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BETWEEN:

HER MAJESTY THE QUEEN in the
right of the Dominion of Canada } APPELLANT;
(Plaintiff)

AND

The Ship M/V ISLAND CHAL-
LENGER, the barge LORD TEM-
PLETOWN and the Ship M/V } RESPONDENTS.
SWAN (Defendants)

Shipping—Practice in Admiralty—General Rules and Orders in Admiralty, R. 215—General Rules and Orders. R. 2(1)—Rules of Supreme Court, 1883 of England, O. XIX, Rs. 7, 7B—Particulars not to be ordered when effect would be to hamper plaintiff and prevent full discovery.

The appellant appealed from the decision of Smith D.J.A. of the British Columbia Admiralty District ordering the plaintiff to give particulars of certain allegations in the statement of claim.

Held: That the prime consideration that should govern the exercise of the discretionary power implicit in the rules relating to the ordering of particulars is that justice should be done.

- 2. That where particulars are not required to enable the defendants to plead they should not be ordered when their effect would be to hamper the plaintiff in the prosecution of his claim and prevent him from obtaining full discovery from the defendants.
- 3. That where the defendant knows the facts and the plaintiff does not the defendant should give discovery before the plaintiff delivers particulars.
- 4. That the particulars ordered were neither necessary nor desirable to enable the defendants to plead and the order for them was premature.

APPEAL from decision of Smith D.J.A. of the British Columbia Admiralty District ordering plaintiff to give particulars.

The appeal was heard before the President of the Court at Ottawa.

K. E. Eaton for appellant.

J. G. Gorman for respondents.

THE PRESIDENT now (February 8, 1956) delivered the following judgment:

This is an appeal from the decision of Sidney Smith D.J.A. of the British Columbia Admiralty District (1), ordering the plaintiff to give certain particulars.

(1) [1955] Ex. C.R. 262.

The action is for damages and loss of revenue suffered and incurred by the plaintiff as the result of the alleged negligence of the employees, servants or agents, or of the persons in charge of the navigation of the defendant vessels. The circumstances from which the claim arises are stated to be that on August 22, 1952, the M/V *Island Challenger* having the barge *Lord Templetown* in tow and being assisted by the M/V *Swan* was proceeding downstream in the Fraser River to pass through the Old Fraser River Bridge spanning the River between the City of New Westminster and the Municipality of Surrey, which bridge is owned by the plaintiff, and while the swing span was open the barge *Lord Templetown* struck the centre protection pier of the bridge causing extensive damage to it and the bridge. The claim is for the cost of repairing the bridge and loss of tolls during the time it was closed for traffic.

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Paragraphs 7 and 8 of the statement of claim read as follows:

7. The aforesaid collision between the Barge *Lord Templetown* and the protection pier of the said bridge was occasioned solely by the negligent navigation of the servants or those in charge of the navigation of the said M/V *Island Challenger*, the barge *Lord Templetown* and the M/V *Swan*, particulars of which are as follows:—

- (a) Using too long a tow line to tow the barge *Lord Templetown* having regard to the area of navigation, the state of the tide, known current and the available channel at the point in question.
- (b) Failing to have tug or tugs of sufficient power to control the said Barge *Lord Templetown* while passing through the said channel formed between the piers of the bridge.
- (c) Failing to navigate with caution when in the neighbourhood of the said bridge and piers.
- (d) Proceeding or attempting to proceed downstream through the said South Channel at too slow a rate of speed or, alternatively, at a rate of speed where control of the said Barge *Lord Templetown* could not be exercised.
- (e) Failing to have the Barge *Lord Templetown* or the M/V *Island Challenger* or the M/V *Swan* under proper or any control.
- (f) Increasing speed after danger of collision became apparent.
- (g) Failure to keep a proper lookout aboard the M/V *Island Challenger*, the barge *Lord Templetown* and aboard the M/V *Swan*.

8. In the alternative, damage was occasioned to the said pier and bridge by the collision of the Barge *Lord Templetown* with the said pier which damage indicates a prima facie case of negligence as such collision would be avoided by ordinary care and skill exhibited by those in charge of the navigation of the M/V *Island Challenger* and/or the Barge *Lord Templetown* and/or the M/V *Swan*.

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Thus it appears that there are specific allegations of negligence as set out in paragraph 7 and a general charge of *res ipsa loquitur* raised by paragraph 8.

Prior to delivering a statement of defence the defendants, the ship *M/V Island Challenger* and the barge *Lord Templetown* demanded further and better particulars of the negligence alleged in paragraph 7 as follows:

- As to (a) Further and better particulars of the alleged use of too long a towline stating to what extent the towline used was too long, and further and better particulars of the alleged known current, stating the rate, direction and effect of such current and giving full details of the said current alleged to be known by the Defendants.
- As to (b) Further and better particulars of the alleged failure to have a tug or tugs of sufficient power to control the said Barge *Lord Templetown* stating in what way and to what extent were the said tug or tugs of insufficient power to control the said Barge.
- As to (c) Further and better particulars of the alleged failure to navigate with caution when in the neighbourhood of the said bridge and piers, stating whereof the failure consisted and in what particular or particulars the defendants or either of them failed to navigate with caution as alleged, distinguishing between the failure of each defendant.
- As to (d) Further and better particulars of the allegation that the Defendants proceeded or attempted to proceed downstream through the said south channel at too slow a rate of speed, stating how and to what extent the Defendants were proceeding or attempting to proceed at too slow a rate of speed.

In answer to the said demand the plaintiff replied as follows:

1. As to the particulars required by Paragraph 1(a) of the Demand herein, the Plaintiff says that the particulars demanded of the alleged use of too long a towline are matters of evidence and not necessary for the purpose of pleading and in any event are within the knowledge of the Defendants *The Ship M/V Island Challenger* and the Barge *Lord Templetown*, and as to the particulars of the current the Plaintiff says that the particulars demanded are matters of evidence and not necessary for the purpose of pleading and in any event are matters of public record and knowledge and within the knowledge of the Defendants *The Ship M/V Island Challenger* and the Barge *Lord Templetown*.

2. As to the particulars required by Paragraph 1(b) of the Demand herein, the Plaintiff says that the particulars demanded are matters of evidence and not necessary for the purpose of pleading and cannot be given by the Plaintiff until after Examinations for Discovery.

3. As to the particulars required by Paragraph 1(c) of the Demand herein, the Plaintiff says that the Particulars demanded are matters of evidence and not necessary for the purpose of pleading and cannot be given by the Plaintiff until after Examinations for Discovery.

4. As to the particulars required by Paragraph 1(d) of the Demand herein, the Plaintiff says that the particulars demanded are matters of evidence and not necessary for the purpose of pleading and the Plaintiff cannot give the said particulars until after Examinations for Discovery.

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Thereupon a motion was made before Sidney Smith D.J.A. in Chambers for an order for particulars and on April 25, 1955, the particulars were ordered as demanded. It is from this order that the present appeal is taken.

It is to be noted that the demand for particulars was made only by the first two defendants and not by the defendant the ship M/V *Swan*, and that the particulars ordered were in respect of the allegations in paragraph 7.

There is no specific provision in the General Rules and Orders in Admiralty of this Court for the ordering of particulars but Rule 215 provides:

215. In all cases not provided for by these Rules the general practice for the time being in force in respect to proceedings in the Exchequer Court of Canada shall be followed.

Nor is there any specific provision in the General Rules and Orders of this Court or in any Act of the Parliament of Canada for the ordering of particulars, except in particular cases of which this is not one. Under the circumstances, Rule 2(1) of the General Rules and Orders applies, which reads as follows:

(1) In all suits, actions, matters or other judicial proceedings in the Exchequer Court of Canada, not otherwise provided for by any Act of the Parliament of Canada, or by any general Rule or Order of the Court, the practice and procedure shall:—

(a) If the cause of the action arises in any part of Canada, other than the Province of Quebec, conform to and be regulated as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Supreme Court of Judicature in England; and . . .

Thus the applicable rules are to be found in "The Rules of the Supreme Court, 1883" of England of which Order XIX, Rule 7, provides:

7. A further and better statement of the nature of the claim or defence, or further or better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.

and Rule 7B provides specifically:

7B. Particulars of a claim shall not be ordered under Rule 7 to be delivered before defence unless the Court or Judge shall be of opinion that they are necessary or desirable to enable the defendant to plead or ought for any other special reason to be so delivered.

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The applicable rules are permissive rather than directory and the prime consideration that should govern the exercise of the discretionary power implicit in them is that justice should be done. This is emphasized in the language of Ferguson J.A. in delivering the majority judgment of the Ontario Court of Appeal in *Fairbairn v. Sage* (1) where he said:

The wording of the Rules is permissive, rather than directory, and the cases seem to me to establish that there is no hard and fast rule as to when, at what time, or in what cases, particulars will be ordered or refused. On my reading of the Rules and the cases, the granting or refusing of particulars lies in the discretion of the Court, and the factors that are to guide the Court in exercising the discretion in reference to granting or refusing an order for particulars, are the circumstances of each case. The endeavour of the Court should be to do justice to all parties in view of those circumstances.

In that case the Court had under consideration an Ontario rule similar to the English rule to which I have referred.

In general, the cases indicate that the object in ordering particulars is twofold: (1) for purposes of pleading, i.e., to enable the opposite party to plead intelligently; (2) for purposes of trial, i.e., to define the issues to be tried, so as to save the expense of calling unnecessary witnesses and to prevent the opposite party from being taken by surprise: *vide* Holmsted & Langton's Ontario Judicature Act, Fifth Edition, page 675. In some cases the first purpose is paramount, in others the second.

Here the learned District Judge expressed the opinion that the particulars ordered by him were desirable to enable the defendants to plead.

I am unable to agree. The defendants do not require the particulars demanded by them in order to enable them to plead. They are just as able to admit or deny the allegations in the statement of claim without having the further particulars demanded as they would be if they were furnished.

Where particulars are not required to enable the defendants to plead they should not be ordered when their effect would be to hamper the plaintiff in the prosecution of his claim and prevent him from obtaining full discovery from the defendants: *vide* *Dixon v. Trusts and Guarantee Co.*

(1) (1925) 56 O.L.R. 462 at 471.

(1); *Mexican Northern Power Co. v. Pearson Ltd.* (2); *Somers v. Kingsbury* (3). This is particularly true where the facts alleged lie within the knowledge of the defendants rather than within that of the plaintiff: *vide Millar v. Harper* (4) where Bowen L.J. said, at page 112:

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It is good practice and good sense that where the Defendant knows the facts and the Plaintiffs do not, the Defendant should give discovery before the Plaintiffs deliver particulars.

What I have said applies in the present case. It would be unfair to the plaintiff to require particulars at this stage for it would unjustly restrict the scope of what should be permissible examination for discovery and the refusal of particulars at this stage does not work any injustice against the defendants.

While I appreciate that the ordering of particulars by the learned District Judge was an exercise of discretion by an experienced judge and should not be disturbed without good cause I must, with respect, state that the particulars ordered by him were neither necessary nor desirable to enable the defendants to plead and there are no special reasons why they should be delivered at this stage. Whether the defendants will be entitled to them or any of them at a later date, after full discovery has been had, in order to define the issues for the purposes of the trial is a matter to be determined then. The present order for particulars was premature and the appeal from the decision ordering it must be allowed. The order is set aside and the defendants will have 28 days from the date hereof within which to deliver their statement or statements of defence. The plaintiff is entitled as against the first two defendants to the costs of this appeal and of the proceedings relating to the particulars in the Court below, such costs to be costs in the cause to the plaintiff in any event of the cause.

Order accordingly.

(1) (1914) 5 O.W.N. 645.

(2) (1914) 5 O.W.N. 648.

(3) (1923) 54 O.L.R. 166 at 169.

(4) (1888) 38 Ch.D. 110.