

CANADA / JUDGMENT

Schlueter v. Delatek Inc.

2001 FCT 748

COURT

Federal Court

DECIDED

4 July 2001

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Schlueter v. Delatek Inc.

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T-2003-97

Notes

Digest

Decision Content

Date: 20010704

Docket: T-2003-97

OTTAWA, Ontario, this 4th day of July, 2001

PRESENT: The Honourable Mr. Justice Rouleau

BETWEEN:

MICHAEL PERCY SCHLUETER

Plaintiff

AND:

DELATEK INCORPORATED, TECHNICAL ORDINANCE INCORPORATED,
THE ATTORNEY GENERAL OF BRITISH COLUMBIA AND
HER MAJESTY THE QUEEN IN RIGHT OF CANADA
IN THE NAME OF THE ROYAL CANADIAN MOUNTED POLICE
AND IN THE NAME OF THE CANADIAN ARMED FORCES
Defendants

ORDER

- [1] I attended at Edmonton on June 25, 2001 to entertain an application by the Crown seeking summary judgment to strike the plaintiff's Statement of Claim.
- [2] At the opening, I was advised by counsel for the plaintiff that the action had been discontinued against the defendants Delatek Incorporated, Technical Ordinance Incorporated and the Attorney General of British Columbia.
- [3] Accordingly, the style of cause is hereby amended to read as follows:

MICHAEL PERCY SCHLUETER

Plaintiff

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
IN THE NAME OF THE ROYAL CANADIAN MOUNTED POLICE
AND IN THE NAME OF THE CANADIAN ARMED FORCES
Defendant

JUDGE

Date: 20010704

Docket: T-2003-97

OTTAWA, Ontario, this 4th day of July, 2001

PRESENT: The Honourable Mr. Justice Rouleau

BETWEEN:

MICHAEL PERCY SCHLUETER

Plaintiff

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

IN THE NAME OF THE ROYAL CANADIAN MOUNTED POLICE

AND IN THE NAME OF THE CANADIAN ARMED FORCES

Defendant

ORDER

[4] The defendant's application for summary judgment is granted. The action is statute-barred and there is no genuine issue for trial.

JUDGE

Date: 20010704

Docket: T-2003-97

Neutral Citation: 2001 FCT 748

BETWEEN:

MICHAEL PERCY SCHLUETER

Plaintiff

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

IN THE NAME OF THE ROYAL CANADIAN MOUNTED POLICE

AND IN THE NAME OF THE CANADIAN ARMED FORCES

Defendant

REASONS FOR ORDER

ROULEAU, J.

[5] In October, 2000, Her Majesty the Queen in Right of Canada filed a motion seeking summary judgment in favour of the defendant dismissing all or part of the plaintiff's claim as set out in the Statement of Claim. It is alleged that the action is statute-barred and there is no genuine issue for trial.

[6] Following the filing of the initial Statement of Claim in September, 1997, an Amended Statement of Claim was filed in January, 1998. In July, 1999, the action was discontinued against all defendants except Her Majesty the Queen. In August, 1999, the Crown filed its application by way of a Motion to Strike which was adjourned on three separate occasions. Finally, in October, 2000, the Crown filed this Application for Summary Judgment at which time it also filed its Motion Record.

- [7] In January, 2001, the plaintiff filed its Motion Record in response and, just prior to the hearing of the application, on June 20, 2001, the plaintiff filed an additional affidavit to which he attached a series of documents he had obtained through access to information. These documents deal with an examination and report pertaining to an explosive device (stun grenades) which is alleged to be defective and accordingly the cause of injury to this plaintiff. After hearing submissions from the parties, I am satisfied that the affidavit should be accepted for filing and I so order.
- [8] The facts leading up to this application are as follows.
- [9] The plaintiff is a former member of the Canadian Armed Forces (hereinafter "CAF"). In September, 1995, while a member of the Princess Patricia's Light Infantry, he and his unit were dispatched to British Columbia to assist the Royal Canadian Mounted Police (hereinafter "RCMP") involved in an aboriginal standoff. Because of his special knowledge and training with explosives, he was involved in setting up an early warning system around the perimeter of the encampment that his unit and the RCMP had established.
- [10] Stun grenades, which he now alleges were defective, were attached to trip wires. While the plaintiff was attaching one of the grenades, it unexpectedly ignited in his hands causing the loss of his right thumb and fourth finger and tissue loss to his right hand and wrist. In addition, he suffered permanent partial hearing loss in one ear. Following the incident, the plaintiff was granted a monthly pension benefit of \$1,443.61 from the Government of Canada paid pursuant to the Pension Act. He subsequently commenced his action in this Court by way of Statement of Claim.
- [11] The defendant brings this application for summary judgment submitting that there is no genuine issue for trial. In support of its application to strike, the defendant submits that the plaintiff's action is beyond the Court's jurisdiction and is statutorily barred. He relies on the following statutory provisions in consideration of this application:

Pension Act

111. No action or other proceeding lies against Her Majesty or against any officer, servant or agent of Her Majesty in respect of any injury or disease or aggravation thereof resulting in disability or death in any case where a pension is or may be awarded under this Act or any other Act in respect of the disability or death.
111. Nulle action ou autre procédure n'est recevable contre Sa Majesté ni contre un fonctionnaire, préposé ou mandataire de Sa Majesté relativement à une blessure ou une maladie ou à son aggravation ayant entraîné une invalidité ou le décès dans tous cas où une pension est ou peut être accordée en vertu de la présente loi ou de toute autre loi, relativement à cette invalidité ou à ce décès.

Crown Liability and Proceedings Act

9. No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.
9. Ni l'État ni ses préposés ne sont susceptibles de poursuites pour toute perte - notamment décès, blessures ou dommages - ouvrant droit au paiement d'une pension ou indemnité sur le Trésor ou sur des fonds gérés par un organisme mandataire de l'État.

[12] In *Langille v. Canada (Minister of Agriculture)*, (1992) 2 F.C. 208 the Federal Court of Appeal made the following comments with respect to section 9 [then subsection 4(1)] of the Crown Liability Act:

Subsection 4(1) outlaws a proceeding "in respect of a claim if . . . compensation has been paid . . . out of the Consolidated Revenue Fund . . . in respect of . . . damage or loss in respect of which the claim is made". The words "in respect of " are words of very broad import. Indeed, in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at page 39, Dickson J. (as he then was), described the same words in another federal statute in these terms:

The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.

[13] In *Sarvanis v. Canada*, [2000] F.C.J. No. 12, the Court of Appeal again considered the interpretation of section 9 of the Crown Liability Act and, relying on its decision in *Langille*, concluded as follows:

We are not persuaded that the first issue identified by the Motions Judge raises a genuine issue for trial. Section 9 covers both compensation and pension whether the payment of a pension is meant to fully compensate or not. Therefore, it is irrelevant that the disability payments received by the Respondent are not indemnity payments.

Nor are we persuaded that the second argument represents a genuine issue for trial. In our view, despite the factual differences, the interpretation placed on section 9 by the Court in *Langille*, *supra*, would appear to be equally applicable here. As was noted in that case, section 9 is very broadly framed. In our view, the "pension" in this case was paid out of the Consolidated Revenue Fund "in respect of" the injury sustained by the Respondent on June 16, 1992. Indeed, in his own application for the CPP disability pension the Respondent identified the cause of this injury as the accident which he suffered on that date.

[14] Applying these principles of law to the facts of the case now before me, I am satisfied that by virtue of section 9 of the Crown Liability and Proceedings Act and section 111 of the Pension Act, the plaintiff's claim is, as a matter of law, statute barred, insofar as the plaintiff has received a pension, paid out of the Consolidated Revenue Fund "in respect of" the untimely injury to the plaintiff, regardless of fault, while his claim in the present action is also for relief from the same injury and loss.

[15] The plaintiff maintains that he is not seeking double recovery, but rather is asking for damages which are not covered by the benefits available under the Pension Act and related legislation. However, that is precisely the type of claim which the legislation does not permit. In Langille, the Court of Appeal stated:

The only difference here is that respondents, by way of this action in tort, are seeking to enhance recovery in respect of that destruction beyond the level of the compensation they were paid in 1978 out of the Consolidated Revenue Fund. In our view, subsection 4(1) [now section 9] of the Crown Liability Act bars them from doing so.

(Emphasis added)

[16] This reasoning is equally applicable to the plaintiff's claim in the present matter.

[17] The plaintiff alleges that the operation of the Crown Liability and Proceedings Act and the Pension Act precludes him from exercising his right to a determination of the issue of blame, contrary to sections 7 and 15 of the Canadian Charter of Rights and Freedoms which provide as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

15.(1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[18] The plaintiff alleges there is a chance that his action may succeed if it went to trial. He submits that the documents obtained through access to information will support his claim of willful disregard and negligence on the part of the authorities who were well aware of the defective nature of the stun grenades. He further alleges that provisions of the Pension Act and the Crown Liability and Proceedings Act cannot absolve tortious conduct. He suggests that it is not "plain and obvious" that the plaintiff has been adequately compensated "in

respect of" injuries sustained. He relies on *Duplessis v. Canada*, 2000 F.C.J. No. 1917. He further suggests to the Court that the willful disregard for the safety of the plaintiff, as practised by servants of Her Majesty the Queen, should permit additional recovery and refers the Court to the case of *Budge v. Calgary (City)*, 77 D.L.R. (4th) 361, where the Court wrote:

When *Whitebread* was appealed to the Supreme Court of Canada it follows that the interest of both respondent is proprietary in nature and purely economic and is not protected by s. 7 of the Charter.

The foregoing should be read in context. It has to do with a statute which replaces common law liability with a special scheme of compensation much like insurance. So it does not bar all recourse. It does not pardon or legalize tortious conduct, still less deliberate conduct. In a different facts outside that context, different Charter considerations might apply. But I need not consider whether that is so here. In any event, no argument was made here that the law of torts generally is protected under s. 7 of the Charter.

(My emphasis)

[19] The Crown in response submits that alleged violations of sections 7 and 15 of the Charter have been previously considered by this Court. In particular, the Federal Court of Appeal, in the matter of *Horn v. Canada et al*, (1994) 73 F.T.R. 301, aff'd (1994), 176 N.R. 30, dealing with similar provisions limiting liability of the Crown, held as follows with regards to section 7:

Although the facts of these cases may vary, the position of the Court on the application of s. 7 of the Charter does not. As in these cases cited above, the right to sue is not included within the rights of s. 7 and therefore, I believe that no Charter violation has occurred.

[20] In *Horn*, supra, the trial judge wrote as follows:

The s. 7 issue has mainly been decided on the grounds that a civil right to sue is a proprietary right not protected by any sections of the Charter. This approach of "fundamental freedom/right" was first established in *Re Terzian*. The Ontario Divisional Court found that prohibition provisions barring injured employee lawsuits did not infringe s. 7. The Court in this case stated:

We are all of the view that the right to bring an action for damages in the circumstances of this case is not a matter that falls within the meaning of "security of the person" as those words are found in s. 7 of the Canadian Charter of Rights and Freedom. (p. 145)

The British Columbia Court of appeal also adopted such an approach in *Whitebread v. Walley et al*. (1988), 51 D.L.R. (4th) 509 (B.C.C.A.), ("*Whitebread*") (The appeal on the issue of s. 7 was dismissed from the Bench by the Supreme Court of Canada). Although the Canada Shipping Act was in question, Madame Justice McLachlin analyzed the spectrum of protection of s. 7 of the Charter. At one end, she states, s. 7 is meant to protect the physical liberty of individuals from abusive detention, etc. At the other end of the spectrum, it appears that purely economic claims are not within the purview of s. 7. (p. 520)

[21] With regards to section 15 of the Charter, the Court of Appeal determined the following after a discussion of the relevant jurisprudence:

In his view, the legislation was fair and equitable. It may treat individuals unequally but the differentiation did not constitute discrimination. The loss of a right to sue has been balanced by the advantages of the Act such as quick payments and no fault coverage. I agree with the decision of the Court in this case. Almost immediate payments and no judicial delays, no contributory negligence, and absolute liability are advantages that overcome any disadvantages of not being able to sue. The Act is not discriminatory and I believe that s. 15(1) has not been violated.

[22] As I review the reasons for the decision in Duplessis, supra, now under appeal, it should be brought to the plaintiff's attention that this was not a matter in which the Crown was seeking summary judgment but rather a motion to strike certain sections in the Statement of Claim and, as the learned Prothonotary suggested, "it was not plain and obvious".

[23] It should also be noted that her review of the authorities on section 7 of the Charter, more particularly in the Supreme Court of Canada case to which she has been referred, *R. v. Beare*, [1998] 2 S.C.R. 387, the Court was dealing with "life, liberty and security of the person" in a situation involving a police arrest and the obligation to provide finger prints.

[24] The other cases referred to, *Rodriguez* and *Kipling*, were not dealing with claims for pension but were in fact matters dealing with disciplinary proceedings arising out of directives issued by the military. Of particular interest to this cause of action, are the Prothonotary's comments at paragraph 71 of her decision:

Absent clearer evidence that the pension entitlement was intended to cover and does cover the injuries which form the basis for this claim, and that these injuries are in fact related to or indistinguishable from the aggravation of his syndrome, I cannot find it plain and obvious that the plaintiff has already been awarded a pension in relation to the injuries claimed. This finding applies equally to section 9 of the Crown Liability and Proceedings Act on which the Crown relies to bar Sergeant Duplessis' claim in tort.

[25] It is obvious that the Prothonotary was concerned in Duplessis, supra, that the claim may be distinguishable from that for which pension benefits were being paid. In the case at bar it is evident that the relief now being sought directly relates to the injuries for which "compensation has been paid out of the Consolidated Revenue Fund" ... "in respect of damage or loss in respect of which the claim is made".

[26] The plaintiff's reference to the Budge matter, supra, is also distinguishable. There is no doubt in my mind that the quote referred to is obiter. It is also important to note that the Alberta Court of Appeal was conscious of the fact that the Workers' Compensation Act was a "statute which replaces common law liability". The Crown Liability and Proceedings Act on the other hand creates an avenue of recovery which did not exist at common law. I am also satisfied that Workers' Compensation statutes do not contain prohibitive clauses as do the Pension Act and the Crown Liability and Proceedings Act.

[27] For these reasons, the defendant's application for summary judgment is hereby granted. I am satisfied that the action is statute-barred and there is no genuine issue for trial.

JUDGE

OTTAWA, Ontario

July 4, 2001

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