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 "floodgates".

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 evidence would not. With respect to him, the special provisions of the Evidence Act

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 cable that meets the same Canadian Standards Association (CSA) tests, but the cables will not be identical. Similarly, a company that

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 important, but not the precise nature. We are not interpreting a contract or a

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.

The words "means of knowledge" in R. 27(22) must have some limit and it must be based on reasonableness. What is reasonable 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.

Examples of improper use of the argument are not difficult to find. In the discovery of Mrs. Farago of Northern Telecom Limited this is found:

"(Q. 385) Do you now work closely with the R and D department of Bell Northern?

"MR. KOWALCHUK: I instruct the witness not to answer the question.

"MR. WALLACE: (Q. 386) Is there a common technical library between Bell Northern and the R and D department of Northern Electric?

"MR. KOWALCHUK: I instruct the witness not to answer the question.

"MR. WALLACE: (Q. 387) Do you exchange technical information and publications etc.?

"MR. KOWALCHUK: Are you talking about now?

"MR. WALLACE: Now between Bell Northern and Northern Electric.

"MR. KOWALCHUK: I instruct the witness not to answer.

"MR. WALLACE: (Q. 388) Did you in the past exchange technical information and articles and so forth between Bell Northern Electric and the present defendant?

"MR. KOWALCHUK: When in the past are you speaking of?

"MR. WALLACE: Well, let's take it up to February '71 first.

"MR. KOWALCHUK: Are you speaking of information on Teck cable?

"MR. WALLACE: I am talking about any technical information.

"MR. KOWALCHUK: I instruct the witness not to answer the question."

It was argued that each of these questions required the witness to go too far astray, that the floodgates would be opened, that the discoveries would go on forever. I think that to be quite unreasonable.

Whether any of the questions would have been difficult to answer we do not know. The witness was not permitted to say.

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. Nor is an area of questioning barred by the statement that if the plaintiff enters it the defendant will have to follow. The defendants can enter or not enter an area as they see fit. If, as they say, it leads to nothing, then they are in no danger.

If a 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. Difficulty in answering does not exclude a whole area. It excludes specific questions. No area of fact is closed on the ground that to enter it would "open the floodgates".

Rigid Limitations

Rigid limitations rigidly applied can destroy the right to a proper examination for discovery. The following exchange demonstrates the difficulties:

"MR. WALLACE: (Q. 190) Right. And I produce to you a photograph set forth in an exhibit which is a C.G.E. exhibit with reference to Vulkeen Teck cable showing certain installations of Vulkeen cables.

"MR. HARVEY: What is the date of the publication?

"MR. WALLACE: Take a look and see.

"MR. HARVEY: I thought you might know the date.

"MR. WALLACE: Let's not fight.

"MR. HARVEY: I am not fighting. I have attached some significance to the time factor in this case and I am simply asking the date.

"MR. WALLACE: That's fine. Go ahead.

"MR. HARVEY: Well, I'm sorry, Mr. Wallace, on a brief look at it, I can't see a date.

"MR. WALLACE: All right. So we don't have a date.

"MR. HARVEY: I am objecting to —

"MR. WALLACE: Objecting to what?

"MR. HARVEY: To any proposed examination on the material.

"MR. WALLACE: I am now going to put the question. You can object to the question. (Q. 191) I am producing to you a document headed 'Vulkeen Teck armoured cable' and ask for the purposes of identification it be marked as an exhibit.

"*(Exhibit 12 for Identification:* Document headed 'Vulkeen Teck armoured cable')

"MR. WALLACE: (Q. 192) Now, then, I show you two or three photographs of industrial installations of Teck cable. Would you look at those? Now, I am asking you: Are they not representative of the type of industrial installation [in] which you would expect Teck cable to be used?

"MR. HARVEY: Don't answer that. I object to that question. I instruct the witness not to answer."

A ruling that conduct after a particular time is not admissible could not support those objections. They are unreasonable.

Teck/Non-Teck

The respondents refused to answer questions pertaining to PVC-coated cable other than Teck cables and the learned chambers judge upheld their objection.

The appellant seeks in this litigation to show that the dangerous propensity of PVC-coated cables came to the attention of the industry generally, and ought to have or did come to the attention of these respondents. One source of that knowledge is other fires in which this factor is alleged to have been of importance. The respondents say that Teck cable is so different from other cables that they should not be expected to have learned from the experience respecting other cables. The learned chambers judge accepted that and referred to "Teck cable with its unique PVC coating". It may ultimately be shown that the respondents could learn nothing from the fires, from any publications on the question, or from the research done outside their own companies. I think that the decision should follow, not precede, the trial.

In part, the learned chambers judge based his conclusion that evidence pertaining to cable other than Teck cable was not appropriate on the pleadings. He pointed out [pp. 106-107]: "The statement of claim does not attempt to allege any similarity between Teck cable and other kinds of cable." It is not appropriate to plead evidence, and the information respecting these other cables is essentially evidence from which the court will be asked to conclude that the defendants

knew or ought to have known of a danger. The respondents relied upon an affidavit to the effect that evidence of non-Teck cable would not be a guide to the propensities of Teck cable. The respondents refused to answer questions on that subject:

"(Q. 770) Is it your opinion that this paper dealing with fire protection of grouped, controlled cable installations has no relevance to fire protection involving Teck 90 cable?

"MR. HARVEY: I am objecting to the question, instructing the witness not to answer.

"MR. WALLACE: (Q. 771) Is it your — do you not agree that the factors to be considered in reducing the risk of flame spread for grouped, controlled cable installations are similar factors to be taken into consideration in reducing the risk of fire spread for Teck 90 cable?

"MR. HARVEY: Same objection."

I do not think it appropriate to conclude on affidavit evidence that a proposition is unsound, then exclude the area from examination. That is what was done here.

It was said that before there could be examination with respect to cable other than Teck cable the appellant would have to establish that the other cable was similar. I know of no procedure whereby a party can prove an aspect of his case before discovery. The decision on similarity ought to be made at trial, not before trial, and particularly not before discovery.

A great number of cases were cited to us on this issue. Many of them arose out of an accident and the only question was the cause of that accident. They are not helpful. Here we are concerned with the propensities of PVC-jacketed cable to propagate flame and the knowledge, from time to time, of the respondents of that propensity. There may be distinctions between the PVC coating on one cable and that on another but there are also similarities. I would be surprised if these companies waited until there was a fire propagated by cable manufactured by them before they did any research on PVC generally and PVC as used on the various cables they supplied. Such conduct might of itself indicate negligence.

An example of the questions with which we are concerned under this heading is this:

"(Q. 379) Do they do research into the flame resistant characteristic of PVC?

"MR. KOWALCHUK: I instruct the witness not to answer.

"MR. WALLACE: (Q. 380) Did they do research into that at the time you were with them?

"MR. KOWALCHUK: I instruct the witness not to answer the question.

"MR. WALLACE: (Q. 381) Did they do research into PVC coated cable?

"MR. KOWALCHUK: I instruct the witness not to answer the question.

"MR. WALLACE: (Q. 382) Did they do research into PVC coated Teck cables?

"MR. KOWALCHUK: You may answer that.

"THE WITNESS: They did not."

I think that all of these questions should have been answered. One is not restricted to asking in terms of the statement of claim. It is evidence that is being sought. A question to be proper need not be focused directly on a matter in question in the action but need only relate to such a matter.

I am of the view that the appellant is entitled to ask questions about PVC-sheathed cables, whether Teck or non-Teck.

Flamastik

Flamastik is said to be a coating put over PVC to overcome the propensity to spread flame. Evidence with respect to it could indicate knowledge of and an ability to overcome the alleged propensity. Questions pertaining to it and to other means of reducing PVC's tendency to spread flame are relevant and should be treated as part of the Teck/Non-Teck argument. To restrict the appellant to a particular cable with a particular coating is quite unreasonable.

Post-Sale Conduct

It was argued that nothing that happened after the supply of the cable was admissible. The argument relied in part on the contention that there could not be liability in tort as a result of the supply of goods pursuant to a contract, and in part on the contention that there was no duty to warn. Those arguments can be made after the evidence is in. Evidence of knowledge after the sale is 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 is relevant, but one is enough. It is clear that these questions should be answered.

Post-Fire Events

Evidence of conduct subsequent to the date of the fire raises three quite separate issues. First, is such evidence relevant or, to put it more accurately, is it "regarding any matter . . . relating to a matter in question in the action"? Secondly, is there a policy that such evidence will be excluded? It is said that its use would discourage people from making improvements that would avoid further loss for fear such improvements would be used to their disadvantage as evidence. The learned chambers judge accepted the policy argument to exclude questions about knowledge and conduct subsequent to the fire. I will return to these two questions.

Many American cases have been cited to us and they raise the third question. There is in them repeated reference to the fear that the jury will use the evidence improperly. That is not a fear in this case; there will not be a jury and the judge can be trusted not to use the evidence improperly. Even if there might have been a jury, I would not have thought this to be a reason to limit an examination for discovery. I do not have the fear of juries that is disclosed in the American judgments. That may be because our juries are carefully charged while their juries receive very little guidance from the judge. In any event, if there is evidence that ought to be kept from a jury because it might be used improperly, that is not a matter to influence the scope of an examination for discovery. Scope of discovery and admissibility at trial are substantially similar but not identical. That a question was required to be answered does not mean that the trial judge is bound to admit it in evidence.

The policy question, isolated from the worry about the jury abusing the evidence and the relevancy of the evidence, is stated in Wigmore on Evidence, 3rd ed. (1940), vol. 2, para. 283:

" . . . that it would discourage all owners, even those who have genuinely been careful, from improving the place or thing that had caused the injury, because they would fear the evidential use of such acts to their disadvantage: and thus not only would careful owners refrain from improvements, but even careless ones, who might have deserved to have the evidence adduced against them, would by refraining from improvements subject innocent persons to the risk of the recurrence of the injury."

And Wigmore thus concludes that:

"Whatever then might be the strength of the objection to such evidence from the point of view of Relevancy alone, the added considerations of Policy suffice to make clear the impropriety of resorting to it. On one or another or both of these grounds have most Courts rested their reasoning".

The reasoning in the cases is not so clear to me. I have difficulty finding cases that separate the policy reason for excluding evidence from the question of relevancy.

At the root of most of the judgments are these statements: Bramwell B., in *Hart v. Lancashire & Yorkshire Ry. Co.* (1869), 21 L.T.R. 261 at 263:

"People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be (as I have often had occasion to tell juries) to hold that, because the world gets wiser as it gets older, therefore it was foolish before";

and Coleridge L.C.J. in *Beaver v. Hanson Dale & Co.* (1890), 25 L.J. Notes of Cases 132:

"Now, a perfectly humane man naturally makes it physically impossible that a particular accident which has once happened can happen again, by fencing or covering, or at any rate making safe the particular thing from which it arose. That, however, is no evidence of, and I protest against its being put forward as evidence of, negligence. A place may be left for a hundred years unfenced, when at last some one falls down it; the owner, like a sensible and humane man, then puts up a fence; and upon this the argument is that he has been guilty of negligence, and shews that he thought the fence was necessary because he put it up. This is both unfair and unjust. It is making the good feeling and right principle of a man evidence against him."

Neither of those learned judges thought there to be an exclusionary rule evolving, nor did the other judges in those two cases. Nothing was said about admissibility. The cases turn on the weight to be given the evidence.

Three decisions in the Supreme Court of British Columbia have been referred to by counsel. In *Howard v. B.C. Elec. Ry.*, [1949] 1 W.W.R. 933, [1949] 3 D.L.R. 304, the court required answers only to some of the questions asked about conduct after the accident. The distinction was between relevant and non-relevant matters. The rejected questions sought evidence of an "implied admission".

Cathcart v. Richmond (1965), 51 W.W.R. 767, also rejected questions that were for that purpose, but recognized that such evidence could be admitted for other purposes. Those two cases were considered in the third decision, *Parkes v. Weston (George) Ltd.*, Victoria No. 1105/75, 18th April 1977 (not yet reported), where the conclusion was:

" . . . that the evidence was admissible, not as an admission of negligence or failure to maintain a standard of reasonable care, but rather as relevant to the question of negligence as discussed in the *James v. River East* decision."

The Manitoba Court of Appeal in *James v. River East S. D.*, [1976] 2 W.W.R. 577, 64 D.L.R. (3d) 338, had considered the policy question and rejected an exclusionary rule. They followed *Toll v. C.P.R.* (1908), 1 Alta. L.R. 318, 8 C.R.C. 294, 8 W.L.R. 795 (C.A.), a decision of the Alberta Court en banc, and *C.P.R. v. Calgary* (1966), 58 W.W.R. 124, 59 D.L.R. (2d) 642, a decision of the Alberta Appellate Division which approved *Toll*.

No case binding on us supports an exclusionary rule based on policy and I am not inclined to introduce such a rule. In my view a defendant will not expose other persons to injury and himself to further lawsuits in order to avoid the rather tenuous argument that because he has changed something he has admitted fault.

That leaves for consideration only the question of relevance. In this case post-fire conduct bears on the capacity to produce a fire retardant cable; on the capacity to test cables and know of 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.

In my view, in this case, the examinations for discovery cannot be cut off at the date of sale, the date of the fire, or any other date.

Cross-Examination on List of Documents

The learned trial judge concluded that questions were not improper simply because they challenged the defendants' list of documents. I agree with him.

The question is stated thus in Northern Telecom's notice of cross-appeal:

"5. The learned Judge erred in law in failing to hold that questions which amounted to a cross-examination of this Respondent's Affidavit of Documents should not be answered".

The question given under this heading follows:

"(Q. 890) Were any papers or records of the research produced as a result of your work on that -40 jacket? A. That was —

"MR. KOWALCHUK: Just a minute, Mrs. Farago, please. Mr. Twining, there is an affidavit verifying the list of documents here. If you can find such an article in that list you can question her about it. If you can't, I suggest you are passing into the realm of questioning the affidavit of documents. You may be able to do that in some forum but it is my humble submission you can't do that here at this discovery.

"MR. TWINING: Well —

"MR. KOWALCHUK: If it were relevant and if we had it, you would get it.

"MR. TWINING: Are you instructing Mrs. Farago to refuse to answer questions?

"MR. KOWALCHUK: Yes.

"MR. TWINING: With respect to any documents that are not listed in your list of documents?

"MR. KOWALCHUK: No, it may be listed in your list of documents.

"MR. TWINING: All right, any documents that are not listed in either the plaintiff's or the defendant's list of documents?

"MR. KOWALCHUK: Not necessarily. If you can come up with one, point it out to us. I may think about that even though it is not listed in a list. You are questioning her as to whether it exists, whether she did one, whether we have one; ultimately, I would suppose, why it isn't in the list.

"MR. TWINING: You are instructing Mrs. Farago not to answer questions directed to the existence of documents not disclosed in your list, is that correct?

"MR. KOWALCHUK: The existence of documents in the possession of Northern Telecom, yes.

"MR. TWINING: Documents which are not disclosed in the affidavit of documents?

"MR. KOWALCHUK: Or in your list of documents.

"MR. TWINING: I want to be perfectly clear.

"MR. KOWALCHUK: All right, go ahead, ask the question.

"MR. TWINING: It is our position that these documents are in the possession of Northern Telecom. I don't want to play games about that. Is it your position that you are instructing Mrs. Farago not to answer questions with respect to documents not disclosed or even the existence of documents not disclosed in the plaintiff's or the defendant's or in Telecom's list?

"MR. KOWALCHUK: I am advising Mrs. Farago not to answer any questions that I consider are passing into the realm of cross-examination or questioning the affidavit of documents, whether it is your affidavit of documents or ours is irrelevant, specifically ours in this case. Now, you be guided by that if you wish. That is as far as I am going to assist you in that regard.

"MR. TWINING: (Q. 891) Mrs. Farago, my last question to you was were technical documents or papers prepared as a result of your work on -40F PVC jacket?

"MR. KOWALCHUK: I instruct the witness not to answer the question."

The argument in support of this objection is based on R. 26(6):

"(6) The Court may order a party to attend and be cross-examined on an affidavit delivered under this rule."

The new rules provide for a list of documents to be given and for an affidavit verifying the list. The respondents say that those provisions coupled with R. 26(6) provide a procedure for questioning the affidavit and the list and that it is the only procedure. They say that one may not, on an examination for discovery, ask questions that tend to challenge the list already supplied.

I see no need to bar a question which has the effect of challenging the list. Such a ruling would offer too many advantages to a dishonest litigant and would fail to recognize the great difficulty of providing a complete list in a case such as this.

I agree with the learned chambers judge that the list of documents is not conclusive, that there is no rule excluding from examination for discovery questions relating to documents alleged to be in possession of the person being examined but not on the list of documents, and that no question is excluded simply because it calls into doubt the list of documents or the affidavit in support.

Associated Companies

This question arises in two ways. What the appellant sought first

was information about the research and other facilities available to the respondents. Here is an example:

"Exam. for Discovery
W. K. Rybczynski (Pirelli)
Aug. 22, 1978

"(Q. 102) I see. Well, then, Pirelli Canada, the defendant in this action, relied on its — for its research and development on the Milan company, is that correct? A. That is correct.

"(Q. 103) And could you — who would be the person who would be aware or what position, what position would an individual hold who would be aware of the research and development that Pirelli Milan has done on Teck cable and PVC coatings?

"MR. HARVEY: Well, my instructions, Mr. Wallace, are that there hasn't been, what you call —

"MR. WALLACE: I am asking.

"MR. HARVEY: I appreciate that. My instructions are that Pirelli Milan, to refer to it as you have referred to it, did not do research in relation to what you have described as Teck cable. And it is a question of relevancy.

"MR. WALLACE: You can either refuse the witness to answer the question or I want him to answer it.

"THE WITNESS: I refuse to —

"MR. HARVEY: Let's have the question again.

"MR. WALLACE: (Q. 104) The question is: What position or what person — if you don't know the name of the individual, then what office would be knowledgeable of the research and development done by Pirelli Milan into Teck cable and PVC coatings generally?

"MR. HARVEY: I object to the question and instruct the witness not to answer."

Negligence on the part of one of the associated companies, on the pleadings in this case, would not be relevant. The question of associated companies does not, in those circumstances, arise. What does arise is what information and research were available to a respondent and what information would have been available had the respondent sought it. In this context the associated company objection was to exclude a question that would otherwise be appropriate. It cannot do that. If a company has an arrangement whereby it has ac-

cess to another's research, questions can be asked about that in this litigation.

Some questions were objected to on the basis that the companies were not shown to be associated. A party attempting to show a relevant relationship is entitled to ask questions designed to prove that relationship. He does not have to establish the relationship as a prerequisite to asking the question.

A number of questions were asked about who held the shares in a respondent company. There is no issue raised in the statement of claim or elsewhere to which share ownership might be relevant. The chambers judge, correctly in my view, refused to order that such questions be answered.

List of Witnesses

In attempting to utilize the final words of R. 27(22) — "(27) . . . 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." — counsel for the appellant asked for a list of the witnesses that the defendants proposed to call at the trial. There are other new provisions respecting witnesses, but that question cannot be justified except under subrule 22. The Evidence Act, R.S.B.C. 1960, c. 134, makes provision for disclosure but does not call for a list of witnesses.

I would be surprised if parties at an examination for discovery knew which witnesses they would call. If the word "witness" is to be used with respect to this rule, I think it must refer to witnesses to the occurrence that led to the litigation, not witnesses at trial.

I would have preferred that the matter be left there to be explored from time to time by chambers judges, but that is not feasible. All counsel agree that when the examinations are continued the question will be asked in the words of the provision. At least one counsel has already done that. In the result, we are bound to consider the scope of the provision. I expect that the rule was drawn with litigation quite different from this in mind and was to facilitate discovery of who saw the occurrence from which the litigation grew. Here, to answer the question truthfully would involve supplying lists containing thousands of names.

It appears that this rule was made with R. 28 — "Pre-Trial Examination of Witness" — in mind. The pre-trial examination also refers back to R. 27(22) in R. 28(8), and that is of assistance in

interpreting R. 27(22). It eliminates the suggestion that what we are searching for is witnesses who will be called at trial.

Reading RR. 27 and 28 and the Evidence Act provisions for disclosure, I conclude 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. I use the term "expert" to describe 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. If that suggestion is correct, the doctor who treated the patient would be a person contemplated by R. 27(22), but the doctor who is called in solely to advise counsel and give expert evidence would not. With respect to him you would go to the special provisions in the Evidence Act. Can a party ask for a list "of all persons who reasonably might be expected to have knowledge relating to any matter in question in the action"? It is impossible to deal with such a question in this case. I would require that the question be focused upon a particular matter so that a person could give a sensible and honest answer without a great deal of research. What is reasonable in this case may have to be decided by a chambers judge after the discoveries have recommenced. I doubt that I can be more helpful at this stage.

To summarize: (1) There is now no exclusionary rule respecting names and addresses of witnesses; (2) Rule 27(22) does not call upon a party to reveal what experts it has retained; and (3) in this case a question in the words of the rule would be unreasonable and an answer to it should not be required.

Northern's Cross-Appeal

Northern has cross-appealed from the ruling that it answer questions relating to failure to warn pursuant to an alleged duty to warn between the date of sale and the date of fire. It is said that the appellant cannot recover in both tort and contract. I agree with and adopt the reasons of the learned chambers judge expressed in Pt. 3 of his reasons for judgment.

Library Issue

We do not have the necessary information to rule on questions about the respondents' libraries. At first blush the questions seem unreasonable. They appear to put an undue burden on a defendant. Indeed, some seem to shift to a defendant the job of doing the plaintiff's research. Here is an example:

"MR. WALLACE: (Q. 358) . . . I would ask that you produce those articles, technical literature, brochures and pamphlets relating

to the flame retardancy or flammability of PVC cable, Teck and otherwise, between the years 1965 to 1972, and 1972 to 1975 and, I presume, of course, that you can't do that at this time, but your counsel will take it under advisement and advise me that which he is prepared to accede to and that which he is prepared to refuse production of, right?

"MR. KOWALCHUK: Correct.

"MR. WALLACE: Right. I want to make certain also that in that request is contained all information relating to Flamastik, production of Dyna-Therm Corporation or other flame retardant codings that may be applied to reduce the propensity of Teck cable to spread flame."

It may be that a defendant has its library indexed so that it can give an answer with little trouble. If that is the case it should do so, qualifying the answer by the explanation that its answer is what is shown by an index or a computer print-out, as the case may be. Beyond that it need not go. I think Mr. Weddigen was right when he said that, with respect to public documents, text books and such things, the appellant ought to do the digging. It ought to find out what books it is interested in and ask specifically whether the respondents have those books or articles.

Mr. Starr of Canada Wire was asked for a list of all documents in its possession and for a list of those documents that it does not now have but at one time had in its library. I think that a defendant should not be required to do more than provide information that is readily available to it in answer to a general question such as that.

The appellant is entitled to go further regarding papers created by a defendant for its own use. Only the defendant can know of those papers.

There are other questions that can be treated as part of the library issue and responded to in similar fashion. For example:

"MR. WALLACE: (Q. 396) You have given me a list of a number of organizations of which you personally are a member and with respect to which you attend various meetings. I would appreciate your advising me of the associations and organizations of which other members of the defendant company involved in the development of Teck cable and concerned with its flammability or lack thereof were members and what meetings those individuals would be expected to attend. Now, I appreciate that that is a very difficult thing to respond to and it would necessitate the canvassing of the membership of the

various individuals in the R and D department and the quality control department and then the sales department to ascertain who were members of what organization and what meetings they would normally attend.

"MR. KOWALCHUK: For my own benefit —

"MR. WALLACE: Now, I will want that between the years 1967 to 1971, in the years from 1971 to 1975."

If an answer is readily available it ought to be given. If it is not, that can be explained and more precise questions asked.

I hope that enough has been said on this issue to guide the parties. Without knowing how difficult it would be to prepare an answer I am not able to say whether an answer should be required.

Pirelli's Cross-Appeal

Pirelli in its cross-appeal referred to one group of questions and three individual questions that the trial judge ordered be answered. With the exception of Q. 1036 they do not fall within the general categories referred to elsewhere in these reasons and must be dealt with separately.

The group of questions follows:

"MR. WALLACE: (Q. 241) Did your company make any effort or take any steps to investigate the cause of fires and the contribution of PVC to those fires during that period?

"MR. HARVEY: I object. The question is objected to and the witness is instructed not to answer.

"MR. WALLACE: (Q. 242) Sir, could you direct your mind to the mechanisms of a fire involving group cables. Is it correct group Teck cables of the type supplied to the plaintiff —

"MR. HARVEY: At what period of time?

"MR. WALLACE: (Q. 243) Group Teck cables of the types supplied the plaintiff —

"MR. HARVEY: At what period of time?

"MR. WALLACE: I'm sorry, I don't follow you.

"MR. HARVEY: Well, perhaps my instructions are in error and I reviewed the interrogatory. We have answered the interrogatory to indicate that the defendant was not aware of group — if I am para-

phrasing your question correctly, cable, Teck cables grouped where there was a fire prior to the date of the —

"MR. WALLACE: I am not asking him about the fire. I am asking him to direct his mind to the mechanism of fire involving grouped Teck cables of the type supplied the plaintiff.

"MR. HARVEY: When?

"MR. WALLACE: So there is no question of time involved.

"MR. HARVEY: When did you suggest there was such a fire?

"MR. WALLACE: I am not suggesting there was a fire. I am suggesting that he direct his mind to the mechanism of fire.

"MR. HARVEY: On a hypothetical basis?

"MR. WALLACE: Yes. The mechanism of fire, principles involving fire in grouped Teck cables of the type supplied the plaintiff. (Q. 244) Now, is it not correct —

"MR. HARVEY: Well, I am going to let you ask. Please leave an opportunity for me to consider Mr. Wallace's question.

"MR. WALLACE: (Q. 245) Is it not correct that the heat, if such a fire occurs, that the heat radiated from cable to cable, that group can be sufficient to defeat the inherent self-extinguishing mechanism built into the PVC components of the cable?

"MR. HARVEY: The question is objected to and the witness is instructed not to answer."

The objection is that no foundation was laid for the questions. That suggestion does not appear to have been made at the time and I think that, if one objects, one should say why. Presuming that this objection can now be made, I merely say that I know of no requirement that a foundation be laid. None was cited to us. Those questions should have been answered by the witness without interruption by counsel.

Two of the other questions objected to are these:

"Q. 178 All right. Now, I am putting this to you that the normal industrial installation of Teck Cable is in trays that carry a multiplicity of cables, a number of cables, a group of cables, right? . . .

"Q. 213 Yes. Fine. Now, then, I put to you that the defendant company, in the period from 1969 to 1971, recognized that the group-

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.