

COMINCO LTD. v. WESTINGHOUSE CANADA LIMITED et al

Court of Appeal, McFarlane, Seaton and Aikins, JJ.A.

Judgment — March 7, 1979.

Discovery — Range of examination — General principles — Question need not focus directly on a matter in question but need only relate to such a matter — Supreme Court Rules, 1976, R. 27(22).

Discovery — Range of examination — General principles — “Means of knowledge” — Limits of discovery based on reasonableness — Limits not drawn to exclude otherwise proper area simply because to enter area would expose a great deal of material — Supreme Court Rules, 1976, R. 27(22).

Discovery — Range of examination — General principles — Inappropriate to limit scope of discovery by concluding evidential proposition unsound — Such conclusions to be reached at trial, not before discovery.

Discovery — Range of examination — General principles — Questions relating to post-accident conduct — No policy excluding such questions.

Discovery — Range of examination — Production and inspection of documents — Questions tending to challenge list of documents — Proper.

Discovery — Range of examination — Disclosure of names of witnesses — Required to disclose witnesses to occurrence that led to litigation, not witnesses party proposes to call at trial nor pure expert witnesses — Supreme Court Rules, 1976, R. 27(22), 28.

Discovery — Range of examination — Questions shifting to other party the job of doing research — Other party required only to provide readily available information.

In 1973 a fire occurred in the plaintiff's zinc plant which the plaintiff alleged spread quickly because of the propensity of the polyvinylchloride base insulating sleeve on certain cables to burn and spread fire. The particular type cable involved was Teck cable, “Teck” being a Canadian term descriptive of armoured cable whether it had a polyvinylchloride base sleeve or not. The defendants were the manufacturers, suppliers or both of the Teck cable. The causes of action alleged by the plaintiff against the defendants included breach of contract, breach of statutory warranty, negligent misrepresentation, breach of warranty, negligent failure in manufacture, and failure to warn the plaintiff as a purchaser and user. The gravamen of the plaintiff's complaint appeared to be that the defendants manufactured and sold a dangerous product without giving the plaintiff adequate warning either before or after the sale. Connected with these allegations of negligence was the proposition that the defendants either knew or ought to have known of the propensity of the cables to spread fire. Following the refusal of the defendants' officers to answer certain questions on examination for discovery, the plaintiff was partially successful in that it obtained an order compelling the officers to answer some but not all of the questions which the officers had refused to answer. The plaintiff appealed and the defendants cross-appealed. A number of issues arose on the appeal, namely:

- (1) The general scope of an examination for discovery;
- (2) The propriety of questions posed by the plaintiff pertaining to polyvinyl-chloride-coated cables other than Teck cable;
- (3) Questions relating to the defendants' post-sale and post-fire conduct;
- (4) Questions that tended to challenge the defendants' lists of documents;
- (5) Questions relating to the defendants' associated companies;
- (6) Questions requiring the defendants to produce lists of the witnesses they proposed to call at trial; and
- (7) Questions requiring the defendants to produce their "libraries" concerning certain matters in issue.

Held — Appeal and cross-appeal allowed in part.

1. The scope of an examination for discovery extends to any matter relating to a matter in question in the action and is in the nature of a cross-examination. Although a question may at first sight seem to be somewhat remote from the matter in question, unless it is plain the answer could not be relevant to an issue, then the question is within the right given the cross-examining party by R. 27(22). Although the matter in question in an action is defined by the pleadings, one is not restricted to asking questions in terms of the pleadings. It is evidence that is being sought. The question need not be focused directly on a matter in question in the action but need only relate to such a matter. Rigid limitations rigidly applied can destroy the right to a proper examination for discovery.

The words "means of knowledge" in R. 27(22) are limited on the basis of reasonableness. What is reasonableness will depend on the case, the importance of the information to the case, the expense and difficulty involved in obtaining the answers, and the other circumstances. There are limits to an examination for discovery but they are not drawn so as to exclude an otherwise proper area simply because to enter the area would expose a great deal of material. If the question is difficult to answer, the witness can say so and can be cross-examined about the difficulty. It is for the witness, not counsel, to deal with that. This limitation excludes specific questions. No area of fact is closed on the ground that to enter it will open the "flood-gates".

2. The plaintiff was attempting to show that the dangerous propensity of polyvinylchloride-coated cables came to the attention of the industry generally and ought to have come or did come to the attention of the defendants. One source of that knowledge was other fires in which this factor was alleged to have been of importance. The defendants said Teck cable is so different from other cable that they should not have been expected to have learned from the experience respecting other cables. This argument was improperly accepted by the chambers judge as limiting the scope of discovery. It might ultimately be shown that the defendants could have learned nothing from the fires, from any publications on the question or from research done outside their own companies; but that decision should follow, not precede, the trial. The chambers judge also based his exclusion of such questions on the fact the pleadings did not allege any similarity between Teck and other kinds of cable. It is inappropriate to plead evidence, and the information respecting these

other cables was essentially evidence from which the court would be asked to conclude that the defendants knew or ought to have known of the danger. The defendants also relied on an affidavit that evidence concerning non-Teck cable would not be a guide to the propensities of Teck cable. It is inappropriate to conclude from affidavit evidence that a proposition is unsound and then to exclude that area from the examination for discovery. It was unnecessary for the plaintiff to show that the other cable was similar to Teck cable as a precursor to its right to discovery. The decision on similarity ought to have been made at trial, not before trial and particularly not before discovery.

3. Evidence of knowledge after the sale was relevant to the questions of failure to warn, what a defendant ought to have known and when it ought to have known. There are other issues to which this evidence was relevant, but it was sufficient that it was relevant to one issue in order to open up the right to discovery.

Questions relating to post-fire conduct were also proper. There was no fear that a jury would use such evidence improperly, for there would not be a jury in this case, and the judge could be trusted to use the evidence properly. Moreover, even if there had been a jury and there had been evidence that ought to have been kept from it because it might have used it improperly, that was not a matter to influence the scope of the examination for discovery. The scope of discovery and admissibility at trial are substantially similar but not identical. That a question is required to be answered on discovery does not mean the trial judge is bound to admit it as evidence. Similarly, an exclusionary rule regarding questions relating to post-accident conduct based on policy would not be introduced. A defendant would not expose other persons to injury and himself to further lawsuits in order to avoid the rather tenuous argument that because he had changed something, he had admitted fault. Moreover, post-fire conduct was relevant, that is, "regarding any matter . . . relating to a matter in question in the action". Such evidence bore on the capacity to produce fire-retardant cable and the capacity to test cables and know their flammability; on the fitness of the cable produced for the purpose for which it was required; and on what ought to have been known before the fire.

4. Questions were not improper simply because they challenged the defendants' lists of documents. Such a ruling would offer too many advantages to a dishonest litigant and would fail to recognize the difficulty of providing a complete list in a case such as this.

5. The plaintiff's questions regarding companies associated with the defendant were aimed at determining whether the defendants had access to related companies' research. Such questions were relevant to the matter of what information and research were available to the defendants and what information would have been available had the defendants sought it.

6. Rule 27(22) did not require the defendants to disclose lists of witnesses they proposed to call at trial. The words in R. 27(22) refer to witnesses to an occurrence that led to the litigation, not the witnesses at trial. Reading RR. 27, 28 and the Evidence Act together, it is also clear that R. 27(22) does not have in mind experts, even though a matter in question in the action might be one upon which expert evidence is to be called. The term "expert" describes a witness with no personal knowledge of the facts giving rise to the issue to which his expertise is to be applied — a pure expert. A doctor who treated a patient would be a person contemplated by R. 27(22), but a doctor who was called solely to advise counsel and give expert

are applicable. In the present case a question in the words of R. 27(22) was impossible to deal with, and such a question should have been focused upon a particular matter so that a witness could give a sensible and honest answer without a great deal of research.

7. The plaintiff's questions requiring the defendants to produce their libraries seemed unreasonable and put an undue burden on a defendant. Indeed, some of these questions seemed to shift to a defendant the job of doing the plaintiff's research. With respect to public documents, text books and such things the plaintiff ought to have done its own digging. It ought to have found out which books it was interested in and asked specifically whether the defendants had those books or articles. With respect to general questions, the defendant should not have been required to do more than to provide information that was readily available to it. The plaintiff was entitled to go further regarding papers created by the defendants for their own use for only the defendants could know of those papers.

Cases considered

C.P.R. v. Calgary (1966), 58 W.W.R. 124, 59 D.L.R. (2d) 642 (Alta. C.A.) — considered.

Cathcart v. Richmond (1965), 51 W.W.R. 767 (B.C.S.C.) — considered.

Hopper v. Dunsmuir (1903), 10 B.C.R. 23 (C.A.) — applied.

Howard v. B.C. Elec. Ry., [1949] 1 W.W.R. 933, [1949] 3 D.L.R. 304 (B.C.S.C.) — considered.

James v. River East S.D., [1976] 2 W.W.R. 577, 64 D.L.R. (3d) 338 (Man. C.A.) — considered.

Toll v. C.P.R. (1908), 1 Alta. L.R. 318, 8 C.R.C. 294, 8 W.L.R. 795 (C.A.) — considered.

Statute considered

Evidence Act, R.S.B.C. 1960, c. 134.

Rules considered

Supreme Court Rules, 1976, RR. 19(23), 26(6), 27(22), 28(8).

[Note up with 9 C.E.D. (West. 2nd) *Discovery*, ss. 19, 24; P1 Can. Abr. (2d) *Discovery*, III, 3, a, b.]

APPEAL and cross-appeal of order of Bouck J. requiring the answering of various questions on examination for discovery, 9 B.C.L.R. 100.

W. J. Wallace, Q.C., for appellant.

W. M. Holburn, for respondent Canadian General Electric Co. Ltd.

R. Weddigen and G. G. Hilliker, for respondent Canada Wire and Cable Co.

R. B. Harvey, for respondent Pirelli Cables Limited.

D. P. Roberts and T. A. Kowalchuk, for respondent Northern Telecom Limited.

(Vancouver No. CA 780973)

7th March 1979. The judgment of the court was delivered by

SEATON J.A.:— The learned chambers judge made a series of rulings respecting the obligation of employees or officers of the defendants Canadian General Electric Company Limited, Pirelli Cables Limited, Canada Wire and Cable Company, Limited, and Northern Telecom Limited to answer questions upon examination for discovery [9 B.C.L.R.100]. From some of those rulings the plaintiff (appellant) appeals. Pirelli and Northern Telecom cross-appeal with respect to others. Though the arguments before the learned chambers judge took seven days and his decision was given promptly, he gave extensive reasons for judgment. Many areas of dispute were eliminated by those reasons for judgment; all were illuminated. They have permitted the argument before us to focus on precise areas.

INTRODUCTION

I am bound in these reasons to speak in generalities because an examination of the precise questions will not resolve the problems. The examinations for discovery have been adjourned, not concluded. If a question is rejected because of its precise wording, that objection will be overcome by a revised question when the examination continues. A new objection will be made and the question will not have been resolved. Notwithstanding the general nature of my observations, they are directed to the facts and the issues in this case.

There was a fire at the appellant's zinc plant at Trail, British Columbia, on 7th December 1973 which originated in an electrical switch room. The cause of the fire is not disclosed in the pleadings and is not relevant. The allegation is that the fire spread rapidly because it was the propensity of the insulating sleeve on certain cables to burn and spread fire. The cables were manufactured and supplied by defendants in the action.

The part of the cable that, it is alleged, propagated fire is the outer sleeve. Its base is polyvinylchloride, commonly called PVC. The PVC is combined with other things, and the result is also, somewhat loosely, called PVC. PVC has many uses and even in cables there are significant differences in its composition, depending on the contemplated use. Each company will answer the varying demands in what it thinks to be the best way. Two companies will produce a

the same Canadian Standards Association (CSA)

makes a number of different cables will not use the same type of PVC in each.

It is alleged in the statement of claim that the cable here was Teck cable. That is a Canadian term that describes an armoured cable, whether it has a PVC sleeve or not. The word "Teck" does not describe the sleeve. CSA standards for Teck do not differentiate between different sleeves but set temperature and other standards that apply to all Teck cable. Non-CSA approved Teck includes cable that is similar but not submitted for approval, or substantially similar but not designed to meet the Teck CSA standards.

The appellant claims several million dollars special damages as well as general damages. All of the defendants other than Westinghouse Canada Limited are manufacturers of the cable in question and, it is said by the appellant, liable in negligence. All of the defendants other than Phillips Cables Limited are sellers of the cable in question to the plaintiff and, it is said by the appellant, are liable in contract and for breach of statutory warranty.

There are a number of causes of action including breach of contract, breach of statutory warranty, negligent misrepresentation, breach of warranty, negligent failure in manufacture, failure to warn the appellant as a purchaser, and failure to warn the appellant as a user. The appellant does not claim that the cable that was supplied fell short of the standards of the CSA. It claims that the respondents manufactured and sold a dangerous product without giving adequate warning either before or after the sale. Tied up in the allegations of negligence is the proposition that the respondents either knew or ought to have known of the propensity of the cables to spread fire. It will be apparent that many issues are raised by the pleadings that would not be raised in an ordinary action for the supply of defective goods or in an action related solely to the cause of the fire.

SCOPE OF DISCOVERY

Most of the issues before us deal with the scope of an examination for discovery. That is fixed by R. 27(22):

"(22). Unless the Court otherwise orders, a person being examined for discovery shall answer any question within his knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the action, and is compellable to give the names and addresses of all persons who reasonably might be expected to have knowledge relating to any matter in question in the action."

That is a new rule and it is somewhat different from the old. Why "touching the matters in question" was discarded in favour of "regarding any matter . . . relating to a matter in question in the action" is not apparent to me. If there is a difference, nothing in this appeal turns upon the difference.

The observations of Hunter C.J. in *Hopper v. Dunsmuir* (1903), 10 B.C.R. 23 (C.A.) at pp. 28-29, retain their validity and are worth repeating:

"No doubt some of the questions propounded and refused to be answered seem at first sight to be somewhat remote from the matter in hand, but I think it is impossible to say that the answers may not be relevant to the issues, and such being the case they are within the right given the cross-examining party by the rule. Even under the decisions on the English practice the Court could not disallow an interrogatory unless it was plain that the answer could not be relevant to the issue: *Sheward v. Earl of Lonsdale* (1880), 42 L.T.N.S. 172; *In re Thomas Holloway* (1887), 12 P.D. 167.

"It is also obvious that useful or effective cross-examination would be impossible if counsel could only ask such questions as plainly revealed their purpose, and it is needless to labour the proposition that in many cases much preliminary skirmishing is necessary to make possible a successful assault upon the citadel, especially where the adversary is the chief repository of the information required.

"It was argued by the learned counsel for the respondent that only a sort of cross-examination was allowed by the rule; that it consisted in asking leading questions bearing *directly* on the issues, and, if thought proper, in a loud tone of voice. I cannot agree. I think that the function of a cross-examiner is not to play the role of the ass in the lion's skin, but to extract information that will be of use in the decision of the issues, and by the most circuitous routes if it shall appear necessary to do so.

"I may add that, in my experience of the use of this procedure in Ontario, no one ever suggested that the cross-examination was not to be one in reality as well as in name."

The matter in question in an action is defined by the pleadings. It does not follow that there ought to be a fine scrutiny of the pleadings. We have heard an interesting argument of that nature but it is an inappropriate exercise. Pleadings are amended; particulars are amended. The nature of the negligence or breach alleged is impor-

statute; we are looking at pleadings to determine the scope of a trial that is going to take place at some time in the future.

Miscellaneous Observations

It was suggested that when the statement of claim alleged that the defendants knew or ought to have known certain things, it should have set out specifically how such knowledge came to their attention or ought to have come to their attention. The essential to be pleaded is knowledge. The means by which a party gained knowledge is, properly, evidence of that knowledge; it might be set out in particulars but it need not be in the statement of claim. To hold to the contrary would be to reject R. 19(23).

It has been said that each party is required to make out his own case. If that suggests that you cannot make out a case by admissions, I think it to be wrong.

There has been reference to the need for a party to know the case prior to discovery so that there will not be "trial by ambush". Examination for discovery is one of the means by which "ambush" at trial is avoided. After full discovery the trial will have fewer surprises. It is the evidence of a witness that is to be discovered. He does not need to know about the other side's case in order to answer honestly.

It was said of many questions that they were objectionable either because they related to a different type of cable or because they related to a period after the fire. Neither is a reason for excluding an otherwise admissible question. Evidence that is relevant to one question does not become inadmissible because it is not relevant to another issue.

Counsel said that one cannot embark on a fishing expedition. I find little help in that statement. I take it that a fishing expedition describes an examination for discovery that has gone beyond reasonable limits into areas that are not and cannot be relevant. In those waters one may not fish. In other waters one may. That one fishes is not decisive, it is where the fishing takes place that matters.

The Floodgate Argument

This argument is dealt with separately because it is at the foundation of many of the objections. It goes something like this: If the appellant is to ask us about associated companies or all PVC-jacketed cables, this discovery will go on forever, we shall have to retain hundreds of people to prepare the answers, and the material will be so voluminous that it will be impossible.

ing of Teck cable produced a serious fire hazard that was not reflected by the CSA test?"

It is said that the questions make an assumption that the witness did not adopt and are therefore objectionable. That objection is without validity. It is also argued that the first question should be restricted in time. I see no merit in that. If practices have changed, the witness can say so. I see no reason to disagree with the trial judge's conclusion respecting those questions. Question 104, set out above, is objected to on three grounds of relevance that are dealt with elsewhere in this argument. None of them is a ground for rejecting an otherwise proper question. I do not think that there is any reason to prohibit the appellant from learning about the research and development relied upon by the respondent.

CONCLUSION

I think that I have now dealt with all of the questions noted in the appeal and the cross-appeals, not in the sense that the individual questions have been examined — for reasons set out at the beginning, that would not be useful — but in the sense that all of the issues raised by the individual questions have now been ruled upon.

I have felt bound to conclude that the appellant has the right to discovery in a broad area, but I worry about that right being used unreasonably. There has been frequent reference to the need for reasonableness. It is required of all parties, particularly in complex litigation such as this. If there are further problems the parties will have to go back to the chambers judge and he might have to deal firmly with any abuses. If at the end of the trial it appears that the plaintiff discovered extensively in areas in which it did not succeed, the trial judge might make a suitable order for costs.

The appellant has very substantially succeeded on this appeal and the cross-appeals. Most of the questions originally submitted to the learned chambers judge have been answered in its favour. I think it is entitled to its costs here in any event. It should have the costs below but in the cause so that its recovery of those costs will be dependent on its success at trial.

I would allow the appeal and the cross-appeals to the extent set out in these reasons.

Order accordingly.