Gagnon (*Suppliant*) *v.* **The Queen** (*Respondent*)

Noël J.—Quebec, June 2 and 3; Ottawa, September 9, 1970.

Crown—Petition of Right—Accident—Explosion—Sonic boom—American aircraft visiting Canada—Visiting Forces Act, R.S.C. 1952, c. 284—Canadian Forces Act, 1954, (Can.) 1953-54, c. 13, s. 17—Presumption—Crown liability—Burden of proof —Jurisdiction of the Court—Arbitration provided for under s. 19 of the Visiting Forces Act—Court Rules 92, 93 and 94 concerning written pleadings—Point not raised as a defence to the action.

While riding a motorcycle along a road in the Province of Quebec, suppliant was suddenly overturned and thrown to the ground as the result of a powerful explosion. Alleging that this explosion was a sonic boom produced by an aeroplane owned by the Crown, or by a foreign aircraft flying over Canadian territory, suppliant sued the Crown for damages suffered as a result of the accident. He claimed that the Crown was liable due to the fault, negligence and carelessness of the pilot of this aircraft.

The evidence showed that on the date of the accident, two American military interceptors were conducting authorized exercises quite near the scene of the accident.

Although this point was not raised as a defence to the action, the Crown maintained at the hearing of the case that under the *Visiting Forces Act,* R.S.C. 1952, c. 284, s. 19, a court before which a suit is brought against the Crown, based on s. 16 of the statute, does not have jurisdiction to decide whether the member of a visiting force who is responsible for the misfeasance, committed it within the scope of his duties or employment, and that this question must necessarily be resolved by an arbitrator.

Held, Absolute certainty is not required in questions of causality, and a preponderance of evidence is sufficient. The circumstances established in the present case are sufficient to allow the reasonable inference that the accident could only have been caused by one or other of the two American interceptors owned by the armed forces of the United States, and flying on an authorized path quite near the scene of the accident. (Cf. *Trib. gr. inst. Bressuire,* October 17, 1967; D.S. 1967, 667.)

(2) Sec. 17 of the *Canadian Forces Act, 1954,* (Can.) 1953-54, c. 13, amending s. 16 of the *Visiting Forces Act,* R.S.C. 1952, c. 284, does not create a presumption to the effect that a member of a force visiting Canada, and who commits a tort, has thereby acted within the scope of his duties, because it is always possible that such member was not on duty at the time. The presumption only exists when it has been established that the member of a visiting force acted within the scope of his duties, and it is only then that his tort will be deemed to have been committed by a servant of the Crown, also acting within his duties. This is an essential element of Crown liability, which the suppliant had the burden of establishing, and which he has established.

(3) Further, the breach committed by the pilot of one of the aeroplanes, by flying as he did, below 30,000 feet and over a built-up area in contravention of the statutory regulations passed for the purpose of ensuring protection and security for buildings and people, creates a presumption of liability which has not been overturned by the Crown. (Cf. *Sterling Trusts Corp. v. Postma* [1965] S.C.R. 324, at p. 329).

(4) The arbitration provided for in s. 19 of the statute does not apply only to claims between signatory States.

(5) If, on the other hand, the Crown does not plead in the form laid down by Court Rules 92, 93 and 94 concerning written pleadings, and does not state that it has actually proceeded as required by statute to submit the matter to an arbitrator, and establish that it has obtained a decision by the arbitrator, the Court cannot presume or agree that the question to be determined under s. 19 has ever been raised.

PETITION of right.

Robert Cliche for suppliant.

Gaspard Côté and *Alain Nadon* for respondent.

[TRANSLATION]

NOËL J.—The suppliant, a day labourer, is claiming from the Crown damages and interest amounting to $46,223.50, which he has agreed to reduce to the sum of $9,500, and which the respondent has agreed should be the amount awarded for all items of damage claimed in the event that his petition of right is found to be justified.

He claims to have suffered these damages in the following circumstances.

On August 18, 1961, he was riding a motorcycle along a road that runs from Ste. Justine to Ste. Camille in the county of Dorchester, Que., when there was suddenly a powerful explosion which threw him off his cycle and hurled him to the ground, thereby causing him serious injuries.

The explosion which caused the accident, according to the suppliant, was a sonic boom created by an aeroplane owned by the Crown, or, he adds, by a foreign aircraft flying over Canadian territory. The suppliant maintains that the respondent is liable for this accident because it was due to the fault, negligence and carelessness of the aeroplane pilot, who did not adhere to regulations and indeed was reckless in the operation of his aircraft. The respondent, on the other hand, denies the allegations in the petition of right, and contends that no military aircraft belonging to Her Majesty, or piloted by one or more members of Her Majesty's Air Force, flew over the area where the accident occurred on the date indicated by the suppliant. Respondent further maintains that no military aircraft belonging to a force visiting Canada, in accordance with the *Visiting Forces Act,* or piloted by one or more members of such a force, flew over the area where the accident occurred on the date given by the suppliant. It adds that no sonic boom over Canadian territory, which can be attributed either to a Canadian military aircraft piloted by one or more members of the Canadian Air Force, or to the members of a visiting force, took place on the date and in the area mentioned by the suppliant in his petition of right. The respondent further alleges that if a sonic boom was heard in the area and on the date indicated by the suppliant, it was not created in Canadian territory and Her Majesty cannot be held responsible. In any case, it says, if such a boom did occur, it did not, and could not, have caused the suppliant's accident; and if the latter

was in fact thrown from his motorcycle and hurled to the ground, this accident was solely due to the fault, recklessness and negligence of the suppliant, in particular because:

(*a*) he was riding his motorcycle at a speed that was both excessive and dangerous;

(*b*) he was not riding his motorcycle with due care and attention;

(*c*) he did not have complete control over his motorcycle; and

(*d*) he failed to take proper precautions for his own safety.

The suppliant Gagnon, now living in Connecticut, in the United States, testified at length as to the circumstances surrounding the skidding of his motorcycle. In 1961 Gagnon was living with his father-in-law, two miles from Ste. Justine and two and a half miles from Ste. Sabine, in the county of Dorchester, Que. He was then owner of an Indian motorcycle, which he had purchased three days before the accident. He stated that he had previously owned two other motorcycles and was well acquainted with such vehicles. Indeed, he had already travelled between 25,000 and 30,000 miles on motorcycles. On the day in question, he had difficulty starting his cycle and had to push it, with his father-in-law's assistance. He stated that, before he left, a loud explosion was heard, and he described it as louder than thunder, like a burst of dynamite, which made the ground tremble. He was, however, not on his cycle at the time. He then rode away towards Ste. Justine, but before reaching the village, he turned back in the direction of Ste. Sabine. The road, he said, was paved and straight for a distance of four miles; there were hills but no curves. He was going along in the middle of the right lane at a speed of 45 to 50 miles an hour when, as he came to the top of a small rise, a dreadful explosion occurred. At the time, he said, he thought that both tires of his cycle had burst at once. A check of these tires in due course, however, showed them to be in good order. "I spun on the cycle," he said, "and the back wheel went towards the left-hand ditch. I landed on the tubes of my cycle that shield the legs. I spun around completely in the air and fell onto the pavement on the left side. I slid, lost speed, and ended up on the pavement, on the left side, on my knees. Rather than go into the fence, I hit the mailbox post. I swerved and went into the ditch, and the cycle kept going until it wound up in Mr. Giroux's yard, sliding along on its tubes." He stated that he did not lose consciousness, but could not look up. The second noise, the one which caused him to fall from his cycle, was like the first which he heard before leaving for Ste. Justine. However, he added, it was much nearer. Mrs. Giroux came to his assistance and helped him, as his right leg was broken, with an open fracture near the hip joint. In addition, he was dragged along the pavement and received third degree burns up to his elbow. In somewhat confused language, Gagnon stated that at the time of the explosion and the accident, "there was the noise, it was like someone pushed me and made me lose control . . . it pushed me, the vibrations and shocks were so powerful, it was like being numb."

Under cross-examination Gagnon further stated that at the top of the rise he heard "a second noise . . . it seemed to be very loud, like 10 boxes of dynamite going off under you; my reaction was to watch where I was going, to look out for my face. I went underneath my cycle without touching the pavement." He said that a motorcycle is driven with the whole body and "it can be controlled with a push." Regarding the effect on him of the explosion, he described it as follows: "I felt on my right side, it was like a vibration which went down the whole length of my body." He admitted having stated that he was paralyzed on his cycle when questioned in Quebec some days after the accident, but claimed that the explosion caused him to shiver. Then, in answer to a question by the counsel for the respondent, he repeated that he remained paralyzed by the noise. "I did not even apply the brakes after the explosion. I took off into the air. I remained paralyzed with both hands on the handlebars. When the accident happened," he added, "I was terrified, the noise stayed with me for half a month and I could not sleep, I was in sound shock." Finally, he stated that the noise of the explosion he heard immediately before the accident was like the aeroplane noises he had heard a couple of times over the Maine forests, where he worked.

The suppliant's description of the explosion alleged to have taken place before he lost control of his cycle is indeed fully supported by several witnesses.

[*Here the learned Judge reviewed the evidence of the witnesses and continued:*]

From the suppliant's evidence, as well as the testimony of those who heard the sonic booms, it would appear that the accident involving the suppliant was caused by the explosion that followed the flight of one of the aeroplanes which were criss-crossing the sky around the parishes of Ste. Germaine, Ste. Justine and Ste. Sabine on August 18, 1961. The suppliant claims he was, as it were, pushed by the rush of air caused by the sonic boom, and the respondent maintains that this was not possible because the impact of air pressure from a sonic boom on a motorcyclist would not be sufficient to affect him.

M. A. Laviolette, an aeronautical engineer and expert witness for the respondent, explained how a supersonic "bang" occurs. He said that an aircraft flying faster than the speed of sound causes two shock waves, one before it and the other behind. These two waves spread out into the atmosphere, strike the ground at an oblique angle and bounce back. The bang results from the accumulation of pressure disturbances around the aircraft flying at a supersonic speed; this phenomenon takes the geometric shape of two revolving cones, having their axis parallel to the ground and the source of the noise at their apex. These two cones strike the ground and describe a mat of pressure shaped like a "C". In relation to the ground, this mat of pressure moves along the aeroplane's flight path, at the same speed, causing the pressure on the ground to be distributed. The leading shock wave produces pressure in excess of atmospheric pressure, whereas that produced by the trailing wave is lower. This distribution of pressure on the ground reaches

the ear as a double explosion, but the explosion caused by a supersonic aircraft at 1,500 miles an hour strikes the ear as a single explosion, nearly like thunder. Laviolette stated that the overpressure and dimensions of the shock mat produced by a supersonic aircraft are tied to its weight, size, length, speed, and especially, its altitude. The pressure is greatest below the flight path in the middle of the "C" and fades to zero on either side. The maximum overpressure below the flight path of a fighter at 10,000 feet is five pounds per square foot; at 30,000 feet, it is about one pound per square foot. The figures given for high pressure, however, do not take account of the effect caused by the aircraft when it manœuvres. During a manœuvre, a turn, Laviolette stated, or when the aircraft is accelerating, there can be a phenomenon of focussing the shock waves on the ground which results in increased overpressure. Also, he added, there are the effects of the atmosphere, of the weather and the contour of the land, and these effects may double the overpressure. It is Laviolette's opinion that the overpressure created by the two supersonic aircraft at 10,000 feet is not much more than that produced by a close peal of thunder; at 30,000 feet, it would be less than that of thunder nearby. He felt it unlikely that the overpressure of five pounds per square foot caused by the aircraft flying at 10,000 feet threw Gagnon from his motorcycle. A pressure of five pounds is produced by the wind on a motorcycle going at 50 miles an hour, and according to the description of the accident, the aeroplane was moving in the same direction as the motorcycle, hence the pressure created by the shock wave would merely have cancelled that of the wind meeting the rider. He admitted, however, that this did not take into account the psychological and medical effects that the sonic "bang" could have on the individual. In cross-examination the suppliant's counsel asked him whether he could state definitely that a moving cycle would not be affected by the pressure of a sonic "bang", and he replied that it depended on the overpressure and it was a difficult question to answer. Ultimately, he stated that he would rule out the effects of pressure on a motorcyclist, but take into consideration the effect of surprise occasioned by a sonic explosion, particularly as it is completely unexpected and the aircraft sometimes cannot be seen or heard until after the boom has taken place.

Paul-André Roy, a physical engineer and the head of Investigation Technique de Québec Ltée, was also heard as an expert witness, in this case for the suppliant. The extent of the overpressure caused by the shock wave as it strikes the earth—or rather the two shock waves (the first being a high pressure zone, the second a low pressure zone, according to Roy)—is a function of various factors, such as the shape, speed and altitude of the aeroplane and the condition of the atmosphere. The chief factor affecting the intensity of the energy in the shock wave, according to him, is the altitude of the aircraft. In any event, he said, the high pressure zone lasts about one tenth of a second, as does the low pressure zone. The maximum amount of overpressure he called the pressure jump: as the extent of the pressure jump at ground level is inversely proportional to the altitude, the closer the aeroplane is to the ground, the greater the overpressure. He explained that the shock wave is a

high-energy pressure zone, and it can cause certain effects on the ground: these are a sound effect, a vibration effect and a pressure effect. He stated that if the aeroplane is flying at a low altitude, the sonic boom can be very loud, in excess of 120 decibels, the pain threshold for hearing; and this intense noise can cause such pain that there is momentary loss of balance. He added that this effect is increased by surprise, as the shock wave travels more slowly than the aircraft and hence an observer can see the aircraft pass over him without hearing any noise. With no advance warning, this shock wave produces a sound effect which, united to the surprise effect, can cause an abrupt change in an individual's movements. According to Roy, certain frequencies contained in the shock wave cause the objects it strikes to vibrate, and this can then set up a resonance which may in some cases break window-panes and weaken walls or floors. Finally, he said, there is a possible phenomenon of static pressure, or thrust, if the shock wave strikes an object. However, the object struck must have a large enough effective surface, such as a solid wall or enclosed building, so that there is a pressure differential between the exterior and interior of the building. The wave moves very fast (about 750 m.p.h.) and does not last long (about one tenth of a second). He admitted that if a shock wave strikes an object with reduced surface area, such as a man, it would have no dynamic effect as the latter is surrounded by overpressure. He explained that the impetus of the first wave is very slight, because the air slips around the object and the pressure is nearly uniform around it, even if it is somewhat greater on the side the wave comes from. Then the second shock wave, which is a low pressure area, cancels the effect of the first almost immediately. Consequently, he was also of the opinion that the static pressure could not have had any effect on a motorcycle, but stated that the possibility should not be overlooked that a sonic boom might exceed 120 decibels, and be painful to the ear. Moreover, the impact of this sound can be increased by the effect of surprise on the observer, who does not immediately connect the noise he hears with the plane. It is conceivable that in these circumstances a driver may be startled, and for the rider of a moving motorcycle, this may involve a change in his driving and a loss of balance that would make him lose control of his machine.

The expert witnesses do not seem to differ as to the effect which a sonic boom can have on a person, in particular the rider of a moving motorcycle. In fact there is agreement that the static pressure could not have had any significant effect on the suppliant at the time of the accident. It appears, however, that he could have been affected by the surprise or pain occasioned by the exceedingly loud noise described by those who heard it, and by the suppliant himself. If this noise, caused as we have seen by an aircraft flying at a low altitude (because in order to be seen and described by the witnesses as it was, this aeroplane had to be flying at an altitude less than 30,000 feet), and consequently in breach of the regulations set out in Exhibit D-2, which forbid flight at a supersonic speed within 25 miles of a built-up area, or lower than 30,000 feet, was the cause of the accident involving the suppliant, I must hold that the latter is entitled to the remedy sought, provided, of course, he proves that this sonic boom was occasioned

by an aircraft of the respondent, or an aircraft for which the latter is responsible. The suppliant says this is so. Indeed, he claims to have connected the plane or planes causing the sonic boom with two American aircraft, owned by a country which is a party to an agreement among the Parties to the North Atlantic Treaty, and contained in R.S.C. 1952, c. 284, titled the *Visiting Forces Act*. Section 16 of this Act, replaced in 1954 by s. 17 of the *Canadian Forces Act, 1954* (Can.), (1953-54, c. 13), states that:

> (*a*) a tort committed by a member of a visiting force while acting within the scope of his duties or employment shall be deemed to have been committed by a servant of the Crown while acting within the scope of his duties or employment;

and

> (*c*) a service motor vehicle of a visiting force shall be deemed to be owned by the Crown.

By virtue of s. 3(1) of the *Crown Liability Act*, which states, *inter alia*, that the Crown is civilly liable for any tort committed by one of its servants, the suppliant seeks to make the respondent liable for the acts of the pilots of American military aircraft as if they were its employees. Indeed, it is by means of a presumption of law that a tort committed by a person acting within the scope of his duties or his employment is deemed to have been committed by a servant of the Crown acting within the scope of his duties or his employment, that the suppliant seeks to sue the respondent.

To do this, according to the respondent, the suppliant must establish not only that the aeroplane, or aeroplanes, responsible for the damage claimed, were aeroplanes owned by a member of the North Atlantic Treaty, and that they were visiting Canada, but also that the pilot or pilots of these aeroplanes were, at that time, acting in the performance of their duties. Counsel for the respondent indeed maintains, and I believe correctly, that s. 17(*a*) does not create a presumption that a member of a visiting force who commits a tort is always acting within the scope of his duties. In fact it is only when a member of a visiting force acted within the scope of his duties that his tort will be deemed to have been committed by a servant of the Crown acting within his duties.

Counsel for the suppliant, on the other hand, maintains that he has established that (*a*) the aeroplane or aeroplanes responsible for the sonic boom belonged to a member of a force visiting Canada and that (*b*) the pilot or pilots were acting at that time within the scope of their duty or employment. He especially relies on the examination for discovery of Robert L. Martin as proof of this. Martin is an officer in the armed forces and assistant judge advocate at Quebec. He stated that he was familiar with the file prepared in Ottawa by the Department of National Defence, covering in detail the day of the accident, August 18, 1961. He said the Department had no record of flights by Canadian aircraft over the county or district of Beauce on August 18, 1961. Only Canadian Sabre aircraft of the F86

MKW type could fly at supersonic speeds, he said, and they were at Chatham, N.B. in 1961, but these aircraft could fly beyond the speed of sound only when at an altitude of 30,000 feet or when diving. Further, the distance between Chatham and Ste. Justine is too great for these aircraft to have made supersonic flights over the Ste. Justine area and returned to their base. He also stated that there was no indication by St. Sylvestre that on August 18, 1961, aircraft were present in the Ste. Justine sector. According to this witness the radar base at St. Sylvestre can cover a radius of 80 miles, and Ste. Justine is located about 60 miles from St. Sylvestre. On the other hand, he stated, the American radar stations, Carswell, Charlestown and St. Albans, have some control over this sector, and on the day of the accident the flight of two supersonic aircraft was announced in a region very close to the Ste. Justine sector. Indeed, in the forenoon of August 18, 1961, there were two American aircraft aloft, one near Millinocket, Maine, the other in the sector of Presqu'isle, Maine. These two areas are located about 300 miles from Ste. Justine, but the exercises of these planes sometimes took them quite close to the Ste. Justine area. Martin stated that at the period when the accident occurred there was in fact an exercise zone in this region for aircraft charged with the defence of North America under the NORAD agreements. He affirmed that aircraft which fly beyond the speed of sound must do so over land at 30,000 feet, and at a distance which must not be within 25 miles of a built-up area, and over water, at 10,000 feet. The witness admitted that there were air exercises from time to time close to St. Sylvestre, and the aircraft carrying out exercises in the St. Sylvestre sector came from the American base at Burlington. He replied as follows to the questions that were put to him:

Q. Did these aeroplanes fly over Canadian territory at any time as part of their exercises?
A. I think the answer to that is yes.
Q. Was there a Canada-United States agreement regarding these overflights, or were these flights over Canadian territory made pursuant to the defence plan known as NORAD?[1]
A. Right, it is the overall defence plan for North America.
Q. In what region did these incursions take place?
A. Do you mean in Quebec?
Q. In Quebec.
A. New Brunswick.
Q. In Quebec, and more precisely, could the incursions of these aircraft have been made into the Ste. Justine area?
A. In the training periods?
Q. Yes, in the training periods.
A. Yes.

Martin then said the record showed that, in 1961, the Americans had F-89s, F-102s and F-101s, all of which were able to fly at supersonic speeds. He admitted that the exercises under the North American defense agreements could be carried out as much in Canadian territory as in American territory.

[1] It is clear that the reference is to the North Atlantic Treaty, and not NORAD, since the discussion on both sides centred on the *Revised Statutes of Canada 1952*, c. 284.

Martin testified at the hearing and stated that the Department was advised of the presence on the day of the accident of two aircraft capable of supersonic flight in the Presqu'isle sector, running from Eagle Lake in the west to Millinocket in the Grenville, Maine sector. He stated that the distance between Eagle Lake and the place of the accident is only 50 miles, and from Moosehead Lake to the scene of the accident, only 65 to 70 miles. The St. Hubert headquarters (MNRHQ) sent the following message to headquarters, Canair Hed, dated October 2, 1962:

> Your As0533 26 Sep PD ALL Available MNR Records Slash logs for the period have been reviewed PD *the only entries that might be remotely associated with incident received from St Sylvestre PD summarizing CLN two flights of USAF interceptors were conducting training exercises under St Sylvestre control during period under Review* PD no requests for supersonic flight are entered in Log Also no reported sonic booms PD Paren this info must be logged if they occur PD Paren flight were in vicinity of Presque Isle with west limit as Eagle Lake PD other aircraft in Millinocket Dash Grenville area.

(The italics are mine.)

The witness admitted that the message indicates there were two aeroplanes conducting exercises on the morning of the accident, that they were controlled by St. Sylvestre, and there was no public or pilots' report that there had been any sonic booms.

Ronald Pratt, navigator pilot and witness for the respondent, said he was employed at St. Sylvestre in 1961, but that he was not there in August 1961. He stated that ordinarily a fighter-interceptor requests permission to fly at a supersonic speed. He admitted that from time to time American aircraft were controlled by St. Sylvestre: this witness said that the radius of effective radar control from the St. Sylvestre station was 200 miles, and the Ste. Justine sector was within the effective radius of the station. Regarding the information received from St. Hubert about the presence of two American aircraft in the vicinity of Ste. Justine, he replied as follows to the questions put to him:

> Q. On the basis of information on P-3, can you say the two aircraft were always under the control of St. Sylvestre?
> A. It appears that way.

The witness admitted that, to his knowledge, an aeroplane had flown at a supersonic speed without permission on one occasion, and that Ste. Sabine and Ste. Camille were inhabited areas.

He also admitted the possibility that an aircraft had taken off without registering its flight plan in Canada or the United States. Such an aircraft, he said, would not have passed the radar station unnoticed, but it would not be registered. In cross-examination he stated that if two interceptors were carrying out exercises above St. Sylvestre on August 18, 1961, they should have been recorded in the log at St. Sylvestre. However, as one of the counsel for the respondent indicated, the log or records at St. Sylvestre were unfortunately destroyed some months after the accident, and it is not now possible to check the entries they contained. According to the witness,

if the log still existed, it would be possible to ascertain the type of aircraft that were flying over the area, their place of origin, and the time they left their base, as well as the course they followed. When aircraft such as the two in question conduct exercises, the witness admitted that these exercises do not always have exact limits, and it is even possible that the aircraft may exceed the limits set for their exercises. He also admitted that there was a strong possibility that the two aeroplanes crossed the Canada-U.S.A. boundary line and went as far as the locale of the accident, not many miles from the border.

Jean-Louis Lapointe, a captain and aircraft pilot, was also heard as a witness. He has flown subsonic and supersonic aircraft. He stated that in 1961 only the Americans had supersonic aircraft that could fly beyond the speed of sound in a horizontal plane, without making a dive. Canada only had aeroplanes that could fly beyond the speed of sound in a dive.

He stated that supersonic flights must be made above 30,000 feet so as not to frighten and shock the populace, and to avoid causing damage. He explained that it is harder for an aircraft flying below 30,000 feet to break the sound barrier, because the pressure and resistance of the air is such that it takes more power to move through it. He added however that it is fairly easy to break the sound barrier at altitudes of 10,000 to 30,000 feet, but that "it is not recommended." This witness stated that an American interceptor may well have gone beyond the border on its way back towards Maine, and that at 1,200 miles per hour the flight path necessary to turn the aeroplane around may take it quite a distance. To the question put to him, namely whether pilots sometimes overshoot the flight limits set for them, he replied, "it can happen, but with the control, it is difficult, but it is possible." Usually, a pilot who wishes to fly at a supersonic speed asks to do so. He admitted however that if a pilot does not make this request, and his speed becomes supersonic, it would not be recorded at the radar station. He also added, "it could be that in 1961 the tower did not notice it; this is no longer possible today because at the push of a button the speed of the aircraft can immediately be obtained." He went on to say that if the radar detected an aeroplane whose takeoff was not controlled, the radar station would not record it. This witness indicated that in 1961 there were no civil supersonic aircraft.

Counsel for the respondent maintains that identification of the aeroplane, or aeroplanes, that flew over Ste. Justine on the day of the accident is pure conjecture, and that even if the suppliant identified the aeroplane or aeroplanes concerned, as the burden was on him to do, he has not established, as he also must, that the pilot or pilots of these aeroplanes were within the scope of their duties at the time of the accident.

Absolute certainty is not required in questions of causality, and a preponderance of evidence is sufficient. Indeed, it appears to me from the evidence adduced that the circumstances established are sufficient to allow the reasonable inference that one or other of the two American interceptors owned by the armed forces of the United States, and flying on an authorized

path in this vicinity, was certainly the cause of the accident on which suppliant's claim is based.[2] It could not have been Canadian aircraft, as we have seen, since in the first place, their base was too far away to permit a return trip, and secondly, in 1961 these aeroplanes, according to the evidence, could only break the sound barrier in a dive. As we have seen, the evidence indicates that the aeroplane or aeroplanes, on the day of the accident, flew at greater than the speed of sound in a horizontal plane and at quite a low altitude. According to the witnesses, only aircraft of the American armed forces could have flown in this manner at the date of the accident, because at that time there were no civilian jet aircraft able to do so.

If the matter is looked at in this way, it appears to me that the respondent would clearly be responsible for this accident, as under s. 16 of the *Visiting Forces (North Atlantic Treaty) Act,* and its revised version in s. 17 of the *Canadian Forces Act,* 1953-54 (*Can.*) c. 13, for the purposes of s. 3(1)(*a*) of the *Crown Liability Act,* a tort committed by a member of a visiting force, acting within the scope of his duties or his employment, is deemed to have been committed by a servant of the Crown, while acting within the scope of his duties or employment.

As we have seen, this section does not create a presumption to the effect that a member of a force visiting Canada, who commits a tort, has thereby acted within the scope of his duties because it is always possible that such member was not on duty at the time. The presumption only exists when it has been established that the member of a visiting force acted within the scope of his duties, and it is only then that his tort will be deemed to have been committed by a servant of the Crown, also acting within his duties. According to the respondent, this is an essential element of Crown liability which the suppliant has the burden of establishing, and which he has not established. The suppliant, on the other hand, claims that this has been proved, and I am obliged to agree with him. Martin, the officer selected by the respondent to answer the examination for discovery and to connect it up, had to admit that two American military interceptors were carrying out authorized exercises at the time quite near the scene of the accident, enabling the Court to conclude that one of the planes, seen by several witnesses who heard the boom, perpetrated the accident sustained by suppliant. These planes were, as we have seen, controlled by St. Sylvestre, and although they may have slightly exceeded the somewhat flexible limits of their flights or exercises, their pilots nevertheless were, at the time, within the scope of their duties or employment, and "visiting" according to the definition in s. 2(k)[3] of the Act, and consequently, within the conditions

[2] *Cf. Trib. gr. inst. Bressuire, Oct. 17, 1967: D.S. 1967, 667.*
The Agreement must be applied, where damage is caused by a supersonic bang, even if the accused aircraft could not be identified, so long as it is established by elimination that it could only be a N.A.T.O. aircraft.

[3] 2. In this Act

* * *

(*k*) "visiting force" means any naval, army or air forces of an associated state present in Canada in connection with official duties; . . .

required to invoke liability of the respondent. This point of view also has to be taken, in my opinion, because the respondent did not see fit in its written pleadings to raise the point that the pilot was not on duty at the time of accident, a question, moreover, which I shall have occasion to discuss further at a later stage.

Indeed, it appears that the breach committed by the pilot of the aeroplane, by flying as he did, below 30,000 feet and over a built-up area in contravention of the statutory regulations (Exhibits P-5, D-1 and D-2) passed specifically for the purpose of ensuring protection and security for buildings and people, creates a presumption of liability which has not been rebutted by the respondent. Cf. *Sterling Trusts Corporation v. Postma,*[4] and particularly the remarks of Cartwright J. at page 329:

> I do not find it necessary in this case to attempt to choose between the two views as to how this cause of action should be described. I think it plain that once it has been found (i) that the respondents committed a breach of the statutory duty to have the tail-light lighted and (ii) that that breach was an effective cause of the appellant's injuries, the respondents are *prima facie* liable for the damages suffered by the appellants.

However, the respondent goes further, and maintains that by virtue of s. 19, c. 284 of the *Revised Statutes of Canada, 1952,*[5] a court before which a suit is brought against the Crown, based on s. 16 of the statute, does not have jurisdiction to decide whether the member of a visiting force who is responsible for the misfeasance committed it within the scope of his duties or employment. Indeed, the respondent contends that it is clear the legislator, whatever his reasons, intended this to be so, by providing that this matter must be resolved by an arbitrator appointed in accordance with Article VIII, subparagraph 2(*b*) of the Agreement set out as a schedule to the statute; and that the decision of this arbitrator shall be final and conclusive, not only for the purposes of ss. 17 and 18, but also for the purposes of s. 16 of the statute; and that the latter section is the one on which the present action must turn.

The respondent maintains that this requirement of the statute is not limited to claims between States that are parties to the Agreement. It would apply, according to the respondent, in any case where he victim of a delict, or quasi-delict ascribable to a member of a visiting force seeks to obtain compensation from the Crown in right of Canada.

It follows that recourse to the arbitrator to decide whether the member of an armed force was within the scope of his duties would, according to the respondent, be compulsory if the Court concluded that the damages

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[4] [1965] S.C.R. 324.

[5] 19. Where a question arises under section 16, 17 or 18 as to whether
(*a*) a member of a visiting force was acting within the scope of his duties or employment; or
* * *
the question shall be submitted to an arbitrator appointed in accordance with sub-paragraph (*b*) of paragraph 2 of Article VIII of the Agreement, and for the purposes of those sections the decision of the arbitrator is final and conclusive.

incurred by the appellant had been caused by the misfeasance of a member of a visiting force belonging to one or another of the countries to which the *Visiting Forces Act* applies; and that the Crown in right of Canada must be held responsible for the damages only in so far as the person causing them acted within the scope of his duties.

Chapter 284 of the *Revised Statutes of Canada, 1952*, more especially ss. 16 and 19 of this Act and sub-paragraph 5(*a*) of Article VIII[6] of the Agreement between the Parties to the North Atlantic Treaty, set out as a schedule to the Act and approved by s. 3 of the latter, provide for two situations. In fact, sub-paragraphs 1 and 2 of Article VIII of the Agreement deal with claims between the associated States, and sub-paragraph 5(*a*) of Article VIII of the Agreement covers damages caused to third parties by the negligence of a member of a visiting force.

Counsel for the suppliant maintains that arbitration is only mandatory in claims between signatory States, and that it would not apply to a claim made by a third party, as in the present case.

Paragraph 5(*a*) of Article VIII of the Agreement appended as a schedule to the Act indeed states that:

> (*a*) Claims (by third parties) shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of the receiving State with respect to claims arising from the activities of its own armed forces. (I have added the words in parentheses.)

Now, recourse taken against the Crown on account of negligence or torts of members of the Canadian armed forces are subordinated to the general law, and claims against them must be pursued before the ordinary Canadian courts of law, *inter alia*, the Exchequer Court.

While the proposition of counsel for the suppliant is an attractive one, and its effect would be to uphold this Court's jurisdiction in the matter, I am unable to hold that the arbitration provided for in s. 19 of the statute must apply only to claims between signatory States.

A close look at the *Visiting Forces (North Atlantic Treaty) Act*, and the Agreement appended thereto, in particular the claims it provides for, permits a better understanding of the economy of this legislation, and of the purpose it seeks to attain, though it must be noted in passing that the

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[6] 5. Claims (other than contractual claims and those to which paragraphs 6 or 7 of this Article apply) arising out of acts or omissions of members of a force or civilian component done in the performance of official duty, or out of any other act, omission or occurrence for which a force or civilian component is legally responsible, and causing damage in the territory of the receiving State to third parties, other than any of the Contracting Parties, shall be dealt with by the receiving State in accordance with the following provisions:

(*a*) Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of the receiving State with respect to claims arising from the activities of its own armed forces;

statute could have been clearer on the procedure for arbitration, and that it is silent regarding the persons who can avail themselves of it, and the manner of doing so.

Article VIII of the Agreement deals with claims for damages caused by a member of the armed forces of a visiting State on the territory of the receiving State. It lays down different rules for such claims according as they concern:

(*a*) claims for damages caused to the property of a Contracting Party and used by its armed forces, if these damages are caused by a member of the armed forces of another Contracting Party "in the execution of his duties in connexion with the operation of the North Atlantic Treaty" (Article VIII, paragraph 1(i));

(*b*) claims similar to those provided for in paragraph (*a*) for damages caused to the property of a Contracting Party other than that stipulated in paragraph (*a*). (This refers to property not owned by the armed forces. Article VIII, paragraph 2(*a*));

(*c*) claims "arising out of acts or omissions of members of a force or civilian component done in the performance of official duty, or out of any other act, omission or occurrence for which a force or civilian component is legally responsible," and causing damages to "third parties" in the territory of the receiving State (Article VIII, paragraph 5), or

(*d*) claims against the members of an "armed force" based on tortious acts or omissions committed in the receiving State and not done in the performance of official duty (Article VIII, paragraph 6).

The Contracting States waive all claims in category (*a*). Those in category (*b*) shall be resolved either by agreement or by a sole arbitrator. Those in category (*c*), claims by third parties, shall be resolved by the receiving State in accordance with "the laws and regulations of the receiving State with respect to claims arising from the activities of its own armed forces," and the receiving State must be reimbursed by the sending State. As regards claims in category (*d*) (that is, for tortious acts not done in the performance of official duty), the receiving State must deal with the claim in such a manner that the originating or sending State can decide whether to offer an *ex gratia* payment, without prejudice to the right of the claimant to institute an action "against a member of a force or of a civilian component."

It is in this context, when it is necessary for the receiving State to decide whether it must accept the claim of a third party based on a legal liability (Article VIII, paragraph 5), or simply follow the procedure laid down for *ex gratia* payments (Article VIII, paragraph 6), that we turn to the provisions governing the two types of claims, namely paragraph 8 of Article VIII:

this stipulates, *inter alia,* that: "If a dispute arises as to whether a tortious act or omission of a member of a force . . . was done in the performance of official duty . . . the question shall be submitted to an arbitrator . . . ".

Returning now to the case at hand, and applying the terms of the Agreement to a claim for damages caused by an act committed by a member of the armed forces of the United States in Canada, it follows that, as regards the United States, Canada has undertaken

(*a*) if the act complained of was committed "in the performance of official duty," that it will be dealt with in accordance with the laws and regulations of Canada "with respect to claims arising from the activities of its own armed forces";

(*b*) if the act complained of was not done "in the performance of official duty," to see to it that it is presented to obtain an *ex gratia* payment, without prejudice to the right of the claimant to sue the person responsible; and if a dispute arises as to whether the tortious act or omission was done in the performance of official duty, to submit it to arbitration. (This refers to a dispute between Canada and the United States.)

It follows from the foregoing that the *Visiting Forces* (*North Atlantic Treaty*) *Act* has only made the changes in our country's laws necessitated by the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, signed June 19, 1951, and that the Agreement remains simply an international agreement. It does not, consequently, have the force of law, and it is not then possible, from the presence in the Agreement of paragraph 5(*a*) of Article VIII, to draw the conclusion that claims by third parties are not subject to arbitration.[7]

Indeed, s. 3 of the statute does not state that the Agreement is law, or forms part of the Act, but simply says, in its French text, that it is ratified (confirmé), and in its English text that it is approved. Notwithstanding sub-paragraph (*a*) of paragraph 5, Article VIII of the Agreement, s. 19 can only be interpreted as its text clearly indicates, namely that "Where a question arises under section 16 . . . whether a member of a visiting force was acting within the scope of his duties or employment . . . the question shall be submitted to an arbitrator appointed in accordance with" provisions contained in the Agreement.

The legislator seems by this means to have sought to ensure that Canada's liability under Article VIII, sub-paragraph 5(*a*) of the Agreement is regulated strictly by the Agreement in the case of claims which the Court has to determine, and Article VIII, paragraph 8 of the Agreement provides that in the event of a dispute as to whether a tortious act or omission of a member of a force was done in the performance of official duty, the question shall be submitted to an arbitrator.

[7] Cf. *Dean v. Green* (1883) 8 P.D. 79 at pp. 89 and 90: A schedule in a statute is as much part of the statute and as much an enactment as any other part. If the enacting part and the schedule cannot be made to correspond, the latter must yield to the former.

The same is true for the procedure set out in s. 16 as regards deciding whether a member of a visiting force acted within the scope of his duties or his employment. This question, it appears to me, must also be submitted to an arbitrator.

This does not dispose of the case, however, because the requirements of s. 19 must now be reconciled with the circumstances of the present claim as disclosed in the statements of pleadings.

From these pleadings it appears the appellant alleged, *inter alia,* that the sonic boom was created by "a foreign aircraft flying over Canadian territory," and that the respondent is liable for the act complained of because it was caused by the fault, negligence or carelessness of the pilot of the aircraft. The respondent, after denying all the allegations of the petition of right, only made the following allegations:

(*a*) no military aircraft owned by a force visiting Canada flew over the area in question on the day of the accident;

(*b*) no sonic boom was created at the time and place of the accident that can be ascribed to a military aircraft owned by a force visiting Canada;

(*c*) if a sonic boom was heard in the area on the day of the accident, it was not within Canadian territory;

(*d*) if there was a sonic boom, it did not, and could not, have caused the accident sustained by suppliant, which was solely caused by his own negligence.

Although certain witnesses were questioned during the proceedings as to the possibility of flights by Canadian aircraft over the area where the accident took place, the two principal points at issue in the proceedings, arising out of the written pleadings, were whether

(*a*) a boom was in fact created by an American aircraft flying at a low altitude over the area where the suppliant was, and

(*b*) if such a sonic boom did take place, whether it caused the injuries sustained by the suppliant.

There was indeed no allegation by the respondent in its written pleadings that even if an American aeroplane had created such a boom, the pilot of this aeroplane, having gone off on a frolic of his own, was not within the scope of his duties. Furthermore, the respondent did not raise any objection to the fact that the suppliant has not alleged that the pilot was acting at the relevant moment within the scope of his duties or employment, an omission which the Court moreover, if requested, would have permitted the suppliant to remedy by motion. Nor has the respondent alleged in writing that under s. 19 the Court does not have jurisdiction to decide whether the pilot was, or was not, within the scope of his duties.

The method of preparing written pleadings to this Court is however clearly set out in Rules 92,[8] 93[9] and 94[10] of the Court, and they do not appear to have been observed in the present case.

Certainly, a defence based on a statement or allegation that the American aircraft which caused the sonic boom was piloted by a person making an unauthorized flight would have to have been specifically pleaded. Once it is established that an American military aircraft was indeed responsible for the sonic explosion at the time and place of the accident, it seems to me one must presume that this aircraft was flying in the course of a normal military exercise. Furthermore, this conclusion necessarily follows in the present case if reference is made to Exhibit P-3, in particular where it says: "the only log entries that might be remotely associated with incident received from St. Sylvestre P.Q. Summarizing CLN *two flights of USAF interceptors were conducting training exercises* under St. Sylvestre control during period under review" (italics mine). Moreover, I do not consider it unfair to the respondent to take this view: it knew, at least since the examination for discovery, of the presence of American aircraft in the neighbourhood of the scene of the accident on the day in question, a fact brought out during the questioning of Robert L. Martin, assistant judge advocate at Quebec, chosen by the respondent to answer on his behalf and bind her in the discovery. It felt, however, that this evidence was insufficient to establish that one of the two American aircraft involved was responsible for the accident. It seems to me that if there had been facts to justify the claim that the flight of these two aeroplanes was unauthorized, or that the two pilots made these flights for their own purposes, or as a prank involving misconduct, these facts certainly would have been pleaded. As they were not, surely one must conclude that there is no dispute between Canada and the United States as to whether the pilots in question were within the scope of their duties, and consequently that s. 19 does not apply. But if this proposition is unacceptable, and this way of looking at the matter is incorrect, we may ask how a defence based

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[8] Rule 92

When an allegation of fact in a pleading is to be taken as admitted

Every allegation of fact in any pleading in an action, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic or person of unsound mind not so found by inquisition, or other person judicially incapacitated.

[9] Rule 93

Allegations of fact and grounds of defence

Each party in any pleading, not being an information, petition of right, or statement of claim, must allege all such facts not appearing in the previous pleadings as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, which if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings.

[10] Rule 94

Pleadings not to be inconsistent

No pleadings shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

on s. 19, if it had been duly pleaded, is to be entertained in a proceeding brought under s. 16. Indeed, when a claim is filed and the visiting State submits that its pilot was not within the scope of his duties, the receiving State must adopt a position on the matter at the outset of the proceedings. At the instigation of the claimant, or on its own initiative, the receiving State will then take the necessary steps to bring about arbitration. I must also note in passing that it is far from certain that a private individual has any standing in these proceedings. If the third party making a claim introduces his petition of right while the arbitration is continuing, there would undoubtedly be a motion to suspend the hearing pending the decision of the arbitrator. If the arbitrator should decide that the pilot was not on duty, the respondent will move for dismissal of the petition, because a cause of action can only be based on s. 16 for a delict or quasi-delict committed by a pilot within the scope of his duties, and the decision of the arbitrator that this delict, or quasi-delict, was not committed in these circumstances is final and conclusive. Alternatively the respondent, instead of seeking denial of the petition, could also simply plead in its statement of defence that s. 19 is applicable to the claim, and as the matter has been before an arbitrator who decided that the accused was not within the scope of his duties, this constitutes a good defence to the action. But what of the situation when there is no such pleading, as in the present case? The suppliant cannot institute proceedings under the international Agreement; nor can the Court. The provision in s. 19 that "the question shall be submitted to an arbitrator appointed in accordance with . . . Article VIII" must therefore be implemented by the Crown. If the Crown does not plead in the form laid down by the Rules of the Court, and does not state that it has actually proceeded as required by statute to submit the matter to an arbitrator, and establish that it has obtained a decision by the arbitrator, the Court cannot presume or agree that the question to be determined under s. 19 has ever been raised.

If s. 19 is not in fact interpreted in the manner described above, s. 16 of the Act is truncated or reduced to such a degree that it can only be used to found a cause of action if the Crown decides to admit that its servant was within the scope of his duties, or takes the initiative to bring about an arbitration under the Agreement. It seems to me to be contrary to the tendency in modern federal legislation to provide citizens with an appropriate remedy against the State in such matters, to interpret s. 16 so as to confer such an arbitrary discretion on the Crown that it would produce a complete denial of justice.

The appellant will therefore be entitled to receive payment in the amount of $9,500, as well as his taxed costs.

After judgment was formally given in the present case, I came across a judgment of the Cour de Cassation, dated July 10, 1961, dealing specifically with the question as to whether arbitration is compulsory in private litigation between an individual and a member of visiting NATO armed forces, which decides the question in the affirmative, providing, however, that judgment be withheld pending the decision of the arbitrator. This judgment is reported in *Recueil Dalloz de 1961,* at pp. 601 *et seq.* (Soc. X . . . C. C. . . .*et al*).