Montreal 1967

Feb. 17

Feb. 28

BETWEEN:

KONINKLIJKE NEDERLANDSCHE STOOMBOOTMAATSCHAPPIJ N.V. (The Royal Netherlands Steamship Company) ..... SUPPLIANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Pleadings—Facts occurring subsequent to date cause of action arose—Abuse of process—Whether subsequent facts relevant to prove antecedent facts—Exchequer Court Rules 88, 114.

Suppliant claimed damages arising out of a collision of ships in Lake St. Peter, Quebec on April 10th 1965 at 6:28 a.m. allegedly due to the misalignment of lights maintained by the Department of Transport as aids to navigation. Respondent moved under Exchequer Court Rule 114 to strike out allegations in the petition of right that the Pilotage and Navigation authorities misled pilots by maintaining publicly as late as two weeks after the collision that the navigation lights were reliable and by failing until June 18th 1965 to ascertain and disseminate notice of the true state of facts concerning navigation lights, thereby indicating a lack of system and a pattern of carelessness in the performance of their duties by servants of the Crown.

Held, the allegations of facts occurring after the collision, which constituted no part of suppliant's cause of action, must be struck out as embarrassing and an abuse of the process of the court. The allegations as to lack of system and pattern of carelessness must also be struck out, not because they were allegations of evidence rather than facts in violation of Rule 88, but because they could not stand by themselves but referred to facts occurring after the collision.

A pleading of evidence contrary to Rule 88 will not be struck out unless the applicant establishes some embarrassment or other substantial ground under Rule 114 or under the inherent jurisdiction of the court, on risk of paying the costs thrown away by bringing a frivolous motion.

While events subsequent to the collision might have probative value as to the state of affairs before the collision and so oblige the respondent to give discovery with reference thereto, the determination of the respondent's obligation to give discovery must be decided by reference to the facts pleaded as constituting the cause of action and not to the facts the pleading indicates that suppliant proposes to prove to establish the facts constituting the cause of action.

APPLICATION to strike out parts of petition of right.

J. Brisset, Q.C. for suppliant.

Léon Lalande, Q.C. and *Pierre Bourque* for respondent.

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JACKETT P.:—This is a motion on behalf of the respondent for an order striking out certain parts of the Petition of Right.

The Petition of Right is for damages arising out of a collision alleged to have occurred between the suppliant's vessel *Hermes* and another vessel, called the *Transatlantic*, in Lake St. Peter, while the *Hermes* was on her way from Montreal to Three Rivers, on April 10, 1965 at 0628 hours. According to the Petition of Right the collision occurred as a result of the *Hermes* being, shortly before the collision, a substantial distance from the centre line of the dredged channel resulting in her becoming "subject to bank effect as a result of which she suddenly took a sharp sheer to port onto the upbound *Transatlantic*, thus rendering the collision unavoidable". The reason why the *Hermes* was so far from the centre of the channel (where those who were responsible for her navigation thought that she was) that she became subject to "bank effect" with the result that there was a collision, according to the allegations in the Petition of Right, is that certain lights or beacons constructed and maintained by the Department of Transport as aids to navigation had got out of alignment with the result that, when the *Hermes* kept the beacons in line in a way that should have kept her in the centre of the dredged channel, she found herself 235 feet south of the centre.

The legal nature of the claim against the Crown is revealed by the following paragraphs in the Petition of Right:

> 21. The collision and the consequent damages sustained by the Suppliants were the result of a breach of duty on the part of the Crown and its servants, attaching to the ownership, possession, occupation or control of property namely the structures on which the leading lights and beacons in Lake St. Peter had been installed and more particularly the lower leading light and beacon of Pointe du Lac and the downbound "Rivière du Loup" leading lights and beacons, with the result that their misalignment caused such leading lights and beacons to be a danger to navigation rather than an aid to navigation, and in that the officers and servants of Her Majesty failed to ascertain such misalignment or to give proper warning of it to those in charge of the navigation of the vessels *Hermes* and *Transatlantic* who relied for the safety of their vessels upon being given due warning that such leading lights and beacons were no longer serving the purposes intended and publicized for the information of mariners;
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> 22. Such collision and the consequent damages sustained by the Suppliants were also the result of delicts and quasidelicts committed by servants of the Crown, namely the District Marine Agent of the Department of Transport in Sorel in charge of such aids to navigation, the

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Superintendent of Pilotage in Ottawa, the District Superintendent of Pilots in the District of Montreal and the Chief of the Aids to Navigation Branch of the Department of Transport, and more particularly;

(*a*) As to the District Marine Agent of the Department of Transport in Sorel—

(i) because of his failure to ascertain and correct the misalignment of the leading lights and beacons of Pointe du Lac which had resulted from the shifting and tilting to the south which was known or should have been known to him of the base on which the front range had been installed, which shifting and tilting had already become important in the fall of the year 1964 and had by the beginning of April, 1965 increased to such an extent as to place a downbound vessel, keeping the beacons in alignment on the south bank of the dredged channel;

(ii) because of his failure to ascertain and correct the misalignment of the downbound "Rivière du Loup" leading lights and beacons which had also resulted from the shifting and tilting to the south of the base on which the lower beacon had been installed; and,

(iii) because of his failure to at least warn mariners of the consequent unreliability of such aids to navigation,

the whole in spite of his knowledge of the justifiable reliance by the navigators of vessels passing through Lake St. Peter, and in particular by the navigators of the *Hermes* and the *Transatlantic,* on the performance of his duties by the said servant of the Crown and the acceptance of such duties by such servant, the more so in view of the conditions referred to in Paragraph 15(*c*) which still prevailed;

(*b*) As to the Superintendent of Pilotage in Ottawa as well as to the District Superintendent of Pilots in Montreal because of their failure to provide to the Pilots assigned to vessels in the Pilotage District of Montreal the information required by them to competently discharge their duties in the conduct of such vessels, but on the contrary in lulling such Pilots into a false sense of security by maintaining publicly even as late as two weeks after the collision herein referred to that the Pointe du Lac leading lights and beacons were entirely reliable as indicating the center of the navigable channel in accordance with the charts and other marine publications issued by the Canadian Hydrographic Service and the Department of Transport, thereby indicating a pattern of carelessness in the performance of their duties by the servants of the Crown;

(*c*) As to the Chief of the Aids to Navigation Branch of the Department of Transport and to the Superintendents referred to in Paragraph (*b*) hereof, all of whom were servants of the Crown and subject to the direction and control of the Minister of Transport because of their failure in their duty to commercial shipping and to your Suppliants in particular—

(i) to establish any suitable system to receive reports of navigational dangers in the area in question and to act upon the same; and,

(ii) more particularly, in that they knew or ought to have known that other vessels and, more particularly, the downbound cargo vessel *Mancester Commerce* and the downbound pas-

senger vessel *Carinthia* had previously to the date here in question, namely on the 3rd and 9th days of April, 1965, respectively, encountered difficulties and danger while traversing the dredged channel across Lake St. Peter in exactly the same locality where the *Hermes* and *Transatlantic* came into collision, which said difficulty and danger were reported or should have been reported to the servants of the Crown herein mentioned, any lack of knowledge on their part being indicative of their failure in their duty as aforesaid to create an effective system for the receipt of such information;

(iii) by failing subsequently to ascertain what was the true state of facts concerning particularly the leading lights and beacons as described in Paragraph 15 hereof and to disseminate sufficient and effective Notice of same, which failure continued until at least the 18th of June, 1965, the said lapse of time being a fact upon which your Suppliants rely as to the lack of system hereinabove referred to and the pattern of carelessness in the performance of their duties by the servants of the Crown as hereinabove alleged;

23. The officers and servants of the Crown mentioned in the preceding paragraph, although having at all relevant times the equipment, personnel and funds required, failed in their duty to inspect and ascertain the condition of the said aids to navigation or to warn mariners of defects developing in them to ensure that navigators, relying upon the performance of the said duty and acting upon the information publicized, would not be misled into navigating in the channel of Lake St. Peter in the belief that they might do so safely in the manner they were directed and invited to do by the said information;

While the Notice of Motion gave notice that an application would be made for an order striking out paragraph 22(*b*), paragraph 22(*c*)(ii) and paragraph 22(*c*)(iii), upon the hearing of the application, it was limited to a motion for an order that all that part of paragraph 22(*b*) beginning with the words "but on the contrary" in the seventh line thereof and all of Paragraph 22(*c*)(iii) be struck out. The two allegations that the Court is asked to strike out are, in effect:

(a) an allegation that the collision was the result of a delict or quasi-delict committed by servants of the Crown—the Superintendent of Pilotage in Ottawa and the District Superintendent of Pilots in Montreal—consisting, in part at least, in lulling pilots assigned to vessels in the Pilotage District of Montreal into a false sense of security by maintaining publicly *as late as two weeks after the collision* that the lights and beacons in question were entirely reliable as indicating the centre of the navigable channel in accordance with the charts and other marine publications

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issued by the Canadian Hydrographic Service and the Department of Transport "thereby indicating a pattern of carelessness in the performance of their duties by the servants of the Crown"; and

(b) an allegation that the collision was the result of a delict or quasi-delict committed by servants of the Crown—the Chief of the Aids to Navigation Branch of the Department of Transport, the Superintendent of Pilotage in Ottawa, and the District Superintendent of Pilots in Montreal—consisting, in part at least, in their failure in their duty to commercial shipping and to the suppliant in particular "by failing subsequently[1] to ascertain what was the true state of facts" concerning the lights and beacons in question and to disseminate sufficient and effective notice of same "which failure continued until at least the 18th of June, 1965".

While they do not fit into the somewhat complicated sentence of which paragraph 22 consists, the last five lines of subparagraph (*c*)(iii) thereof constitute, in effect, a statement that the "said lapse of time" (i.e. the period until June 18, 1965, during which no sufficient notice was disseminated concerning the misalignment of the lights) is a fact upon which the suppliant relies as to the "lack of system" and "pattern of carelessness in the performance of their duties by the servants of the Crown" alleged in other parts of paragraph 22.

The application is made under Rule 114 of the Exchequer Court Rules, which reads as follows:

Striking out Pleadings

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or anything in any pleading on the ground that

(*a*) it discloses no reasonable cause of action or defence, as the case may be,

(*b*) it is scandalous, frivolous or vexatious,

(*c*) it may prejudice, embarrass or delay the fair trial of the action,

(*d*) it constitutes a departure from a previous pleading, or

(*e*) it is otherwise an abuse of the process of the Court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[1] It is not clear to me what point of time is referred to by the word "subsequently".

(2) No evidence shall be admissible on an application under sub-paragraph (*a*) of paragraph (1).

(3) For the purpose of this rule the word "pleading" includes any document whereby any proceeding in the Court was initiated or any claim was defined and any document whereby any claim was defended or answered.

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For the respondent, the application is put on the basis that if the suppliant has a legal claim against the respondent for the collision it must be based on facts that existed before the collision. I accept this submission. If facts in existence at or before the collision do not make the respondent liable therefor, no fact occurring subsequent to the collision can, on any view of the nature of the applicable law that has been suggested to me, make Her liable.

Counsel for the suppliant did not suggest that any of the facts alleged in the passages that have been attacked are a part of the facts constituting the suppliant's cause of action. What he did say, as I understood him, is in effect, that one of the facts upon which he does rely is that, prior to the collision, servants of the Crown distributed to mariners notices leading them to rely on the accuracy of the aids to navigation in question without having established a proper "system" to ensure that, to the extent reasonably possible, the representation that such aids to navigation were reliable would not continue to be acted on after they ceased to be reliable and that the facts alleged in the passages attacked tend to establish the absence of any such system.

In other words, as I appreciate such submission, it is conceded that the facts in the passages under attack *are not* part of the cause of action upon which the suppliant relies; but it is contended that they are facts upon which, along with others, the suppliant relies to establish facts that *are* part of such cause of action. In other words, they are *evidence* of facts that constitute part of the cause of action.

Even if I accepted such view of the pleading, the allegations offend Rule 88 of the Rules of this Court, which provides that every pleading shall contain a statement of the "material facts" on which the party pleading relies "but not the evidence".

However, when the passages attacked are read in the context of the whole sentence in which they appear, as I have endeavoured to read them in the summary that I have made above of their effect, in my view, the passages

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attacked, in so far as they purport to be allegations of fact at all, purport to be allegations of facts constituting the whole or part of delicts or quasi-delicts alleged against servants of the Crown. As I have already indicated, moreover, counsel for the suppliant did not attempt to answer the submission of counsel for the respondent that they could not be supported as constituting, in themselves, any part of the suppliant's cause of action. That being so, the passages in question must be struck out under Rule 114, not because they offend Rule 88, but because they are embarrassing and an abuse of the process of the Court in that, as long as they remain in the Petition of Right, the respondent cannot ignore the possibility that they are what they purport to be (i.e. a further alternative cause of action).

That brings me to the last five lines of subparagraph (*c*)(iii) which is, in terms, not an allegation of a fact upon which the suppliant relies as part of its cause of action but a notice to the respondent that it proposes to rely on a specified fact as tending to prove two other facts that have been pleaded elsewhere as part of the cause of action.

While this is a pleading of evidence contrary to Rule 88, I should not, for that reason alone, have granted a motion to strike it out. Any party bringing a motion to strike out a plea that is, in effect, only giving the other party notice of the evidence on which he proposes to rely would have to establish, in addition to the technical breach of Rule 88, some embarrassment or other substantial ground under Rule 114 or under the inherent jurisdiction of the Court, for bringing the motion or expose himself to the risk of paying the costs thrown away by bringing a frivolous or fruitless motion.

However, here the notice of the intention to use certain facts as evidence cannot stand by itself and therefore must be struck out with the words to which it makes reference, which, as I have already held, purport to plead an alternative cause of action that is admittedly unsupportable.

There is another reason why, in this case, I am inclined to the view that the latter part of subparagraph (*c*)(iii) must be struck out even though it were construed independently as nothing more than a notice of evidence that is going to be tendered at the trial. It became apparent during the argument that the real controversy between the

parties is whether the respondent is bound to give discovery of documents or oral discovery in relation to the facts alleged by the passages under attack as having occurred after the collision. In my view, which I indicated during the course of argument, I am inclined to think that facts such as those alleged in the passages under attack may well have probative value concerning the allegations of fact as to the state of affairs before the collision; and, if there is a possibility that any such facts might be of some such assistance to the suppliant, the respondent would be bound to give discovery of documents and oral discovery with reference thereto.[1]

It is apparent to me that a question concerning the precise extent of any such right to discovery may well arise in these proceedings. When it does arise, it should be decided by answering the question whether the facts subsequent to the collision may possibly have some probative value in relation to the facts existing before the collision that constitute the cause or causes of action raised by the Petition of Right. The decision of that question must depend upon the facts properly alleged as constituting the cause or causes of action. To permit the suppliant to retain in its Petition of Right allegations as to the evidence it proposes to adduce to establish the facts constituting the causes of action for the apparent purpose of supporting the position it proposes to take on the dispute as to discovery, would, in my view, be an improper exercise of the court's discretion.

To put it another way, when a question arises, for example, as to whether the Crown should make discovery of a particular document, or as to whether an officer of the Crown should answer a particular question, that question must be decided by reference to

(a) its relevance to the facts pleaded in the petition of right as constituting the cause of action,

and not by reference to

(b) its relevance to the facts that the suppliant indicates by his pleading that he proposes to prove to establish the facts constituting his cause of action.

To clear the way for the controversy concerning the proper ambit of discovery, the pleas of evidentiary facts,

[1] Compare *Canadian Pacific Railway v. Calgary*, (1966) 59 D.L.R. (2d) 642 (Alta. C.A.)

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the relevance of which is a matter of controversy, should be struck out even if they were in a form in which they could otherwise be allowed to remain.[1]

An order is granted in the terms sought during the hearing of the application. Costs to the respondent in the cause.

APPENDIX

The argument of this motion by counsel from the Province of Quebec before a judge whose background is predominantly in the field of the common law has suggested to me that there are some differences in terminology and in practice between the courts of Quebec and those of the common law provinces, which are of some importance in this national court largely, if not entirely, by reason of the possible misunderstandings to which they might give rise.

In a common law court, according to the use that I make of the words (and I do not profess to know that such usage is universal), any fact constituting part of a cause of action or of a defence or of an answer is a "material" fact, and should be pleaded; any fact that tends to prove or refute a material fact is "relevant" to the issue as to the truth of the "material" fact and may, as such, be proved at trial; and discovery of documents or examination for discovery must be restricted to documents or facts that may have relevance to an issue as to the truth of a material fact.

Generally speaking, therefore, the rules of the common law courts require that the pleadings must contain allegations of all "material" facts but are not to contain allegations of "evidence". This is the rule that has been adopted in the rules of this Court. In practice, evidentiary facts are frequently pleaded and, where this is done merely to ensure that the other side is not taken by surprise—and inciden-

[1] As it seems to me, a question as to whether certain facts are or may be relevant, in an unusual case such as this, should be decided when it comes up for decision as such, either on an application for an order for further discovery or when the trial judge has to rule on an objection as to the admissibility of the evidence at trial. When so raised, it is probable that the presiding judge will be in a better position to appreciate the way in which the party proposes to link the proposed evidence up. If, however the party is permitted to retain an allegation of such an evidentiary fact in his pleading, its relevance may well be regarded as beyond attack either for purposes of discovery or at trial.

tally to let the judge know as early as possible the strength of the pleader's case—it is ordinarily not considered a fit subject matter for attack.

When I turn to practice in the courts of Quebec, I find, as I should have expected, that a pleader must certainly plead all the facts constituting his cause of action or defence. Compare Article 165 of the new Code of Civil Procedure, which provides for dismissal of an action if the suit is unfounded in law "even if the facts alleged are true", and Article 172 which provides that the defendant may plead "any ground of . . . fact" which shows that the conclusions of the demand cannot be granted. (See also Article 183, which refers to the facts alleged in the defence as "material facts".)

In practice however, as it seems to me, in Quebec pleadings, allegations are not restricted to the facts necessary to constitute the cause of action or defence. Some at least of what I regard as evidentiary facts (i.e. facts relevant to the material facts that have been or may be put in issue) are pleaded. For example, it would apparently be regarded as essential to plead an admission of a fact that constitutes part of the cause of action. I can nowhere find this expressly provided for, but I accept it as being universal practice. I also find that, while the word "material" is sometimes used (e.g. Article 183), the word "relevant" appears to be used to describe allegations that are properly pleaded and therefore to include facts that constitute the cause of action as well as documents and other facts that (to me) are of an evidentiary character, and that it is considered proper or essential to plead.

Under the Quebec practice, as I understand it, if a fact of an evidentiary character were not pleaded and its existence has taken the opponent by surprise, the party who should have pleaded it might not be allowed to prove it. On the other hand, it has been decided that the existence of an allegation of a fact that has not been struck out by a preliminary proceeding does not entitle the party to prove it if the trial judge does not consider it relevant or otherwise admissible as evidence. Compare *Leon v. Dominion Square Corporation*[1]. This was not, however, always the position taken by the Courts in Quebec. See Case Note in 16 R. du B. at pages 431 *et seq.*

[1] [1956] Q.B. 623.

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In practice, I do not think that there is much difference, from the point of view of pleading evidence, between the common law provinces and Quebec. When, however, a question arises as to precisely what facts a plaintiff is relying on as constituting his cause of action, either because of a possible attack by way of a question of law before trial, or because of a problem as to discovery, some way must, in my view, be found of settling what such facts are.

Furthermore, while the Quebec Court of Appeal has come to the conclusion that evidence can be rejected even though pleaded, and there is apprehension in Quebec that evidence is inadmissible in Quebec unless pleaded, I should have myself had doubts about the inherent soundness of that practice being such as to prevail in the long run; and I am of the view that the opposite would be the rule in this Court. Finally, it does seem to me that the institutions of discovery in this Court are sufficiently different from those in the Quebec courts to make it important, in certain exceptional cases, to draw a strict line between the facts that constitute the cause of action and the facts that are relevant to the truth or falsity of such facts.