

Background

[3] Mirjana Spasic brought this action in May of 1997, claiming damages from the manufacturers of tobacco products to which she was addicted and which she claimed caused her to develop lung cancer. She has died, and the action is continued by her estate trustee, her daughter Ljubisa Spasic. The action has not progressed beyond proceedings attacking the statement of claim. Much time has passed and expense has been incurred, but no statement of defence has yet been delivered.

[4] The Court of Appeal has already considered paragraphs 8 through 15, in its decision reversing the order of Cameron J., who struck them out in November 1998. Exercising his jurisdiction pursuant to Rule 21.01(b), Cameron J. ruled that the tort of spoliation, which the impugned paragraphs express, was not part of the law of Ontario. On appeal from that decision the Court of Appeal ruled that these paragraphs ought not to have been struck out. That decision was an application of the law as set down by the Supreme Court of Canada in *Hunt v. Carey*, [1990] 2 S.C.R. 959. The learned justices in the Court of Appeal declined to spell out the elements of the novel tort of spoliation, holding that it is for the trial judge to determine the elements of the tort in the context of the facts which will emerge at the trial. In my view, the Court of Appeal intended that paragraphs 8 to 15 should constitute the pleading on which that determination would proceed. These paragraphs, as pleaded, are the framework within which that court foresaw the spoliation issues being litigated.

[5] The motion before Cameron J. was brought in circumstances that must be stated for these reasons to be understood.

[6] On an earlier motion, Master Peterson declined to strike out allegations of the defendants' negligent and intentional acts that caused the plaintiff's lung cancer, and allegations of conspiracy to develop and promote cigarette products and mislead the public about them. He did, however, strike out paragraph 8, which read:

The plaintiff alleges that the defendants have engaged in spoliation of evidence depriving her of the opportunity to properly and fully investigate or prove the facts upon which the causes of action are based and plead and rely upon the doctrine of *omnia praesumuntur contra spoliatores*.

[7] Master Peterson wrote:

Paragraph 8 of the statement of claim raises a different issue. In my view it is a question of law as to whether there is a cause of action for "spoliation" and it would be a question of law as to what are the elements of such a cause of action if it does exist. The plaintiff has delivered a supplemental motion record that purports to provide particulars of the alleged spoliation. Counsel for the plaintiff also submitted that paragraph 7(r) of the statement of claim also contained relevant allegations on this issue. In my view

paragraph 8 as pleaded does not comply with Rule 25.06(1) because it fails to concisely set out the material facts on which this purported cause of action is based. That, in my view, cannot be cured by particulars. I would strike out paragraph 8 with leave to amend so that the plaintiff sets out succinctly the material facts the plaintiff believes support the alleged cause of action. The defendants can then bring the appropriate motion pursuant to Rule 21 to determine the question of law, if so advised, or alternately respond to the specific allegations by way of defence.

[8] Although the plaintiff had voluntarily provided particulars to the defendants in substantially the form later pleaded in paragraphs 8 to 15, the learned master did not rule on whether those particulars would constitute a sufficient factual foundation if incorporated into the statement of claim. After an unsuccessful appeal of the learned master's ruling, the plaintiff amended the claim to incorporate these paragraphs, as well as a paragraph 16 which repeated part of the previous paragraph 8: “the plaintiff pleads and relies on the doctrine of *omnia praesumuntur contra spoliatores*.”

[9] The Court of Appeal upheld part of the decision of Cameron J., his order striking out paragraph 16 on the ground that it pleads a rule of evidence, thereby offending Rule 25.06(2). Cameron J. and the Court of Appeal exercised their jurisdiction over the sufficiency of the pleading with regard to both Rules 21 and 25.

[10] The defendants intended to return to Master Peterson to argue that the new paragraphs still did not meet the factual requirements of a proper statement of claim. Because a claim of spoliation in another tobacco case was making its way to the Supreme Court of Canada from another province, counsel for the parties in this case agreed to proceed first with a motion to be heard by a judge to strike the claim as showing no cause of action, a question of law beyond the jurisdiction of a master. The parties had in mind bringing the validity of this pleading to the Supreme Court at the same time as the other tobacco case. The agreement contemplated returning to Master Peterson on a Rule 25 motion “if necessary” following the disposition of the motion pursuant to Rule 21. By entering into that agreement, plaintiff's counsel foreswore arguing that there should be only one attack on a pleading, in which all grounds of insufficiency are raised in order to be disposed of: *Slan v. Beyak* (1973), 3 O.R. (2d) 295 (S.C.O.).

[11] Following the decision of the Court of Appeal in July 2000, a motion for leave to appeal to the Supreme Court of Canada was dismissed on March 21, 2001. The defendants then brought the present motions pursuant to Rules 25.06(1), 25.06(8), and 25.11. By agreement they were made returnable before Master Clark rather than Master Peterson. Plaintiff's counsel moved to stay or dismiss the motions on the ground that they amounted to a collateral attack on the decision of the Court of Appeal, that the learned Master lacked jurisdiction in light of that Court's decision, and that the defendants' reliance on subrule 25.06(8) was also a collateral attack on the Court of Appeal's ruling. Lamek J. declined to make that order, and adjourned the plaintiff's motion to be dealt with by Master Clark together with the defendants' motions.

Jurisdiction

[12] Master Clark ruled that the decision of the Court of Appeal did not limit his jurisdiction nor otherwise prevent him from determining whether “the plaintiff has failed to plead the minimum level of fact disclosure required by Rule 25.06(1) of the *Rules of Civil Procedure*.” He said of the decision of the Court of Appeal “nowhere does that Court indicate any interest in the form of the statement of claim as amended, which is to be expected since the Notice of Appeal does not mention relief under rule 25.06(1)” (paragraph 17 of the learned master’s reasons). Elsewhere in his reasons the learned master wrote, “[t]o the Court of Appeal this was not a pleadings motion” (paragraph 22).

At paragraph 23, the learned master wrote:

It is also worth noting that at pp. 703 and 704, Borins J.A., while holding that the statement of claim should not have been struck out and that “the appellant’s claim pleaded in those paragraphs should be allowed to proceed to trial”, does not say that it should proceed to trial “as pleaded.”

[13] With respect, I disagree. Both Cameron J. and the Court of Appeal dealt with the matter as a pleadings motion. Both also made reference to Rule 25.06 as well as to Rule 21.01, at least in the context of striking out the plea of the evidentiary maxim *omnia praesumuntur contra spoliatorem*. A plain reading of the decision of the Court of Appeal leads to the conclusion that the learned justices held as Borins J.A. wrote at paragraph 13 of his reasons:

... I am of the view that paragraphs 8 to 15 of the statement of claim should not have been struck out and that the appellant’s claim pleaded in those paragraphs should be allowed to proceed to trial.

[14] In my respectful view, the words of Borins J.A. are a specific reference to the paragraphs “as pleaded” which were in issue before Cameron J. and Master Clark. The decision says specifically that the paragraphs should not have been struck out. Moreover, the decision that the spoliation claim should be allowed to proceed to trial is expressed with explicit reference to the very paragraphs in issue. Different words would have been used if the meaning had been that the spoliation claim could proceed, but only if further amended to remedy the defect later perceived by the learned master, that the pleading “lacks essential supporting fact ingredients to qualify pursuant to rule 25.06(1).”

At paragraph 4 of his reasons, Borins J.A. wrote:

Paragraphs 8 to 15 are very detailed and comprise eight pages of the 27-page statement of claim. There is no need to reproduce these paragraphs. A brief summary of their contents will suffice. It is pleaded that since the 1950s, the defendants knew that cigarettes were hazardous and “inherently defective” and that they “engaged in various schemes to conceal, destroy and alter evidence that established their knowledge”. The schemes alleged included contrived document retention and destruction policies and plans. It is further pleaded that “as a result of the defendants' participation in such schemes, the plaintiff has been deprived of the opportunity to properly and fully investigate and prove the facts upon which her causes of action are based”.

[15] This paragraph demonstrates that the Court of Appeal had no difficulty perceiving the “minimum level of material fact disclosure” or “essential supporting facts” required for a proper statement of that claim. While it is true that the analysis in that court focused on the availability of a separate tort of spoliation as a question of law, it is no less true that the whole question of the sufficiency of the pleading was before it. The Court held that paragraphs 8 to 15 set out the material facts of intentional wrongdoing relevant to spoliation. The passage quoted also illustrates that the pleading meets the more stringent requirements of Rule 25.06(8) for full particulars where intent is alleged.

[16] The Court of Appeal knew of counsel's agreement to proceed with the Rule 21 motion on paragraphs 8 to 15 as pleaded, although defendants' counsel had reserved the right to return to the learned master, if necessary, to challenge their sufficiency as a factual foundation of the spoliation claim. I have no doubt that the learned justices of that court favour the making of agreements and compromises in litigation, to further the goals of speedy and economic justice. The fact that the Court knew of counsel's agreement supports a finding that the Court intended to rule on the entire matter and end contention over the statement of claim.

[17] The plaintiff's cross-motion should have been granted, and the defendants' motions before the master ought to have been dismissed, on the ground that the issues raised had already been disposed of in the Court of Appeal.

[18] The deference due to the ruling of a master in the exercise of his or her discretion is well established, and expressed helpfully in *Marleen Investments Ltd. v. McBride* (1979), 23 O.R. (2d) 125, 13 C.P.C. 221 (H.C.J.). In the usual appeal from such a ruling, the court should not disturb the master's decision unless it is clearly wrong. *Marleen* and other decisions make it clear, however, that where the master's decision is one crucial to the final outcome, or is a decision on a question of law, the standard of review is correctness, and the reviewing court is obliged to substitute its discretion for that of the master if it appears incorrect: *Coriale (Litigation Guardian of) v. Sisters of St. Joseph of Sault Ste. Marie* (1998), 41 O.R. (3d) 347 (Gen. Div.); *Correa v. CIBC General Insurance Co.*, [2001] O.J. No. 3599 (S.C.J.).

[19] In the present case, I hold that the decision of the Court of Appeal renders the master's decision incorrect. There is no ambiguity or hidden reference in the Court of Appeal's decision, and whether one invokes the doctrine of *res judicata* or collateral attack is unimportant. The

learned master ought to have deferred to the Court of Appeal's decision, and this appeal is allowed on that ground.

Rule 25.06

[20] Although my view of this appeal makes it unnecessary to consider the learned master's analysis, I do so in the hope of bringing to an end the interlocutory proceedings attacking the statement of claim.

[21] Courts have repeatedly held that summary disposition of complex, fact-based actions should generally be avoided (*Temilini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.); *Coriale*, supra). In such cases parties may lack, at the pleadings stage, some information they will require to succeed at trial. Claims should not necessarily be struck as a result (*Coriale*, supra, at 360). It is true that Rule 25.06 sets out a threshold for the sufficiency of the material facts pleaded, and this threshold must be met. However, Rule 25.06 also specifically bars the pleading of evidence.

[22] In *Ballard v. Stavro*, [1997] O.J. No. 3577 (Gen. Div.), Epstein J. considered motions to strike portions of a statement of claim under Rules 21 and 25. She stressed the reluctance of courts to strike out only portions of a claim at a preliminary stage, where those portions constitute a distinct cause of action (at para. 33):

The court has discretion to strike out a portion of a pleading where such portion constitutes a separate and distinct cause of action and where in doing so the action can be proceeded with more efficiently; in other words, where the order would achieve some positive practical benefit: see *Montgomery v. Scholl-Plough Can. Inc.* (1989), 70 O.R. (2d) 385 (H.C.) at 388. Again, a party seeking such relief bears a heavy onus. Generally, courts have been most reluctant to strike only part of a claim. I observe that in *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.). Finlayson J.A., in discussing his reasons for refusing to strike an aspect of the claim specifically noted that the parties would be proceeding with the action in other respects anyway. The inference is that it would be rare that striking part of a claim only would be warranted when measured against the potential prejudice to a plaintiff of depriving him at such an early stage of advancing what he considers to be his full case.

[23] The defendants have failed to provide a compelling reason for striking out the spoliation portion of the claim.

[24] Almost six years have passed since the action was commenced. The plaintiff has died of the disease she claimed she contracted due to the defendants' tortious conduct. Her estate continues the action, and the defendants continue to attack the statement of claim. At this time, considering the proceedings that have already taken place, the paramount consideration on this

appeal must be the basic principle of the Rules, that they “shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits” (Rule 1.04). This is not a matter of discretion, neither the master's nor a judge's. The rule is mandatory. This appeal should mark the end of proceedings over this statement of claim.

[25] The learned master approved of the form of paragraphs 14 and 15, and said they could be used again if paragraphs 8 to 13 were amended so as to "contain the minimum level of fact disclosure." He was critical of the breadth of paragraphs 8 to 13, which allege suppression for some 50 years of information on health hazards of tobacco products, and claim that evidence was destroyed by unnamed persons acting within or for the defendants and their predecessors and related corporations.

[26] In my view, the breadth of the allegations is an essential part of the complaint captured in paragraphs 8 to 13, and an essential part of the wrongdoing the pleading seeks to express in the whole of the statement of claim. I am unable to see how those paragraphs could more clearly and succinctly express the accusation that the plaintiff made before her death. To require that persons should be named, or specific documents be identified, or particular acts of destruction or altering of evidence be detailed, would be to require the plaintiff to plead evidence, contrary to Rule 25.06(1).

[27] Paragraphs 8 to 13 are similar in form and scope to the other allegations of wrongdoing made in the statement of claim. Those other allegations refer to the same time period, and allege intentional and negligent conduct and a wide conspiracy among the same participants. Those allegations were considered and approved by Master Peterson, who found they should be permitted to stand. It would be inconsistent with his decision to require a higher threshold of material fact disclosure or require greater particularity of the spoliation allegations. I know of no authority supporting Master Clark's observation that a higher threshold of factual allegation is required or desirable when pleading a novel tort. The contrary is suggested in the decision of the Court of Appeal in this case, as well as in such decisions as *Hunt*, supra and *Ballard*, supra.

[28] A statement of claim should be considered as a whole: *Ballard*, supra. Parts of a claim should not be viewed in isolation from one another. All the portions of the claim together go to arguing the circumstances of the wrong alleged and its resulting harm:

To ascertain whether a cause of action has been made out one must look at the whole picture rather than at a series of isolated events. In doing so it is clear that the whole picture could not be presented without including all of the defendants and all of the claims, as pleaded (*Ballard*, supra, at para. 37).

[29] Furthermore, portions of a claim can be compared to one another in order to determine whether material facts have been pleaded - it is a contextual, common sense analysis. Courts should avoid breaking up portions of a claim and neglecting to determine how those portions fit together.

[30] The allegations are that the defendants concealed information known to them about health risks to consumers of their tobacco products. The plaintiff could not reasonably be expected to know the identity of the persons within the organizations responsible for the alleged concealment, nor the particular means by which it was carried out. Neither could the plaintiff know particulars of the promotional activities and labelling practices of the defendants other than what is publicly known. The plaintiff could not know particulars of document destruction and retention policies, nor the “overt acts” complained of in paragraph 13, to any further extent than is already pleaded. The defendants, on the other hand, must have knowledge of such particulars if the allegations are true. If they are untrue, the time has come to deny them in a statement of defence.

[31] It is vital, when undertaking a Rule 25.06 analysis, not to confuse material facts, evidence, and particulars, although the distinction can admittedly be precarious. As Master Sandler said in *Copland v. Commodore Business Machines Ltd.* (1985), 52 O.R. (2d) 586:

Rule 25.06(1) mandates a minimum level of material fact disclosure and if this level is not reached, the remedy is not a motion for “particulars”, but rather, a motion to strike out the pleading as irregular. It is only where the minimum level of material fact disclosure has been reached, that the pleading becomes regular. Thereafter, the discretionary remedy of “particulars” under rule 25.10 becomes available, if the party seeking particulars can qualify for the relief under the provisions of that rule.

[32] I am satisfied that sufficient material facts have been pleaded. If the defendants cannot plead a response to the allegations as they stand, for want of particulars not within their knowledge, they may demand particulars within 10 days of the release of these reasons, and if particulars are not provided to their satisfaction, they may move, with affidavit evidence, on which they may be cross-examined. If they do not demand particulars, they shall deliver statements of defence within 20 days, and deliver affidavits of documents and proceed to discovery as the Rules require. If the plaintiff cannot make out a genuine issue for trial on the claim as pleaded, Rule 20 will provide the expedient means of disposing of the issue.

Brennan, J.

Released: February 27, 2003

COURT FILE NO.: C17773/97
DATE: 2003-02-27

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Ljubisa Spasic, As Estate Trustee of the Estate of
Mirjana Spasic

Plaintiff

- and -

Imperial Tobacco Limited, and Rothmans, Benson
& Hedges Inc.

Defendants

REASONS FOR JUDGMENT

BRENNAN J

Released: February 27, 2003