
CANADA / JUDGMENT

Paterson & Sons Ltd. v. Lawrence Corp. Ltd.

[1974] SCR 31

COURT

Supreme Court of Canada

DECIDED

31 January 1973

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Paterson & Sons Ltd. v. Lawrence Corp. Ltd.

Collection

Supreme Court Judgments

Date

1973-01-31

Report

[1974] SCR 31

Judges

Fauteux, Joseph Honoré Gérard; Abbott, Douglas Charles; Judson, Wilfred; Hall, Emmett
Matthew; Pigeon, Louis-Philippe

On appeal from

Quebec

Subjects

Transportation

Decision Content

Supreme Court of Canada

Paterson & Sons Ltd. v. Lawrence Corp. Ltd., [1974] S.C.R. 31

Date: 1973-01-31

N.M. Paterson & Sons Ltd. (Plaintiff) Appellant;

and

St. Lawrence Corporation Limited (Defendant) Respondent.

1972: October 31; 1973: January 31.

Present: Fauteux C.J. and Abbott, Judson, Hall and Pigeon JJ.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Shipping—Charter-party signed in the Province of Quebec—Carriage of goods to United States—Damages suffered by longshoreman in United States—Suit against the owner—Settlement approved by judge in U.S.A.—“Action récursoire” against charterer under charter-party—Contributory negligence of longshoreman—Prescription—Code of Civil Procedure, art. 178—Civil Code, art. 1920, 2226-7.

By a charter-party signed in the Province of Quebec, a ship was chartered by the appellant to the respondent for the carriage of goods from the Province of Quebec to the United States. The charter stipulated that the cargoes would be loaded, stowed and discharged free of risk and expense to the vessel and that the dunnage required for loading would be supplied, placed in position for loading and removed free of expense to owners. While the ship was in the United States, one G, an employee of a local stevedoring firm doing the unloading for the respondent's account, fell and was injured when one of the dunnage boards which was defective broke as he was walking on it. He filed suit in the U.S. District Court claiming damages from the appellant as owner of the ship. The latter notified the respondent of this claim. One year later a settlement was negotiated and a release was executed by G on receipt of the sum agreed upon with the appellant. This was approved by a U.S. District Court judge. Subsequently the appellant instituted an action against the respondent alleging the charter-party, the accident and the settlement, to recover the total sum for damages and costs on account of the accident. This action was maintained. The Court of Appeal reduced the amount upon a finding of contributory negligence on the part of G, holding that the victim had no need to walk over the boards to do his work and that he could not have been unaware of the danger of so doing. Hence the appeal to this Court and also the cross-appeal by the respondent praying that the action be dismissed. Held: The appeal and the cross-appeal should be dismissed.

The accident having occurred abroad, its legal consequences were to be determined by reference to the law of the place of occurrence, but this law does not exempt the victim from his share of responsibility, if through his carelessness or negligence he himself contributed to the damage. The claim against the respondent rests upon the terms of the charter-party, a contract made in Quebec and governed by the law of Quebec. Under art. 178 of the Code of Civil Procedure, any defence which might have been set up to the original action may be pleaded to an action brought upon a judgment rendered out of Canada. It is therefore unnecessary to decide whether the settlement approved by the District Court judge is to be considered as a judgment or as a transaction having between the parties the authority of a final judgment, since even if it is to be treated as a judgment, it is not conclusive against the respondent which was not a party to the

suit. It may therefore set-up in defence to appellant's claim G's contributory negligence.

The respondent cannot complain that the release executed by G did bar any recourse it could exercise against third parties since it is in the situation of a primary debtor towards the appellant.

Regarding the question of prescription, referred to by the respondent, the applicable principle is well established: the prescription of a right of action does not begin to run until this right has come into existence. The remedy claimed here is the "action récursoire" which does not lie until a final decision has been reached in the principal action by judgment or by transaction. This action was instituted less than one year after the settlement. This settlement is to be considered as a transaction which was effected at a time when G's right of action was preserved by the proceedings still pending. It is an acknowledgment of G's right interrupting prescription as of its date by virtue of art. 2227 of Civil Code.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec, reversing a judgment of the Superior Court. Appeal and cross-appeal dismissed.

T. Bishop, for the plaintiff, appellant.

D.H. Wood, for the defendant, respondent. The judgment of the Court was delivered by

PIGEON J.—The action in this case was instituted by the appellant N.M. Paterson & Sons Ltd. (Paterson) against the respondent St. Lawrence Corporation Limited (St. Lawrence) to recover a total sum of \$43,221.77 for damages and costs on account of an accident suffered by one Gregory in Cleveland, Ohio, on board its vessel, the "Lawrendoc", while chartered to St. Lawrence. This action was maintained by the Superior Court to the extent of \$40,014.06. On appeal, this was reduced to \$20,007.03 upon a finding of contributory negligence on the part of the claimant Gregory. On the further appeal to this Court, Paterson seeks to have the judgment at trial restored. St. Lawrence cross-appeals praying that the action be dismissed entirely.

By charter-party dated July 15, 1957, the "Lawrendoc" was chartered by Paterson to St. Lawrence for voyages from Trois-Rivières, Québec, to Cleveland, Ohio and Detroit, Michigan, to carry full cargoes of newsprint paper in rolls "to be loaded, stowed and discharged free of risk and expense to the vessel". The charter also stipulated: "dunnage required for loading newsprint paper to be supplied, placed in position for loading and removed free of expense to owners". While the "Lawrendoc" was at Cleveland on December 2, 1957, one Charles F. Gregory, an employee of a local stevedoring firm doing the unloading for St. Lawrence account, suffered an accident on board the vessel. This accident was claimed to be due to defective dunnage put by St. Lawrence's stevedore between the top of the first tier of upended newsprint rolls in the hold and a wooden support of equal height placed along the side of the ship. This dunnage consisted of rough one-inch boards of varying width laid with spaces in between. One of these boards broke as he was walking on it and he fell to the bottom. On July 11, 1958, Gregory filed suit in the U.S. District Court claiming from Paterson as owner of the ship, damages in the amount of \$135,000. On December 10, 1958, St. Lawrence was notified of this claim by Paterson's attorneys in Montreal.

By letter dated February 5, 1959, St. Lawrence said in answer:

It is our position that by your delay in so notifying us and because of the prejudice produced by that delay, our Company has been released and discharged from any obligation which it might otherwise have owed to your client in connection with this matter.

On the advice of counsel, Paterson negotiated a settlement and on March 30, 1959, a stipulation was executed in the following terms, omitting the recitals:

NOW, THEREFORE, the parties in the above entitled cause, by their respective attorneys, stipulate and agree that the following order may be entered in such action:

“Complaint of Charles F. Gregory settled and dismissed with prejudice at defendant and third-party plaintiff N.M. Paterson & Sons Limited’s costs.

Intervening petition of New Amsterdam Casualty Company settled and dismissed with prejudice at defendant and third-party plaintiff N.M. Paterson & Sons Limited’s costs.

Neither such settlement nor dismissal of the aforesaid complaint or the Intervening Petition shall prejudice N.M. Paterson & Sons Limited’s rights nor the rights of Nicholson Cleveland Terminal Company under the third-party complaint or counterclaim pending between Nicholson Cleveland Terminal Company and N.M. Paterson & Sons Limited in the above-captioned cause.

All docket fees are waived.

From the Thirty-five Thousand Dollars (\$35,000) paid plaintiff Gregory in settlement of his complaint by N.M. Paterson & Sons Limited, plaintiff Gregory shall pay Intervenor New Amsterdam Casualty Company the sum of Four Thousand Five Hundred Forty-two and 77/100 Dollars (\$4,542.77) or such other sums as may be due New Amsterdam Casualty Company or Nicholson Cleveland Terminal Company as payments made by them for medical expense and compensation under the Longshoremen’s and Harbor Workers’ Compensation Act, as amended. By receiving such payment they and each of them shall be deemed to have waived any right to recover said sum against said N.M. Paterson & Sons Limited, its successors and assigns, its M/V Lawrendoc, her officers, crew, agents and insurers; nor shall the settlements or this entry be construed as constituting consent or approval under paragraph (g) of Section 33 of the Longshoremen’s and Harbor Workers’ Compensation Act, as amended (33 U.S.C.A. par.933 (g)).”

This was approved by a U.S. District Court Judge affixing his signature under the words “IT IS SO ORDERED”.

The action in the Superior Court alleging the charter-party, the accident and the settlement was instituted by Paterson on February 18, 1960. In this action, it was also alleged that St. Lawrence had been notified of the settlement by letter sent before it was made and in the defence it was admitted that this letter had been received.

A great deal of evidence was adduced at the trial mostly obtained under rogatory commission. This covered the facts of the accident, the extent of the injuries, etc. Proof was also made of the relevant U.S. law. It is clear that there was ample evidence to support the finding of the trial judge that Gregory had a valid claim against Paterson for the damages which he had suffered by reason of defective dunnage.

The only question raised on that point at the hearing was the contention advanced by counsel for St. Lawrence that, under U.S. Maritime Law, Paterson would not be liable for damages due to defective dunnage because this was not part of the ship and did not constitute a walkway. This contention was advanced solely on the basis of dictionary definitions. It cannot be supported in view of the evidence given at the trial that, under U.S. Maritime Law, “the ship owner owes an absolute non-delegatable duty to the Stevedore to provide a ship and appliances which are in all respects seaworthy—seaworthy meaning that the ship or appliances in question is reasonably fit for its intended purpose”, and “that the ship owner will be liable for a defective appliance even though a third party brought it aboard his vessel”. It was conceded that the “benching” which had to be put in by the stevedores for loading the newsprint rolls became part of the ship towards the longshoremen. No distinction can be made, the contract uses the single word “dunnage” to cover everything. The witness Yanik said:

some call them benches, some call them shelves, and some call them dunnage.

As to the defect, the trial judge made the following finding of fact:

[TRANSLATION] This board—part of an arrangement which in fact formed a walkway along the side of the hold—because of its defective condition, apparent to whoever selected and installed it, but not apparent and unforeseeable to anyone using it in the normal course of events, was the real, immediate and direct cause of the fall, and the resulting damage to Gregory.

In the Court of Appeal, Gregory was held to have been guilty of contributory negligence, Choquette J.A. saying:

[TRANSLATION] As the circumstances of the accident were established out of Court on rogatory commission, we are in the same position as the trial judge to weigh the testimony given regarding the cause of the accident.

The trial judge found that the *lex loci* ascribes “a condition of unseaworthiness to a vessel, not only to its construction and powerplant, but also to the cargo and dunnage, anything which may become a source of danger during loading, navigation or unloading”. Without disputing this proposition, I see nothing to exempt the victim from his share of responsibility, if through his carelessness or negligence he himself contributed to the damage. In my opinion the record shows that Gregory was at least half responsible for the accident which befell him, which he only reported to respondent seven months later. The board which allegedly broke under his weight was part of a latticed arrangement designed to support rolls of paper one above the other, specifically in the space formed by the curvature of the hull. As the goods had already been unloaded in this part of the hold, the victim had no need to walk over these boards to do his work

...

In his report to the Federal Security Agency Bureau of Employees' Compensation, dated December 4, 1957, Gregory does not mention "planks used as walkway on the cargo". He simply says: "While I was walking on board used as dunnage one broke causing me to fall striking my right leg and groin". In Webster's New Collegiate Dictionary, "dunnage" is defined as: "Loose material used around a cargo to prevent damage". With his experience of several years in this occupation, Gregory could not have been unaware of the danger of walking on loose boards, even though he was not warned of it.

In the circumstances I would assign half of the responsibility to Gregory.

No serious reasons were advanced against those unanimous findings of the Court of Appeal and the grounds of attack were essentially that the settlement made in the U.S. and the judgment rendered thereupon were conclusive of the extent of Paterson's liability towards Gregory. This contention was urged essentially on the basis that such would be the situation under U.S. law according to evidence given at the trial.

This argument involves a misconception of the extent of the applicability of U.S. law. It is quite true that the accident having occurred abroad, its legal consequences were to be determined by reference to the law of the place of occurrence. Also, an action having been instituted in a competent foreign Court against Paterson, the determination of the quantum was governed by the rules of that court. However, the claim against St. Lawrence rests upon the terms of the charter-party, a contract made in Quebec and governed by the law of Quebec. What the situation would have been if Paterson had brought St. Lawrence before the U.S. District Court as a third party, as it did bring in Gregory's employer, need not be considered. This was not done. There was only a notice given many months later, followed by another letter advising of the impending settlement. Under the law of Quebec, art. 178 (formerly art. 210) of the Code of Civil Procedure, any defence which might have been set up to the original action may be pleaded to an action brought upon a judgment rendered out of Canada. This being so in a case in which the person condemned was a party to the proceedings, a fortiori must it be so towards a person who was not impleaded in the foreign Court. It is therefore unnecessary to decide whether the settlement approved by the District Court is to be considered as a judgment or as a transaction having between the parties, under art. 1920 C.C., the authority of a final judgment. Even if it is to be treated as a judgment, it is not conclusive.

While the legal situation between Paterson and St. Lawrence is not without analogy to that of an insured and an insurer denying liability, account is to be taken of the fact that the stipulations of the charter-party are not those of a liability insurance policy. In such a policy, prompt notice to the insurer is called for. Also, the insurer is authorized to effect settlements but the insured is prohibited from so doing without the consent of the insurer. Here, there is nothing more than an undertaking to load, stow and discharge the cargo free of risk and expense to the vessel. Apart from such stipulation, there would be no liability, the defective piece of dunnage having been put in, not by St. Lawrence, but by an independent contractor, the stevedoring firm that did the

loading at Trois-Rivières. The release executed by Gregory on receipt of the sum agreed upon with Paterson included a discharge of its officers and crew and it was contended that, St. Lawrence being entitled to the benefit of any recourse against third parties, such a release did bar the recourse sought to be exercised. The fallacy of this argument is that, as between Paterson and its servants, St. Lawrence is in the situation of a primary debtor. In *Court Line Ltd. v. Canadian Transport Company Ltd.*[1], the House of Lords held that where, by a charter-party, the charterers were “to load, stow and trim the cargo at their expense under the supervision of the captain”, the primary duty was “imposed on the charterers and if they desire to escape from this obligation, they must ... obtain a finding which imposes the liability upon the captain and not upon them”. Here as in that case, there is no such finding and no evidence on which it could be made. Therefore, St. Lawrence cannot complain of the release obtained from Gregory.

It was also argued that the sum agreed upon with Gregory took into account the possibility of contributory negligence. The answer to this contention is that the agreement is *res inter alios acta*. The recourse to be exercised is no better than if Gregory himself was suing St. Lawrence before the courts of Quebec. It is clear from the judgment of the trial judge that he assessed Gregory’s full damages at no more than the sum paid by Paterson. The Court of Appeal found that “generous” and accordingly cut it down to one half upon a finding of contributory negligence in accordance with relevant U.S. law as proved.

Finally, the claim was said to have been extinguished by prescription. On this last point, no extensive review of the authorities is necessary. The applicable principle is well established as stated in *Tremblay v. Bouchard*[2]. The prescription of a right of action does not begin to run until this right has come into existence. While an “action en garantie simple” may be instituted before judgment on the principal action, there is no obligation to resort to such a proceeding. The remedy claimed here is the “action récursoire” which does not lie until a final decision has been reached in the principal action by judgment or by transaction. Whether the settlement effected in this case is to be looked upon as a judgment or as a transaction does not matter because this action was instituted less than one year later.

Reference was made to art. 2226 C.C. under which there is no interruption of prescription by an action “If the suit be dismissed” and it was contended that this applied here because, under the terms of the “Stipulation” with Gregory, the “complaint” was “settled and dismissed with prejudice”. It is unnecessary to decide whether in view of the Rules of Procedure in the U.S. District Court as proved, this really means that the action is allowed to that extent, not that it is entirely dismissed as contemplated in art. 2226. Assuming it was not so, the settlement would have to be considered as a transaction which was effected at a time when Gregory’s right of action was preserved by the proceedings still pending. The “Stipulation” would then have to be considered as an “acknowledgment” of Gregory’s right interrupting prescription as of its date by virtue of art. 2227 C.C.

For all those reasons I would dismiss the appeal and the cross-appeal with costs. However, there is an arithmetical error which the parties seem to have overlooked but should not be left uncorrected. The trial judge assessed at \$6,151.56 Paterson’s costs and expenses recoverable in

addition to the sum of \$33,862.50 Can. representing Gregory's damages of \$35,000 U.S. Those two sums total \$40,014.06 for which judgment was rendered. On appeal, this last sum was cut in two upon a finding of contributory negligence on the part of Gregory. This is incorrect because Paterson's costs and expenses, which the trial judge held to have been properly and necessarily incurred, are in no way affected by the reduction attributable to contributory negligence. Therefore, the proper computation of the amount payable under the judgment of the Court of Appeal would be

One half of Gregory's damages, \$33,862.50 Can.:

\$16,931.25

Paterson's costs and expenses:

\$ 6,151.56

Making a total of:

\$23,082.81

I would therefore vary the judgment of the Court of Appeal by increasing the amount of the condemnation to \$23,082.81. Subject to this variation, I would dismiss the appeal and the cross-appeal with costs.

Subject to variation, appeal and cross-appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Brisset, Reycraft, Bishop & Davidson, Montreal.

Solicitors for the defendant, respondent: Laurier, Wood & Aaron, Montreal.

[1] (1940) 67, L1 L.R. 161.

[2] [1964] Que. Q.B. 681.

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