathologist on October 7, 2009, after the inquest. On June 9, 2010, counsel for the plaintiff e-mailed Dr. Butt the following: “Please let me know when the report will be ready – we are moving closer to the limitation date in August 2010.” Dr. Butt’s oral opinion became available on August 5, 2010. The written report of Dr. Butt dated May 21, 2011, concluded that:

> the cause of death of Grant McLeod was:
>
> 1a. Restraint related death with excited delirium
> (due to)
> b. Cocaine toxicity.

[18] For the purposes of this application for summary judgment there are four undisputed facts:

1. Without the application of the rule of discoverability, the statutory one-year limitation period expired August 30, 2009.
2. The Statement of Claim was filed on August 27, 2010.
3. Counsel for the plaintiff received the Coroner’s electronic disclosure on July 22, 2009, which included the statements of RCMP and civilian witnesses, and the Time Line of Events.
4. On August 4, 2009, counsel for the plaintiff received the hard copy of the Autopsy Report, Toxicology Report and medical information on Grant McLeod.

[19] I note that the Statement of Defence, filed November 2, 2010, pleads that the action is statute-barred by s. 8(4) of the *Fatal Accidents Act*. The Amended Statement of Claim, filed March 1, 2012, adds a new cause of action but does not plead the rule of discoverability or include any facts that would support the application of the rule.

ISSUES

[20] There are two issues to be determined:

1. Does the rule of discoverability apply to the *Fatal Accidents Act*?
2. If the rule of discoverability applies, do the undisputed facts permit the application of the rule in this summary judgment application?

ANALYSIS

Issue # 1: Does the rule of discoverability apply to the *Fatal Accidents Act*?

[21] In *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, the Supreme Court of Canada re-affirmed that discoverability is a general rule applied to avoid the injustice of precluding an action before the person is able to raise it. On the facts of *Peixeiro*, the injured party's claim was not discoverable until he first learned from his doctor that he had a herniated disc. Major J., at para 37, adopted Twaddle J.A.'s statement in *Fehr v. Jacob* (1993), 14 C.C.L.T. (2nd) 200 (Man. C.A.):

> [37] … that the discoverability rule is an interpretive tool for the construing of limitations statutes which ought to be considered each time a limitations provision is in issue:
>
> > 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. (my emphasis)

[22] It was argued before the Supreme Court of Canada that the statute ousted the rule of discoverability by using the words “damages were sustained” rather than “cause of action arose.” Major J., at para. 38, dismissed this interpretation as “a distinction without a difference” and said that it would require “clearer language to displace the general rule of discoverability.”

[23] The Supreme Court of Canada also made it clear that the principle of diligence in discovering the cause of action must be considered as well as the principle of certainty for the defendant to know when the limitation period has expired. Major J., at para. 18, stated:

> It was conceded that at common law ignorance of or mistake as to the extent of damages does not delay time under a limitation period. The authorities are clear that the exact extent of the loss of the plaintiff need not be known for the cause of action to accrue. Once the plaintiff knows that some damage has occurred and has identified the tortfeasor (see Cartledge v. E. Jopling & Sons Ltd., [1963] A.C. 758 (H.L.), at p. 772 per Lord Reid, and July v. Neal (1986), 57 O.R. (2d) 129 (C.A.)), the cause of action has accrued. Neither the extent of damage nor the type of damage need be known. To hold otherwise would inject too much uncertainty into cases where the full scope of the damages may not be ascertained for an extended time beyond the general limitation period. (my emphasis)

[24] *Waschkowski v. Hopkinson Estate* (2000), 47 O.R. (3d) 370 (C.A.) is a case where the discoverability rule did not apply. In *Waschkowski,* the Court was considering s. 38(3) of the *Trustee Act,* which required that actions for all torts or injuries to the person or property of the deceased “shall not be brought after the expiration of two years from the death of the deceased”.

[25] Abella J.A., as she then was, stated the following at para. 8:

> In s. 38(3) of the Trustee Act, the limitation period runs from a 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 prevents their transformation into a legal claim unless that claim is brought within two years of the death of the wrongdoer or the person wronged. (my emphasis)

[26] In contrast, the case of *Burt v. LeLacheur*, 2000 NSCA 90, applied the rule of discoverability to s. 10 of the Nova Scotia *Fatal Injuries Act*, whose ss. 3 and 10 are similar, but not identical to the Yukon's ss. 2(1) and 8(4) of the *Fatal Accidents Act*. In *Burt*, the daughter of the deceased, the latter having been killed in a motor vehicle accident in 1972, commenced an action in 1997 against the actual driver, when she discovered that the deceased had not been driving the vehicle. Section 10 of the *Fatal Injuries Act* states:

> 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.

[27] Chapman J.A., after reviewing *Peixeiro* and *Waschowski* stated at para. 44 of *Burt*:

> 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. … (my emphasis)

[28] However, in *Ryan v. Moore*, 2005 SCC 38, at para. 27, Bastarache J. did not apply the rule of discoverability to the *Survival of Actions Act*:

> Pursuant to the *Survival of Actions Act*, the limitation period is triggered by the death of the defendant or the granting by a court of the letters of administration or probate. The section is clear and explicit: time begins to run from one of these two specific events. The Act does not establish a relationship between these events and the injured party's knowledge. I agree with the appellants that knowledge is not a factor: the death or granting of the letters occurs regardless of the state of mind of the plaintiff. We face here a situation in respect of which, as recognized by this Court in *Peixeiro*, the judge-made discoverability rule does not apply to extend the period the legislature has prescribed. Thus, I agree with the Court of Appeal that by using a specific event as the starting point of the "limitation clock", the legislature was displacing the discoverability rule in all the situations to which the *Survival of Actions Act* applies. (my emphasis)

[29] Bastarache J., at para. 30, made direct reference to *Burt* and stated that the reasoning in the *Burt* case cannot be applied to *Ryan* for the following reason:

> 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.

[30] It need not be stated here with absolute certainty whether the rule of discoverability does or does not apply to the Yukon *Fatal Accidents Act*. The role of the chambers judge on a summary judgment application is limited to determining whether

there is a *bona fide* triable issue. I am satisfied that the rule of discoverability is a *bona fide* issue for trial, assuming that there are facts to support its application.

[31] I am assisted in reaching this conclusion by *Norn v. Stanton Regional Hospital*, [1998] N.W.T.R. 355 (S.C.), where Vertes J. dismissed an application by a defendant seeking summary judgment on the basis that the plaintiff's action was commenced beyond the two-year limitation period found in s. 6(2) of the Northwest Territories *Fatal Accidents Act.* That section is similar to s. 10 of the Nova Scotia *Fatal Injuries Act* and s. 8(4) of the Yukon's *Fatal Accidents Act*. Vertes J. decided that it was undesirable to reach a definitive answer about the application of the discoverability rule on an application for summary judgment. In other words, the plaintiff's claim should proceed to trial to determine the application of the discoverability rule.

[32] There is a further element that was unique to the *Norn* case and relevant here. Vertes J. stated at para. 21:

> The plaintiffs allege that the facts relating to Ms. Norn's death were concealed from them. They say that they did not learn that they may have a cause of action until after the coroner's inquest which, of course, did not take place until after expiry of the two year period. There is some evidence offered in support of this allegation.

[33] Similarly, in *Estate of Malik et al v. Estate of Sidat and Malik et al v. Security National Insurance Company*, 2009 YKSC 43, Groberman J., sitting as a deputy judge in this court, declined to definitively decide whether discoverability applied to the Yukon's *Fatal Accidents Act*. In that case, Khalid Malik died on July 24, 2006, in a motor vehicle accident. The defendant, Noaman Sidat, who also died in the accident, was alleged to have been the driver. An action was not brought until February 15, 2008. Groberman J. reviewed the *Burt* and *Ryan* cases and concluded that, although

discoverability might be read into the *Fatal Accidents Act*, he was not prepared to do so on a Rule 18 summary judgment application on affidavit, as opposed to a Rule 19 application for summary trial, which gives the judge greater latitude and typically has more detailed evidence. Groberman J. stated:

> [22] In my view, the matter being complex and not free from doubt, it is not an appropriate one to be decided under Rule 18. In particular, it seems to me that if there are complex legal issues to be decided, it makes sense that they be decided in the context of either a summary trial under Rule 19 or after trial, so that if the matter is appealed on an issue of law it is appealed together with any other matters that are appealable rather than being dealt with separately. <u>It would be a different matter if the issue was a straightforward issue of law; however, in my view, Rule 18 is not an appropriate vehicle to decide a complex issue of law such as the one that I have before me.</u> (my emphasis)

[34] Nevertheless, Groberman J. concluded that the rule of discoverability case law was sufficient to dismiss the defendant's application to strike the claim under Rule 18.

[35] Groberman J. also applied the decision of Gower J. in *Malcolm v. Kushniruk*, 2005 YKSC 51, which decided that in a Rule 18 summary judgment application, the onus is on the plaintiff to demonstrate there is some case to be put forward on the issue of discoverability. In that regard, Groberman J. found the evidence of the plaintiff in *Malik* to be "weak evidence but it is not no evidence" (para. 25). He would have found the evidence insufficient on a summary trial, but in the context of summary judgment, he concluded it was sufficient to dismiss the defendant's application.

[36] Counsel for the defendants submits that the rule of discoverability does not apply to the *Fatal Accidents Act* and that *Burt* can be distinguished from this case on the basis of differences in the statutory language. Specifically, the Yukon *Fatal Accidents Act* includes s. 2(2):

> (2) Subject to subsection (5), the liability for damages under this section arises on the death of the deceased.

[37] Section 8(4) of the Yukon *Fatal Accidents Act* also repeats the one-year limitation period with the words, “no such action shall be brought thereafter.”

[38] Counsel for the defendants submits that this wording provides clarifying language not found in the Nova Scotia *Fatal Injuries Act*, i.e. that liability under the Yukon *Act* arises on the death of the deceased, the same triggering event for the limitation period set out in s. 8(4).

[39] Counsel for the plaintiff counters that the wording is the same in s. 2(2) and s. 8(4), and notes that the triggering event is “the death of the deceased”. By definition in the *Fatal Accidents Act,* “deceased” means a person whose death has been caused as mentioned in subsection 2(1), i.e. wrongfully. Hence, it is submitted that the triggering event requires knowledge on the part of the plaintiff that the death was wrongful, making the limitation period subject to the rule of discoverability.

[40] In my view, to use the words of Major J. in *Peixeiro*, the language in the *Fatal Accidents Act* does not clearly displace the discoverability rule.

[41] I agree that s. 2(2) in the Yukon *Fatal Accidents Act* is not found in the other Fatal Accident statutes but it appears to me to be clarifying the difference between the *Survival of Actions Act,* R.S.Y. 2002, c. 212, which preserves a cause of action that occurred before a death, and the *Fatal Accidents Act,* where the statute creates a cause of action after a wrongful death.

[42] In my view, there is some likelihood that the rule of discoverability applies to the Yukon *Fatal Accidents Act* but it is not appropriate to make a definitive ruling in a summary judgment application.

Issue # 2: If the rule of discoverability applies, do the undisputed facts permit the application of the rule in this summary judgment application?

[43] As indicated, this application for summary judgment is brought pursuant to Rule 18(6) of the *Rules of Court* which states:

> In an action in which an appearance has been entered, the defendant may, on the ground there is no merit in the whole or part of the claim, apply to the court for judgment on an affidavit setting out the facts verifying the defendant's contention that there is no merit in the whole or part of the claim and stating that the deponent knows of no facts which would substantiate the whole or part of the claim.

[44] In the case of *Canada (Attorney General) v. Lameman,* 2008 SCC 14, the Supreme Court of Canada set out the procedure for a summary judgment application to strike claims barred by Alberta's *Limitation of Actions Act*. The struck claims related to Aboriginal agreements dating back to the 1880s and 1890s. The evidence filed by Canada indicated that the cause of action would have been clear to the plaintiffs, exercising due diligence, in the 1970s. The claims were commenced in 2001. The plaintiffs did not provide any evidence to refute the evidence provided by Canada.

[45] The Court set out the principle that claims which have no chance of success should not proceed to trial. In para. 10, the Court said:

> [10] … The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[46] In para. 11, the Court states that “the bar on a motion for summary judgment is high” and sets out the following principles:

> 1. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial". The defendant must prove this; it cannot rely on mere allegations or the pleadings. (authorities omitted)
>
> 2. If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal. (authorities omitted)
>
> 3. Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried. (authorities omitted)
>
> 4. The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts. (authorities omitted) (my emphasis)

[47] The Court, at para. 16, reiterated that:

> The applicable definition of when a cause of action arises was articulated by this Court in Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147, at p. 224:
>
> > ... 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 ... (my emphasis)

[48] As stated in *Peixeiro*, once the plaintiff knows that there is some loss or damage and has identified the person who caused it, the cause of action has accrued.

[49] The Court, in *Lameman*, made a further comment at para. 19:

> We add this. In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. A summary judgment motion cannot be

> defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. This applies to Aboriginal claims as much as to any others.

[50] The *Lameman* case, as I read it, requires that the plaintiff "put its best foot forward" and provide evidence to show that the wrongful death was not reasonably discoverable before the expiry of the limitation period. The plaintiff must do more than indicate what evidence may be produced in the trial, and must actually adduce the evidence on the summary judgment application.

[51] In this court, the practice on a summary judgment application has recently been set out. *Golden Hill v. Ross Mining Limited and Norman Ross*, 2009 YKSC 80, followed the decision in *Skybridge Investments Ltd. v. Metro Motors Ltd*, 2006 BCCA 500, and specifically quoted paras. 10-13 of *Skybridge*:

> 10 A judge hearing an application pursuant to Rule 18(6) must: examine the pleaded facts to determine which causes of action they may support; identify the essential elements required to be proved at trial in order to succeed on each cause of action; and determine if sufficient material facts have been pleaded to support each element of a given cause of action.
>
> 11 If *insufficient* material facts have been pleaded to support every element of a cause of action, then beyond a doubt that cause of action is bound to fail and a defendant bringing an application pursuant to Rule 18(6) will have met the onus to negative the existence of a bona fide triable issue.
>
> 12 If *sufficient* material facts have been pleaded to support every element of a cause of action, but one or more of those pleaded material facts are contested, then the judge ruling on a Rule 18(6) application is not to weigh the evidence to determine the issue of fact for the purpose of the

> application. The judge's function is limited to a determination as to whether a bona fide triable issue arises on the material before the court in the context of the applicable law. If a judge ruling on a Rule 18(6) application must assess and weigh the evidence to arrive at a summary judgment, the "plain and obvious" or "beyond a doubt" test has not been met.
>
> 13 On appeal, as on the application in chambers, the question addressed in a Rule 18(6) application of whether there is a bona fide issue to be tried must be decided assuming that the uncontested material facts as pleaded by the plaintiff are true: Van Den Akker v. Naudi, [1997] B.C.J. No. 1649, 1997 CarswellBC 1470 (WeC) (C.A.). (underlined emphasis added; italics in original)

[52] I have concluded that this application for summary judgment should be granted. The plaintiff's claim has been filed out of time and the pleadings neither raise the application of the rule of discoverability nor provide any facts supporting it. The undisputed facts are that the plaintiff's claim was filed just short of two years after Mr. McLeod's death on August 30, 2008. Counsel for the plaintiff received detailed information about the circumstances of his death on July 22, 2009, and again on August 4, 2009, both within the one-year limitation period. Thus, if the rule of discoverability does not apply to s. 8(4) of the *Fatal Accidents Act,* the cause of action was discoverable within the limitation period, and, even if the rule is applicable, counsel still filed outside the one-year period running from the later date. In my view, the plaintiff's claim has no chance of success because it is statute-barred. I find that the wrongful death action was likely evident from the date of death and, in any event, clearly evident on receipt of the witness statements and Autopsy Report. There is no evidence of any diligence by either the plaintiff or counsel for the plaintiff to investigate a cause of action before the expiry of the limitation period. Although counsel for the plaintiff submitted that, as was the situation in *Norn,* circumstances surrounding the death of Mr. McLeod

were somehow kept from the plaintiff, there is no factual basis supporting this submission in light of the Coroner's disclosure of July 22 and August 4, 2009. While the inquest may have revealed more evidence to support the cause of action, the wrongful death cause of action was evident, at the latest, on receipt of the Coroner's brief.

[53] The evidence that has been filed to support the application of the rule of discoverability comes from a lawyer in the firm of counsel for the plaintiff. There is no affidavit from the plaintiff herself. Counsel, in contrast to a layperson, is presumed to know the law, including the applicable limitation period of one year. Counsel received substantial material in the Coroner's disclosure on July 22 and August 4, 2009, and ought to have known at that point that a Statement of Claim should be filed on or before August 30, 2009. Although counsel referred to being retained for the *Fatal Accident Act* claim only after the coroners' inquest, this argument was not pursued in oral submissions, and I do not find any merit in such an argument. The cause of action arises when the injury, damage and tortfeasor are known.

[54] Counsel for the plaintiff submits that the defendants have not met the condition precedent in Rule 18(6) of including in their affidavit the words "that the deponent knows of no facts which would substantiate the whole or part of the claim." It is my view that the defendant has substantially complied with this provision in swearing that "there is no merit in the whole of the plaintiff's claim", and took this position specifically based on the fact that the plaintiff filed beyond the one-year limitation period. It would not have been appropriate in this context to state that there are no facts which would substantiate the whole or part of the claim. Firstly, the plaintiff did not plead the rule of discoverability in this summary judgment application. Secondly, there are known facts that would support the substantive wrongful death claim, so it is understandable that the defendant cannot

truthfully depose that there are no facts supporting the claim. In the circumstances, I exercise my discretion under Rule 1(14) to waive the requirement.

CONCLUSION

[55] I conclude that, while the application of the rule of discoverability has sufficient merit to be considered in this Rule 18(6) summary judgment application, it is an inappropriate context in which to determine its applicability to the *Fatal Accidents Act*. In any event, even if the rule can apply, there is no factual basis to support its application here, and, moreover, the pleadings of the plaintiff do not address the issue.

[56] I therefore grant the summary judgment application to strike the plaintiff's wrongful death claim, as it was not filed within the one-year limitation period set out in s. 8(4) of the *Fatal Accidents Act.*

VEALE J.