CV 05408

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SHEILA FULLOWKA, DOREEN SHAUNA HOURIE, TRACEY NEILL, JUDIT PANDEV, ELLA MAY CAROL RIGGS, DOREEN VODNOSKI, CARLENE DAWN ROWSELL, KAREN RUSSELL and BONNIE LOU SAWLER

Plaintiffs

- and -

ROYAL OAK MINES INC., MARGARET K. WITTE, also known as PEGGY WITTE, PROCON MINERS INC., PINKERTON'S OF CANADA LIMITED, WILLIAM J.V. SHERIDAN, ANTHONY W.J. WHITFORD, DAVE TURNER, THE GOVERNMENT OF THE NORTHWEST TERRITORIES AS REPRESENTED BY THE COMMISSIONER OF THE NORTHWEST TERRITORIES, NATIONAL AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA, Successor by Amalgamation to CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS and the Said CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS, HARRY SEETON, ALLAN RAYMOND SHEARING, TIMOTHY ALEXANDER BETTGER, TERRY LEGGE, JOHN DOE NUMBER THREE, ROGER WALLACE WARREN, JAMES EVOY, DALE JOHNSON, ROBERT KOSTA, HAROLD DAVID, J. MARC DANIS, BLAINE ROGER LISOWAY, WILLIAM (BILL) SCHRAM, JAMES MAGER, CONRAD LISOWAY, WAYNE CAMPBELL, SYLVAIN AMYOTTE, and RICHARD ROE NUMBER THREE

Defendants

Application by certain defendants to strike out the Amended Statement of Claim on the ground that it discloses no cause of action.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on March 19 & 20, 1996

Reasons filed: April 24, 1996

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Defendants

REASONS FOR JUDGMENT

1 Various defendants in this action have applied to strike the plaintiffs' claim as against them. The applications are made on the basis of Supreme Court Rule 124A(1)(a) which provides that, at any stage of the proceeding, the court may order that any pleading be struck out on the ground that it discloses no cause of action.

2 The principles applicable on a motion to strike a claim under Rule 124A(1)(a) are well established. The court should not strike out a claim unless persuaded that the claim could not succeed even if all the facts alleged in the pleading were proved. The novelty of the claim is not a ground for striking it out. If the claim has some chance of success, the court should permit the action to proceed: Hunt v. T & N plc, [1993] S.C.R. 289. Put another way, it must be plain and obvious that the claim cannot succeed before it will be struck out at this preliminary stage. And, as noted in Hanson v. Bank of Nova Scotia (1994), 19 O.R. (3d) 142 (C.A.), the threshold for sustaining a claim is not a high one.

3 The litigation arises out of tragic circumstances emanating from a long and bitter labour dispute at the Giant Mine in Yellowknife. The rule on these types of applications is that no evidence is allowed outside of the facts plead in the claim, which facts are assumed to be true. In this case there are other notorious public facts which form the background to this litigation. Many of these were outlined in the recent judgment of the Supreme Court of Canada in Royal Oak Mines Inc. v. Canada Labour Relations Board et al (No. 24169; February 22, 1996).

4 On September 18, 1992, an explosion at the Giant Mine killed nine miners. The plaintiffs are the widows (in one case the mother) of the deceased miners. They bring this action on behalf of themselves and the other dependants of the deceased. They seek damages for the wrongful deaths of their spouses and son.

5 At the relevant time the mine owner and employer, the defendant Royal Oak Mines Inc., had locked out its unionized workforce and the workers, represented by the defendant Canadian Association of Smelter and Allied Workers, went out on strike. The dispute had been marked by violence at the mine site and other places. The employer kept the mine operating by using replacement workers. Some of the replacement workers were union members who crossed the picket line and some were employed by a contractor, the defendant Procon Miners Inc., retained by Royal Oak. Six of the deceased miners were employees of Royal Oak and three were employed by Procon. Royal Oak also contracted a private agency, the defendant Pinkerton's of Canada Limited, to provide security at the mine site.

6 The nine miners were killed while on the job. The Workers' Compensation Act, R.S.N.W.T. 1988, c. W-6, precludes action by employees or their dependants against their employer or fellow employees. Therefore, the claim on behalf of the six miners employed by Royal Oak seeks damages from all defendants except Royal Oak; the claim on behalf of the other three miners seeks damages from all defendants except Procon.

7 A striking miner, the defendant Roger Wallace Warren, was charged and convicted of nine counts of second degree murder relating to these deaths. Those convictions, and the life sentence imposed as a result, have been appealed by Warren but, until and unless that appeal succeeds in setting aside the convictions, he stands in the eyes of the world and the eyes of the law as a murderer.

8 These are the background facts. Before I turn to a discussion of the specific applications before me, I will set out the general principles applicable to pleadings. I will also outline generally the concept of a duty of care in tort law.

Pleadings:

9 These applications seek to strike out the Amended Statement of Claim on the basis that it discloses no cause of action as against the specific defendants applying. This calls into question the adequacy or sufficiency of the pleading. The court should however allow for some generosity in assessing the pleading to determine if it discloses a cause of action: Korte et al v. Deloitte, Haskins & Sells (1993), 135 A.R. 389 (C.A.).

10 Rule 102 of the Rules of Court sets out a simple requirement for the contents of pleadings:

> 102. Every pleading shall contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.

11 The requirement to plead material facts that disclose a reasonable cause of action has been called the fundamental rule of modern Canadian pleading: Watson and Perkins, Holmested and Watson's Ontario Civil Procedure (Vol. 2, 1995 update), page 25-10.

12 A cause of action is nothing but a set of facts which, if proved, would entitle the plaintiff to some form of relief. Therefore, it is not sufficient to allege in a pleading simply that a duty or a liability exists. The facts which give rise to such duty or liability must be stated. That is because the purpose of a pleading is to define with clarity and precision the question in controversy and to give fair notice of the case which has to be met. The "form" of the pleading

is not the critical question; it is whether the facts supporting the cause of action have been set out. The pleading should, as much as possible, isolate the actual controversy and allow the parties to ascertain what are the relevant issues. This will in the long run lead to fair, efficient, and less costly litigation: Reiger et al v. Burgess et al (1988), 66 Sask R. 1 (C.A.); Odland v. Johnson & Sons Ltd. (1989), 104 A.R. 161 (C.A.).

13 With respect to negligence claims, such as the present one, authorities of long-standing emphasize the need for particularization in the pleading of facts. For example, Odgers on High Court Pleading and Practice (1991, 23rd ed.), at page 160:

> Particulars must always be given of any alleged negligence, showing in what respects the defendant was negligent. The statement of claim should state the facts on which the supposed duty is founded, the duty to the plaintiff with the breach of which the defendant is charged, the precise breach of that duty of which the plaintiff complains, and, lastly, particulars of the injury and damage sustained.

14 For another example, Bullen & Leake and Jacob's Precedents of Pleadings (1975, 12th ed.), at pages 685-686:

> It is not enough for the plaintiff in his Statement of Claim to allege merely that the defendant acted negligently and thereby caused him damage; he must also set out facts which show that the alleged negligence was a breach of a duty which the defendant owed to the plaintiff. The Statement of Claim "ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged" (Gautret v. Egerton (1867) L.R. 2 C.P. 371, per Willes J., cited with approval by Lord Alverstone C.J. in West Rand Central Mining Co. v. R. [1905] 2 K.B. 391 at 400). Then should follow an allegation of the precise breach of that duty, of which the plaintiff complains; in other words, particulars must always be given in the pleading, showing precisely in what respect the defendant was negligent; and, lastly, the details of the damage sustained...
>
> An express allegation of duty on the part of the defendant is a mere inference of law. If the facts stated do not raise the duty, the express allegation will not supply the defect; and if the facts sufficiently show the duty, the express allegation is unnecessary, and therefore ought not to be introduced...

15 The pleading must not consist of bald assertions or inferences to be drawn without containing sufficient detail to support them. To plead merely that a defendant was negligent is to plead a conclusion of law. It is acceptable to set out the legal conclusion which the party will ask the court to adopt so long as the conclusion is adequately supported by a statement of facts which are material to that result: Anglo-Canadian Timber Products Ltd. v. B.C. Electric Co. Ltd. (1960), 23 D.L.R. (2d) 656 (B.C.C.A.); Ducharme et al v. Davies (1983), 29 Sask. R. 54 (C.A.).

Duty of Care:

16 The plaintiffs' case relies on allegations of negligence. To succeed, they must establish that the defendants had a duty of care, that they somehow failed in that duty, and that their failure was at least a contributing factor leading to the harm suffered.

17 A broad general theory for the imposition of liability in tort was articulated by Lord Wilberforce in Anns v. London Borough of Merton, [1977] 2 All E.R. 492 (H.L.), at page 498:

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

18 This formulation was approved by Wilson J. in Kamloops v. Nielsen (1984), 10 D.L.R. (4th) 641 (S.C.C.), as the appropriate way to determine whether or not a private law duty of care exists in any particular situation. This theory of liability was further analyzed and, in some ways, expanded by the judgment of McLachlin J. in Canadian National Railway Co. v. Norsk Pacific Steamship Co. Ltd. et al (1992), 91 D.L.R. (4th) 289 (S.C.C.). The judgment focused on

proximity as the essential factor; proximity as providing the connection between the defendant's conduct and the plaintiff's loss. McLachlin J. wrote (at pages 369 - 370):

> The matter may be put thus: before the law will impose liability there must be a connection between the defendant's conduct and plaintiff's loss which makes it just for the defendant to indemnify the plaintiff. In contract, the contractual relationship provides this link. In trust, it is the fiduciary obligation which establishes the necessary connection. In tort, the equivalent notion is proximity. Proximity may consist of various forms of closeness — physical, circumstantial, causal or assumed — which serve to identify the categories of cases in which liability lies.
>
> Viewed thus, the concept of proximity may be seen as an umbrella, covering a number of disparate circumstances in which the relationship between the parties is so close that it is just and reasonable to permit recovery in tort. The complexity and diversity of the circumstances in which tort liability may arise defy identification of a single criterion capable of serving as the universal hallmark of liability. The meaning of "proximity" is to be found rather in viewing the circumstances in which it has been found to exist and determining whether the case at issue is similar enough to justify a similar finding.
>
> Viewed in this way, proximity may be seen as paralleling the requirement in civil law that damages be direct and certain. Proximity, like the requirement of directness, posits a close link between the negligent act and the resultant loss. Distant losses which arise from collateral relationships do not qualify for recovery.

19 This analysis provides the framework to determine in a given situation whether a duty of care exists. This analysis, together with the applicable rules of pleading, will provide the methodology to determine if the Amended Statement of Claim discloses a

cause of action against these particular defendants. As noted by the Hon. Allen M. Linden in Canadian Tort Law (1993, 5th ed.) at page 257:

> The existence of a duty is a question of law for the court to decide. Consequently, defendants may raise the duty issue in an attack on the pleadings, thereby halting a law suit against them before it reaches the jury.

20 When considering the duty of care on the part of any one of these defendants one must recognize that one defendant has already been convicted of murder. Warren is not one of the defendants seeking to dismiss the claim. In fact, even though he is incarcerated, he has filed a Statement of Defence containing a blanket denial of the allegations. The fact of the murder conviction in and of itself is not significant since murder is also a wrongful act in tort law. But it is significant as arguably an intervening act so as to negate or disrupt the duty of care that may exist between the plaintiffs and some of these defendants.

21 The Amended Statement of Claim does not say murder. It alleges that Warren negligently manufactured and positioned the explosive device that killed the nine miners. Plaintiffs' counsel asserted in his written brief that "counsel should be scrupulous not to refer to matters of fact which are not alleged" (emphasis in original) and that any assertion by defendants' counsel on this motion that the nine miners were murdered is "extraneous" to the pleading. In his oral argument counsel stressed that there was no allegation of murder. Frankly, and with due respect to counsel's role as an advocate, this is somewhat disingenuous. It is also irrelevant. The purported cause of action against these defendants is breach of a duty of care as between these defendants and the plaintiffs.

22 Furthermore, it is artificial to ignore the blatant and tragic truth surrounding these deaths. I accept that my analysis must only focus on the pleading and I must assume that the allegations of fact can be proven. But if a pleading said the earth was flat I am sure I would be free to reject it. Here I do not reject the allegations of negligence in the pleading. I also, however, cannot ignore the underlying fact that the deceased were victims of a criminal act.

23 I do not think that a court is precluded from exercising a certain degree of discretion to supplement the pleading with either notorious facts or unassailable facts. This was done in Cameron v. Ciné St. Henri Inc. [1984] 1 F.C. 421 (T.D.). That case concerned in part a motion to strike parts of the statement of claim as disclosing no cause of action. The applicable Federal Court Rule also prohibited the use of evidence. The court, however, permitted an agreement to be produced. Part of the agreement was referred to in the pleading but the reference was totally erroneous when compared to the actual agreement. In permitting the use of the agreement, Walsh J. said (at page 426):

> I am well aware of the constant jurisprudence to the effect that in considering a motion to strike the Court must assume that all the allegations of the statement of claim are true, and on that basis decide whether or not there is a cause of action disclosed by the said statement of claim. However when the Court has before it evidence in the supporting affidavit clearly showing that an essential allegation, and in fact an allegation on which the very jurisdiction of the Court is based, is not true, or is at least erroneous and misleading, it would be unreasonable to expect the Court to shut its eyes and render judgment on the assumption that the allegation is true.

24 The effect of an intervening criminal act on tort claims has been reviewed in many cases. An intervening criminal act does not automatically relieve some other party from negligence. Mr. Justice Linden, in his text Canadian Tort Law (at pages 354-355), cites a number of recent American cases where one person was found liable for the act of murder by another. In Canada, liability has been found against a municipality for failure to adequately guard prisoners in a city

lock-up after an inmate deliberately set fire to the cell and killed a number of his fellow inmates: Williams et al v. New Brunswick (1985), 34 C.C.L.T. 299 (N.B.C.A.). A landlord was held liable, due to a failure to provide adequate locks, for the rape of a female tenant on the premises: Q. et al v. Minto Management Ltd. (1985), 31 C.C.L.T. 158 (Ont. H.C.J.). As Mr. Justice Linden wrote (at page 355): "In the past, criminal conduct was rarely anticipated, but nowadays it has become more commonplace, resulting in broader liability."

25 If the attempt to dismiss the claim was based simply on Warren's criminal act there would be no need to analyze this issue at length. The fact that the harm on which a claim is founded was caused by a person independent of a defendant against whom a claim in negligence is made does not, of itself, preclude success of the claim. Breach of duty on the part of the defendant may also have played a part in causing the harm. It then becomes a matter of evidence. This was the point made by Lord Reid in the famous case of Home Office v. Dorset Yacht Co. Ltd., [1970] 2 All E.R. 294 (H.L.), at page 300:

> These cases show that, where human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as novus actus interveniens breaking the chain of causation. I do not think that a mere foreseeable possibility is or should be sufficient, for then the intervening human action can more properly be regarded as a new cause than as a consequence of the original wrongdoing. But if the intervening action was likely to happen I do not think it can matter whether that action was innocent or tortious or criminal. Unfortunately tortious or criminal action by a third party is often the "very kind of thing" which is likely to happen as a result of the wrongful or careless act of the defendant.

26 Since 1970, the House of Lords has considered further the question of what effect if any an intervening criminal act has on the duty of care analysis. In Smith v. Littlewoods Organisation, [1987] 1 All E.R. 710, the law lords had before them a claim against a property owner by a neighbour whose property was damaged as a result of a fire set by vandals in the owner's

building. The House of Lords dismissed the claim. In doing so they commented on the degree of foreseeability necessary to impose liability on a defendant when the damage is caused by an independent human act. The judgment of Lord Mackay formulates a requirement that liability can be imposed only if there is a clear basis to assert that the damage is more than a mere possibility. He wrote (at page 721):

> It is true...that human conduct is particularly unpredictable and that every society will have a sprinkling of people who behave most abnormally. The result of this consideration, in my opinion, is that, where the only possible source of the type of damage or injury which is in question is agency of a human being for whom the person against whom the claim is made has no responsibility, it may not be easy to find that as a reasonable person he was bound to anticipate that type of damage as a consequence of his act or omission. The more unpredictable the conduct in question, the less easy to affirm that any particular result from it is probable and in many circumstances the only way in which a judge could properly be persuaded to come to the conclusion that the result was not only possible but reasonably foreseeable as probable would be to convince him that, in the circumstances, it was highly likely. In this type of case a finding that the reasonable man should have anticipated the consequence of human action as just probable may not be a very frequent option. Unless the judge can be satisfied that the result of the human action is highly probable or very likely he may have to conclude that all that the reasonable man could say was that it was a mere possibility. Unless the needle that measures the probability of a particular result flowing from the conduct of a human agent is near the top of the scale it may be hard to conclude that it has risen sufficiently from the bottom to create the duty reasonably to foresee it.

27 The reference to "mere possibility" in the quote above is significant because, as stated in Lorenz v. City of Winnipeg, [1994] 1 W.W.R. 558 (Man. C.A.), at page 567, "remote possibilities do not amount to foreseeability"; and without foreseeability there is no liability. I am not aware of any authority that has eliminated this factor from the analysis of whether there exists a duty of care in any particular circumstance.

The Applications to Strike:

28 While there are some similarities and overlapping arguments in the applications before me, there are sufficient differences that I think it is more convenient to discuss them separately. I will do so under the following headings:

(a) the "Government application" — being the application brought collectively on behalf of the defendants Government of the Northwest Territories, Anthony W. J. Whitford, and Dave Turner;

(b) the "Evoy application" — brought on behalf of the defendant James Evoy; and,

(c) the "Johnson application" — brought on behalf of the defendant Dale Johnson.

29 There was a further application, that being a collective one brought on behalf of a group of nine defendants (Kosta, David, Danis, B.R. Lisoway, Schram, Mager, C. Lisoway, Campbell and Amyotte), however, their counsel withdrew this application at the hearing. I will address this briefly toward the end of these reasons.

The Government Application:

30 The claim against the Government of the Northwest Territories, Whitford and Turner is advanced on the basis of a breach of a private law duty of care as regulators of the mining industry. Whitford was, at the relevant time, an elected member of the legislature and the cabinet minister responsible for administration of the *Mining Safety Act*, R.S.N.W.T. 1988, c. M-16 (since repealed and replaced by a new statute). Turner was the Chief Inspector under the Act. The Chief Inspector is the civil servant who holds the position of director of the Mine Safety Division of the government's Department of Safety and Public Services (s.1 of the Act). To analyze whether the pleading discloses a reasonable cause of action, it is necessary to review in detail the specific allegations against these defendants and the provisions of the applicable legislation. The legislation must be reviewed to determine what obligations, if any, it imposes on these defendants.

31 The Amended Statement of Claim pleads that the nine miners were working at the mine site at the time of their death. It pleads that their deaths were caused by an explosion "related to and arising from" the Giant Mine labour dispute. It pleads that the defendant Royal Oak, along with other defendants associated with it, undertook the responsibility of ensuring the safety of these miners who had gone to work so that the mine could keep operating during the strike.

32 In relation to the Government, Whitford and Turner, the Amended Statement of Claim reads:

> 12. At all material times, the Defendant, Anthony W. J. Whitford (hereinafter called "Tony Whitford") was Minister of Safety and Public Services, and the Defendant, Dave Turner (hereinafter called "Dave Turner") was Chief Inspector of Mines within the said Ministry of the Government of the Northwest Territories.
>
> 13. The Government of the Northwest Territories as represented by the Commissioner of the Northwest Territories (hereinafter called "The Commissioner"), had entered the field of regulating and controlling all aspects of

mine safety and mine operations in the Northwest Territories, and, at the operational level, he appointed or retained Tony Whitford and Dave Turner in the capacities alleged aforesaid, by reason of which he is liable vicariously for all their acts or failures to act.

14. Prior to September 18, 1992, The Commissioner adopted a policy of inspections and operational procedures backed up by the legislative authority necessary to prevent any members of the public including the Nine Miners from being upon the Giant Mine unless invited by Royal Oak and unless the Giant Mine was and it remained safe to be upon and free of any and all conditions which could cause mortal injury to and death of such invitees.

15. In permitting the Giant Mine to operate during the lockout and strike or in permitting non-union miners and miners who were members of CASAW who had been induced or permitted by Royal Oak to cross the picket line and return to work, The Commissioner, Tony Whitford and Dave Turner and each of them owed a private law duty of care to the Nine Miners to implement such policies and procedures, or, in the alternative, to adopt such (further) policies and procedures and implement same as were rationally necessary to attain and maintain safe working conditions in the Giant Mine.

33 The Amended Statement of Claim goes on to allege, in paragraph 22, that "the explosion and resulting mortal injuries to and death of the nine miners were caused by the combined negligence of the defendants or any one or more of them" and then particularizes the alleged negligence:

(G) As to Tony Whitford and Dave Turner:

(a) Failing to inspect the Giant Mine or to cause the Giant Mine to be inspected properly in accordance with established policies or failing to carry out all such policies or to formulate appropriate policies so as to ensure the health and safety of all persons invited upon the Giant Mine by Royal Oak including the Nine Miners;

(b) Failing to ensure that all entrances to abandoned workings of the Giant Mine, or entrances to shafts where work had been discontinued, were filled up with boulders, welded shut, securely fenced or otherwise protected;

(c) Failing to order Royal Oak to properly secure the entrances to abandoned workings of the Giant Mine or to properly secure the entrances to shafts where work had been discontinued;

(d) Failing to order the immediate cessation of work in the Giant Mine until such time as Royal Oak had:

(i) Adequately secured the various entrances to the mine workings so as to prevent unauthorized persons from entering the Giant Mine;

(ii) Posted guards or watchmen at the various entrances to the mine workings so as to prevent unauthorized persons from entering the Giant Mine;

(iii) Secured its underground explosives magazine or properly stored its explosives to prevent access to the same by unauthorized persons; or

(iv) Completed any combination of the above matters

especially where they knew or ought to have known there had been prior incursions into the underground workings of the Giant Mine by unauthorized persons, prior acts of vandalism and sabotage against the property of Royal Oak and miners engaged by them to keep the Giant Mine operating during the lockout and strike, prior acts and threats of violence against such miners and prior death threats against such miners;

(e) Allowing or permitting Royal Oak and those whom Royal Oak invited to be upon the Giant Mine including the Nine Miners to consider that such security measures as Royal Oak had taken prior to September 18, 1992 were reasonable or sufficient generally and by permitting the Giant Mine to continue to operate;

(f) Failing to warn all persons invited by Royal Oak to be upon the Giant Mine including the Nine Miners that all entrances to abandoned workings of the Giant Mine had not been secured or otherwise been protected against unauthorized entry;

(g) Failing to ascertain that unauthorized access to the Giant Mine had been gained prior to September 18, 1992 and in connection therewith, that threats of violence or acts or sabotage had occurred directed toward persons whom Royal Oak had invited to be upon the Giant Mine.

(H) As to The Commissioner:

(a) Failing to cause Tony Whitford and Dave Turner to carry out those acts referred to in subparagraphs (a), (b), (c) and (d) of paragraph (G) hereof;

(b) Not prohibiting Tony Whitford and Dave Turner from conducting themselves as alleged in paragraphs (e), (f) and (g) of paragraph (G) hereof;

(c) Failing to adopt and implement such further policies and procedures as were rationally necessary to attain and maintain safe working conditions in the Giant Mine especially in the face of threats of violence and acts of sabotage.

34 A few preliminary observations should be made about these particulars.

35 First, I must confess to some difficulty in conceiving how an elected executive official, a cabinet minister, could be personally liable in the absence of some specific act on the part of that person. None is specified in these pleadings. It seems to me that in the absence of some specific act the conduct generally by a cabinet minister of his ministerial duties would fall into the sphere of political policy. This point was not argued before me so I will consider it no further.

36 Second, there are references in the pleading, specifically those found in subparagraph (G)(d) and (g), to prior acts of violence and threats. The facts in support of those allegations are not pleaded anywhere in the Amended Statement of Claim. This is, however, another example of a notorious public fact relating to the Giant Mine dispute. It was a matter of public knowledge that there had been such incidents prior to the explosion. I think I can take notice of that.

37 These defendants submit that these pleadings attempt to foist onto the government a responsibility not within the scope of its duty as a regulator of mining safety. They concede that the government does have a duty of care with respect to the occupational health and safety of miners but not with respect to anything and everything that could possibly happen on a mine site. They submit that the government neither had the jurisdiction nor the obligation to do anything that could have averted this tragedy. They could not stop Royal Oak from using replacement workers or order it to shut down because this government has no jurisdiction over labour relations at the mine; that is a federal jurisdiction. They could not exercise public safety police powers because that too is a federal jurisdiction. Finally, as put by defendants' counsel, these deaths occurred due to an intentional criminal act on "private property guarded by a private army." Responsibility for occupational safety cannot imply a duty of care in these circumstances.

38 The plaintiffs submit, however, that the government's acknowledgement that a duty of care was owed to these miners with respect to occupational health and safety is a concession that there was a relationship of proximity. Therefore, in their submission, the first part of the Anns test — a relationship of proximity — has been met. The second part of the test — whether there are considerations which ought to negative or reduce the scope of the duty of care — is

something that has to be determined by evidence and findings of fact. Hence the matter should go to a trial.

39 It is now well settled that government can be liable for negligence in carrying out duties as a regulator of industry. It is really nothing more than saying that if a government is providing a service to the public or carrying out some task for the benefit of the public, then it is subject to the ordinary principles of negligence: Just v. British Columbia, [1990] 1 W.W.R. 385 (S.C.C.). This does not affect a government's tort immunity for activities of a political or policy nature.

40 The *Mining Safety Act*, and the regulations enacted pursuant to it, deals directly with safety in mining operations. It is not correct to say however, as paragraph 13 of the claim says, that the government "had entered the field of regulating and controlling all aspects of mine safety and operations" (my emphasis). A close reading of the legislation will reveal in fact that the factor of "control" is placed fully in the hands of the mine owners.

41 The Act places the primary responsibility for enforcement of the rules and regulations mandated by the legislation on the mine manager and supervisory staff:

> 2. (1) The manager and every supervisor, shift boss, mine captain and department head of a mine shall take all reasonable measures to enforce this Act and the rules and regulations and to ensure their observance by all persons working in or about the mine or those persons under his or her charge, as the case may be.

42 A secondary obligation is placed on all persons working at a mine to carry out their duties in accordance with those rules and regulations:

> 2. (2) All persons working in or about a mine shall take all necessary and reasonable measures to carry out their duties in accordance with those provisions of this

> Act and the rules and regulations that are applicable to the work in which they are applicable to the work in which they are engaged.

43 The Mining Safety Regulations reinforce the argument that the primary duty to enforce compliance with rules and regulations is on the manager:

> 2. Where a provision of these regulations requires that anything be done or that any requirement be satisfied, or prohibits anything from being done, the duty to do or omit doing that thing or satisfying that requirement is that of the manager unless it is otherwise stated or implicit in these regulations.

44 The Act also requires the establishment at each mine of an "Occupational Health and Safety Committee" composed of representatives of management and labour. This committee must carry out a monthly inspection and report on the conditions found at the mine (s.38).

45 The duties of government inspectors are set out in s.42:

> 42. (1) An inspector shall
>
> (a) make the examinations and inquiries that the inspector considers necessary to ascertain whether this Act and the rules and regulations are being complied with;
>
> (b) order the immediate cessation of work in and removal of persons form a mine or portion of a mine that the inspector considers unsafe or require the precautions that the inspector considers necessary to be taken before persons are allowed to return to or continue working in a mine;
>
> (c) exercise such other powers as the inspector may consider necessary for ensuring the health and safety of persons employed in or about a mine;
>
> (d) meet with the Committee of a mine, within one week after any fatal or serious accident at the mine, to discuss the occupational health and safety aspects of the accident; and
>
> (e) do all other acts or things that are imposed on an inspector by this Act or the rules or regulations or that are requested of the inspector by the Minister.
>
> (2) An inspector may, on notifying the manager of a mine, supervisor, shift boss or similar person of his or her presence at the mine, enter, inspect and examine any mine or portion of a mine at any time in any manner that will not unreasonably or unnecessarily impede or obstruct the working of the mine.

46 It will be noted that the Act says that the inspector shall make such inquiries that the "inspector considers necessary". The manager of a mine is given the primary obligation to enforce the Act. The mine safety committee is required to conduct a monthly inspection and make a report. The inspector, on the other hand, is given a certain discretion to exercise such powers as the inspector may consider necessary to ensure the health and safety of workers. The inspector may prosecute for offences under the Act but so may an R.C.M.P. officer (s.47).

47 In my opinion this legislation has all the indicia of traditional occupational health and safety legislation in Canada: see K.E. Swinton, "Enforcement of Occupational Health and Safety

Legislation", in Swan & Swinton, eds., Studies in Labour Law (1983). The legislation is marked by an internal responsibility system: the employer is responsible for compliance; a joint management-labour committee has primary responsibility for inspections; a worker has the right to refuse work where there is reason to believe that an unusual danger to his or her health and safety exists (s.8). Placing the primary obligation for compliance on the employer accords with the common law duty on an employer to provide a safe place of work: Wilson v. English, [1938] A.C. 367 (H.L.). In my opinion, the *Mining Safety Act* and the regulations, in their scope, intent and content, are aimed at preventing injury and death arising from either conditions on a site or the manner in which work is conducted. It is truly "occupational" health and safety legislation. It is not meant to address harm caused by collateral and non-job-related activity (such as intentional criminal conduct).

48 The plaintiffs are, in essence, submitting that any harm suffered on the job, even from criminal conduct, is an "occupational" safety issue. I do not agree.

49 There is a brief but helpful discussion of recent developments in the field of occupational health and safety in the CCH Canadian Master Labour Guide (1995, 9th ed.) at pages 945-946. It points out that violence was traditionally considered a criminal problem not an occupational health and safety issue. Recently, however, both Saskatchewan and British Columbia amended their legislation to specifically include provisions respecting violence. But, again, the onus is put on the employer. In both cases the legislation places an obligation on the employer to carry out risk assessments and to develop policies to deal with potentially violent situations. These are done in consultation with employee safety committees.

50 The fact that in Saskatchewan and British Columbia specific legislative steps were taken to include the concept of violence in occupational health and safety legislation reinforces my view that criminal violence does not come within the ambit of the *Mining Safety Act*.

51 I may agree with plaintiffs' counsel that it should have been obvious to anyone looking at the Giant Mine dispute that there was a potential for the occurrence of acts of extreme violence. But the question before me is whether the government had a duty of care in these circumstances. There is nothing in the legislation to impose an obligation on the part of government to take some step to prevent crime on the site. This government had no jurisdiction to intervene in the labour dispute. It could not prohibit Royal Oak from using replacement workers. An inspector may order the cessation of work at a mine if he considers it unsafe but that has to be related to the scope and intent of the legislation. As I have already said, there is nothing in the legislation to suggest that the regulatory duty extends to any and all possible acts that could cause harm.

52 In my opinion there can be a duty of care on the government in its regulatory role vis-à-vis mining safety but that does not impose a duty for any occurrence on a mine site. There must be some connection between the activity being regulated and the harm suffered by the plaintiffs. If there is negligence in the performance of that duty then liability may be imposed. This becomes clear if one examines the cases referred to by plaintiffs' counsel.

53 In the Just case mentioned above, there was a statutory obligation to maintain highways in a reasonable condition. The plaintiff was injured due to rock falling on the highway. So the

question became the reasonableness of the government's inspection procedures, not whether a duty of care existed. The government owed a duty of care generally to users of the highway.

54 In Swanson & Peever v. Canada (1991), 124 N.R. 218 (Fed. C.A.), the federal government was held liable for failure to enforce air safety regulations. An airline, which had a history of unsafe flying practices known to the regulators, was allowed to continue operating. There was a crash which was found to be due in part to some of the same unsafe practices. In that case, as the court found, there was a clear statuary duty imposed on the federal government "to supervise all matters connected with aeronautics". Therefore there was a duty of care to the general public. The government was found liable because it was negligent in its failure to use its enforcement power to correct a problem situation which it knew existed at the airline (page 231).

55 In Air India Flight 182 Disaster Claimants v. Air India et al (1987), 62 O.R. (2d) 130 (H.C.J.), it was held that a duty of care may be found to exist between those responsible for airport security and the passengers and crew on a particular flight. That case rests on the direct connection between the negligence of the security personnel and the harm caused. The court made specific reference to "the control which the applicants have over passengers and baggage allowed on board the aircraft and the allegations that the applicants knew or ought to have known of threats made against Air India flights" (page 139).

56 In Brewer Bros. et al v. Canada (1991), 80 D.L.R. (4th) 321 (Fed. C.A.), the federal government was held liable to creditors of an insolvent grain elevator operator due to inadequate audits. Liability, however, was founded on the fact that legislation, designed for the protection

of this specific type of creditor, had expressly provided that the government satisfy itself that the operator was financially solvent. Again, there was a clearly defined duty owed to a clearly identifiable group and negligence in the performance of that duty.

57 In Brown v. Alberta et al (1993), 146 A.R. 128 (Q.B.), the federal government moved to strike a claim alleging negligence on its part in the supply of HIV infected blood for transfusions. The claim was allowed to stand on the basis that there was, in the words of Moore C.J.Q.B., a "clear relationship" between the government as a member of the national body that had the obligation to review and approve blood donor programmes, on the one hand, and the parties who, on the other hand, were supplying, receiving and administering the blood products.

58 A case that seems on first impression to extend basic principles is that of Jane Doe v. Police Board of Commissioners (1989), 48 C.C.L.T. 105 (Ont. H.C.J.). In that case the defendant police force sought to strike out the claim on the basis that it and their officers were immune from suit since policing was the exercise of discretionary action and that there was no causal link between the plaintiff's claim and their actions. The plaintiff had brought an action alleging negligence against the police after she had been raped by a serial rapist. It was alleged that the police knew that this serial rapist was operating in the plaintiff's neighbourhood, that the plaintiff was one of a finite number of potential targets, that the police failed to warn her as a potential victim, and, most significantly, that the police had pursued a policy of not warning potential targets preferring to use them as "bait" to secure the criminal's apprehension. The claim was allowed to carry on to trial.

59 In the Jane Doe case there was alleged knowledge on the part of the police of the potential harm and the potential victim together with an operational decision to try to "bait" the trap. To my mind if these allegations were proven there could be liability imposed. This is nothing more than the application of traditional negligence law principles.

60 A case with greater potential relevance is Gauthier v. Alberta Recoveries & Rentals Ltd. (1991), 77 Alta. L.R. (2d) 32 (Q.B.). In that case an action was commenced on behalf of children who allegedly suffered lead poisoning from exposure to lead oxide that their father brought home on his clothes from work. Among the claims was one against the provincial government for negligence in the breach of a statutory duty by not taking steps, through its inspectors, to ensure the health and safety of workers at the father's work site, as contemplated by provincial occupational health and safety legislation. The government moved to strike out the action. Cooke J. allowed the action to continue but only after a painstaking search for a possible duty of care.

61 In Gauthier, Cooke J. makes some comments which are equally applicable to the case before me (at page 39):

> Sections 2 and 6 through 10 clearly are directed at improving and protecting the safety of workers through proper job techniques and safe working environments and job sites. This occupational health and safety is sought to be achieved through the creation of statutory duties and obligations on employers, workers, contractors, suppliers and transporters. The framework of the Act itself is so exclusively directed toward the wellbeing of the worker that it is difficult to find between the Crown and the infant children, a relationship of sufficient proximity to warrant the imposition of a duty.

62 Cooke J. went through a detailed examination of the applicable regulations and found at least an arguable connection (an "extremely tenuous connection" as he put it) between the

requirement for the provision of cleansing stations and the possible contamination of the plaintiffs. In Gauthier, however, the case involved an obvious occupational health problem. There was no issue as to whether the cause of the harm fell within its scope, only whether its effect did.

63 In the present case plaintiffs' counsel has outlined a number of sections from the Mining Safety Regulations that may be pertinent to the allegations. An obvious example is s.15 being the prohibition of entry to the mine for non-workers. But, as noted before, s.2 of the Regulations clearly and directly imposes the duty of compliance on the mine manager. Further, unlike the Gauthier case where it could be argued that those regulations contemplated the harm, nothing in these Regulations contemplates criminal activity at the mine site.

64 In this case, I agree that the miners were in a relationship of proximity to the government and that there was a corresponding duty of care in the occupational health and safety sphere. But there was no duty of care in the circumstances of this case. I do not agree that the first part of the Anns test has been satisfied. That test requires me to examine whether there is "a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former carelessness on his part may be likely to cause damage to the latter" (my emphasis). It is not any relationship but a sufficient relationship; it is not any possibility but something that can be reasonably contemplated.

65 Plaintiffs' counsel also referred me to the recent case of Pasiechnyk v. Saskatchewan et al, [1995] 7 W.W.R 1 (Sask. C.A.). That case decided, among other things, that one must, in order to determine a government's status to be sued, have regard to the particular function being

performed. The question there was whether the non-suit provision of the provincial workers' compensation legislation could afford protection to the government, as an "employer", even though allegations of negligence were made in respect of its duties as a "regulator". The court held that the action was not barred due to the distinct nature of the claim being advanced. It recognized that today governments carry out many functions, some emanating from the public sphere of government operations and some from a private sphere.

66 Similarly in the case before me, the government has a duty of care in the occupational health and safety sphere. But the deaths of these miners resulted from intentional human conduct. Indeed, the fact that these men were murdered means, as it was phrased in the earlier quoted extract from the Littlewoods Organization case, that "the only possible source of the type of damage or injury which is in question is agency of a human being for whom the person against whom the claim is made has no responsibility". There is nothing in the legislation to suggest a duty of care on this government for non-job related dangers. To do so would make the government an insurer of workers' safety for every act that could possibly happen on a mine site. In my opinion that is not what is contemplated by the Anns test nor by any authority that has followed it nor by the legislation.

67 The true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope contended for it. I conclude that these defendants do not. An obligation with respect to inspections in the occupational sense cannot mean there is an obligation to do something on the basis of the possibility that some independent actor would commit an intentional crime. The pleadings postulate the assumption that this government either allowed Royal Oak to do something or failed to prevent Royal Oak from doing something which

it (the government) had jurisdiction over. There is nothing in the pleadings or in what has been submitted to me to support, even on a theoretical basis, such assumptions.

68 I wish to emphasize that I do not decide this issue on the basis of some policy-operations dichotomy. The case was not argued on that basis. I deal solely with the threshold question of whether a duty of care could exist. In my opinion it cannot in the circumstances of this case and the relevant legislation. It is not a matter of the need for evidence; it is the application of legal principles.

69 I recognize that the law relating to government liability in negligence is a developing one. I also recognize that a claim should not be struck if the trend of recent decisions suggests that the law is moving toward supporting such a claim: Galand Estate v. Stewart (1992), 6 Alta. L.R. (3d) 399 (C.A.). But I see no discernible trend to support this type of claim in the absence of some identifiable duty of care.

70 I find myself in sympathy with some comments expressed in Kripps v. Touche Ross & Co. (1992), 69 B.C.L.R. (2d) 62 (C.A.), leave to appeal to S.C.C. refused (1993), 78 B.C.L.R. (2d) xxxiv (note). A court might be tempted, given the developing state of the Canadian law of negligence, to permit every negligence claim to proceed to trial. But, that could lead to a long and costly exercise for the litigants. The court would fail in its duty to the public if it declined to exercise jurisdiction under the Rules of Court simply because it would be easier to say that the relevant area of the law is uncertain.

71 The test under Rule 124A(1)(a) is whether it is plain and obvious that the claim against these defendants cannot succeed. I think it is. For that reason the claim as against these defendants is struck out.

The Evoy Application:

72 The defendant Evoy has moved to dismiss this action not only on the ground that it discloses no cause of action but also on the grounds that it is scandalous, frivolous or vexatious and that it is an abuse of the process of the court, contrary to subrules 124A(1)(b) and (d):

> 124A. (1) The court may at any stage of proceedings order to be struck out or amended any pleading in the action, on the ground that
>
> (a) it discloses no cause of action or defence, as the case may be, or
> (b) it is scandalous, frivolous or vexatious, or
> (c) it may prejudice, embarrass or delay the fair trial of the action, or
> (d) it is otherwise an abuse of the process of the court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly.
>
> (2) No evidence shall be admissible on an application under clause (a) of subrule (1).

73 Evoy has filed an affidavit in support of his argument under (b) and (d) above, even though it is not admissible in support of his application under (a).

74 I have said on a previous occasion that the grounds set out in subrule 124A(1) are not interchangeable ones. They overlap to some extent but they are distinct concepts: Spenrath v. McKenzie et al, [1995] N.W.T.J. No. 78. And, to paraphrase something said by Côté J.A. of the Alberta Court of Appeal, I think it is highly undesirable to short-circuit or circumvent the restriction in subrule 124A(2), and to test the validity of the plaintiffs' legal arguments, under the

guise of trying to strike out the claim under subrules 124A(1)(b) or (d) using some evidence: Zurich Investments Ltd. v. Excelsior Life Insurance Co. (1988), 89 A.R. 14 (C.A.).

75 In my opinion, there is no basis for arguing that the action is scandalous, frivolous or vexatious (in the sense that the plaintiffs' claim is demonstrably false or hopeless) or that it is an abuse of process (in the sense that it is brought for improper motives with no basis in law). These grounds are only invoked by a court in exceptional cases. Therefore I decline to consider Evoy's affidavit on this motion.

76 The allegations against Evoy are contained in allegations made collectively against him and numerous other defendants:

> 20. At all material times, James Evoy, Dale Johnson, Robert Kosta, Harold David, J. Marc Dani, Blaine Roger Lisoway, William (Bill) Schram, James Mager, Conrad Lisoway, Wayne Campbell and Sylvain Amyotte, or any two or more of them acting together or individually, and sometimes also known as Richard Roe Number One, Richard Roe Number Two, were striking members of the Union, a supporter of such striking member or in a position of significant influence or control over a striking member of the Union, including Roger Wallace Warren. Richard Roe Number Three are those other persons, corporations or entities whose identities are not presently known to the Plaintiffs, one or more of whom was a striking member of the Union, a supporter of such striking member or in a position of significant influence or control over a striking member of the Union, including Roger Wallace Warren, or the state of security in the Giant Mine.
>
> 21. In exercising or attempting to exercise significant influence and control over Roger Wallace Warren or the state of security in the Giant Mine in permitting significant influence and control to be exercised or attempted to be exercised or in assisting Roger Wallace Warren to do any of the things attributed hereinafter to Roger Wallace Warren, the Union, Harry Seeton, Allan Raymond Shearing, Timothy Alexander Bettger, Terry Legge, John Doe Number Three, James Evoy, Dale Johnson, Robert Kosta, Harold David, J. Marc Danis, Blaine Roger Lisoway, William (Bill) Schram, James Mager, Conrad Lisoway, Wayne Campbell, Sylvaine Amyotte, and Richard Roe Number Three owed a duty of care to all persons (including the Nine Miners) who were lawfully upon the Giant Mine to avoid conduct which they or any of them knew or ought to have known could

create an unreasonable and foreseeable risk of harm to all such persons including causing others to consider it acceptable, reasonable, justifiable or necessary to conduct themselves in a manner that could create an unreasonable and foreseeable risk of harm to some or all of such persons. As well, the said Defendants owed a positive duty to intervene and/or to prevent others including any members of the Union with or over whom they or any of them stood in a position of influence and control from creating an unreasonable and foreseeable risk of harm to some or all persons and/or a positive duty to warn all persons including the Nine Miners who were lawfully upon the Giant Mine of such risk of harm.

22. The explosion and resulting mortal injuries to and death of the Nine Miners were caused by the combined negligence of each of the Defendants or any one or more of them, particulars of which as are known to the Plaintiffs, include...

(l) As to the Union, Harry Seeton, James Evoy, Dale Johnson, Robert Kosta, Harold David, J. Marc Danis, Blaine Roger Lisoway, William (Bill) Schram, James Mager, Conrad Lisoway, Wayne Campbell, Sylvain Amyotte and Richard Roe Number Three:

(a) Causing Roger Wallace Warren to conduct himself or to fail to conduct himself in any of the ways referred to in paragraph (E) hereof by threatening replacement workers or others seen as strike breakers with violence or death;

(b) Failing to sanction any of Harry Seeton, James Evoy, Dale Johnson, Robert Kosta, Harold David, J. Marc Danis, Blaine Roger Lisoway, William (Bill) Schram, James Mager, Conrad Lisoway, Wayne Campbell, Sylvain Amyotte and Richard Roe Number Three from threatening persons as aforesaid or failing to take care to ensure that substantial influence or control including Roger Wallace Warren understood and agreed that it was not acceptable, reasonable, justifiable or necessary to cause mortal injury and death to or to create any fear of mortal injury or death in any persons while upon the Giant Mine at the invitation of Royal Oak;

(c) Using their executive position with the Union or permitting any of them to use their executive position with the Union to further the creation of foreseeable and unreasonable risk of harm to all persons invited to be upon the Giant Mine including the Nine Miners during the lockout and strike as referred to in subparagraphs (a) and (b) hereof and generally;

(d) Failing to intervene to prevent Roger Warren Wallace from doing or failing to do any of the acts referred to in paragraph (E) hereof;

(e) Failing to prevent any persons including the Nine Miners from proceeding down the passageway in question before the substances referred to in subparagraph (a) of paragraph (E) hereof were removed or disconnected from the device referred to in subparagraph (b) of paragraph (E) hereof;

(f) Failing to warn all persons including the Nine Miners who were lawfully upon the Giant Mine of the risk of harm which their conduct had caused or contributed to;

(g) Generally, conducting themselves in such a negligent fashion as to cause the mortal injury to and death of the Nine Miners.

77 There are other facts which are relevant. Evoy is a well-known public figure in the labour movement in the Northwest Territories; he has run as a candidate for political office; he is an officer of the N.W.T. Federation of Labour; and, while not a Giant Mine employee, he was a vocal

public supporter of the striking workers. Plaintiffs' counsel says that these facts are "extraneous" to the pleadings and should be ignored. But every person in Yellowknife who can read a newspaper knows these facts. I think I can take notice of these facts since they are common knowledge in this community. And without them the arguments advanced on behalf of both Evoy and the plaintiffs cannot be considered in their proper context.

78 Evoy's counsel submits that there are deficiencies in the pleadings. I agree.

79 Paragraph 20 quoted above lists Evoy as one of eleven specifically named individuals who are identified as "striking members", or a "supporter" of the strikers, or someone in a "position of significant influence or control" over a striking member. Obviously none of those individuals, including Evoy, could be all three. But nothing is said in that pleading about which one or more designations apply to Evoy.

80 We know that Evoy was not a striking member of the union. We can assume the truth of the allegation that Evoy was a "supporter of such striking member" although it does not specify which, if any, particular striking member is referred to here. The allegation that he is in "a position of significant influence or control" is a pleading of a conclusion. There are no facts plead to support either a conclusion or inference that Evoy was in a position of influence or control.

81 The plaintiffs' counsel submits that it is sufficient to plead the bald assertion that Evoy exercised influence and control. He says that this pleading supports the finding of a special relationship so as to create the duty of care. But, with respect, this seems to be a circuitous argument. There is a special relationship because he exercised influence and control ("how" we

are not told); he exercised influence and control because there is a special relationship ("what" we are not told).

82 This fundamental problem is illustrated by two points made in the plaintiffs' written submissions:

> 9. The allegations in the Amended Statement of Claim (which have to be assumed to be true), are that there is a direct relationship between the negligence of Evoy and the losses of the Plaintiffs.
>
> 10. Ultimately, the Court needs to review evidence in order to determine whether there is a connection between the negligence and the loss, which requires a trial.

83 The allegation that there is a direct relationship is the pleading of a conclusion. What is missing in the Amended Statement of Claim are the material facts to support that conclusion. One may need evidence to prove the connection between the negligence and loss; one, however, needs to plead the material facts that the evidence is expected to establish. One does not, in any event, need evidence to know if the material facts alleged in the claim can amount to that connection in law so as to be capable of finding liability.

84 Paragraph 21, in the first few lines, also pleads conclusions without material facts and then fails to specify which, if any, of those are meant to apply to Evoy. It also alleges a positive duty to intervene and to warn. This can arise only if there is a special relationship or if the particular defendant created a situation of peril. No material facts are alleged to support either contention. No material facts are alleged so as to specify what part Evoy played, even as a minor contributing factor, in the causation of the loss.

85 The particularized allegations in subparagraph 22(I), while appearing to be particulars, are also nothing more than bald assertions against the collective group without material facts to support them or to identify to which individual defendants they apply. Those subparagraphs that start with "causing" or "failing" are nothing but assertions. There are no material facts alleged to allow one to think that there is even an arguable reason to conclude that Evoy caused something or failed to do something. We are not told how he caused the things he is said to have caused or what he should have done that he failed to do. We are not told in what negligent fashion, as alleged in subparagraph (g), Evoy conducted himself. Finally, with respect to subparagraph (c), this obviously cannot refer to Evoy since it concerns only those holding an "executive position" with the union.

86 Cases where pleadings contain nothing but bald assertions against defendants generally, and not against any defendant specifically, have been held to be bad and struck out: Morris v. British Columbia (1979), 14 B.C.L.R. 197 (C.A.). Allegations which are nothing more than speculative assumptions disguised as facts are also unacceptable. And, as I noted earlier, it is equally bad to plead mere inferences without pleading the material facts to support them. That is the difficulty with the pleadings as against Evoy.

87 I recognize that in many cases many of the specific facts needed to prove the case are within the exclusive knowledge of the defendants. Courts are loath to strike out cases that appear only to lack evidence. If the case simply needs to fill in gaps, which may happen either by discovery or by revelation at trial, then it should be allowed to proceed. But this assumes that the case is not a mere fishing expedition. And this assumes that there is at least an arguable foundation in law for the case.

88 Evoy's counsel also submits that there is no sufficient relationship of proximity between the plaintiffs and this defendant so as to create a duty of care on the part of this defendant. He submits that, even if one assumes the truth of the allegation that Evoy exercised "significant influence and control" over striking union members, there is still no direct and foreseeable relationship between any negligence in such exercise and the resultant deaths.

89 The Amended Statement of Claim does not allege a conspiracy. It does not even allege that Evoy, through some act, incited others to act violently. Yet, on a plain reading of those allegations that could apply to Evoy, the plaintiffs claim that somehow Evoy — who was not in the union, nor was a co-worker of Warren, nor had some statutory authority in relation to the strike or the mine — had a duty to prevent harm and to intervene to prevent others from committing harm. This seems to me to be tantamount to saying that all of us have a general duty to others in the community to prevent harm. We do not. We have a duty to avoid doing or omitting to do anything which may have as its reasonable and probable consequence injury to others and the duty is owed to those whom injury may reasonably and probably be anticipated if the duty is not observed. There is no duty to the world at large in tort law.

90 In this case there was no direct relationship between the deceased and Evoy and there were no imposed or assumed obligations. It is impossible to deduce from the pleading that anything Evoy did or did not do had any effect on Warren's intentional conduct. Evoy's counsel submits that the relationship between the leader of a public labour organization and any specific union, much less any individual member of that union, is collateral at best. I agree. In my opinion the comment of McLachlin J. in the Norsk Pacific case is apropros: "Distant losses which arise from collateral relationships do not qualify for recovery."

91 If one can argue that a public figure, by taking a public stance on a controversial issue, in the absence of some specific involvement, could be held liable for the criminal act of some other person who has an interest in that issue, then one could extend the reach of tort law to almost any situation of public controversy. There may be significant concerns touching on the rights of free speech, opinion, and association raised in respect of this claim especially in the absence of specific facts alleging some direct involvement by Evoy. I do not need to go into those concerns on this application but, in my view, there may be sound policy reasons militating against an extension of tort liability to public figures in these circumstances.

92 I have concluded that the pleadings fail to allege material facts to support a reasonable cause of action. Were that all, I may be inclined to simply order further particulars. But I have also concluded that there is no possible connection between this defendant and the loss. There must be some link between one person's conduct and the resultant loss. The pleadings fail to allege the necessary link, much less the alleged acts, so as to give rise to a duty of care. Nor do I think there is that sufficient proximity to give rise to a duty of care in these circumstances. For these reasons the claim as against the defendant Evoy is struck out.

The Johnson Application:

93 The defendant Johnson also moved under subrules 124A(1)(b) and (d) to strike the Amended Statement of Claim in addition to subrule 124A(1)(a). My comments with respect to the Evoy application apply equally here.

94 The allegations against Johnson are to be found in the same paragraphs of the Amended Statement of Claim as the allegations against Evoy discussed previously. He too is grouped into the collective allegations against all of the defendants named in those paragraphs. Again there is nothing to specify which allegation applies to this defendant. Again these are nothing more than bare assertions or conclusions without material facts in support. Therefore, my previous comments with respect to the deficiencies of these pleadings apply with equal force to this application.

95 Johnson's counsel submits that there are not enough facts plead to draw Johnson into a sufficient proximal relationship to Warren's intentional act. There are no facts plead to reveal any connection between what Warren did and anything Johnson did or did not do. In general I agree with these submissions. There is, however, one significant difference between the position of Johnson and that of Evoy within the context of the entire circumstances.

96 It is a well-known public fact that Johnson was a leading member of the union at Giant Mine. He was an active participant in the strike. He and Warren, and six of the deceased miners, had been co-workers. Johnson filed an affidavit on this application but, just as with Evoy's application, I have not considered it. The facts I have just detailed are background facts taken from general public knowledge.

97 It seems to me that there is at least an arguable nexus between Johnson's involvement in the strike and the overall circumstances surrounding this claim. There is in law a relationship among all members of a union. A trade union is, in law, an unincorporated group or association of workers who have banded together to promote certain objectives for their mutual benefit. The members of a union are related one to the other by contract: Orchard v. Tunney, [1957] S.C.R. 436. It is therefore not inconceivable that a duty of care may exist one to the other.

98 My concerns about the sufficiency of the pleadings still apply. There may be a connection between some alleged negligent act of this defendant and the loss suffered by the plaintiffs. It is impossible, however, to adequately discern from the present pleadings how or what that connection could be. The remedy though is not to strike out the claim at this point but to give the plaintiffs the opportunity to particularize it if they can.

Conclusions:

99 The Amended Statement of Claim is struck out as against the defendants Government, Whitford and Turner. Those defendants will be entitled to recover their costs, but one set of costs only for all three, from the plaintiffs.

100 The Amended Statement of Claim is struck out as against the defendant Evoy also with costs.

101 With respect to the claim against the defendant Johnson, the plaintiffs shall have 30 days within which to deliver particulars as to their allegations against this defendant. Johnson has leave to renew this application to strike out after he receives those particulars. Johnson, however, will have his costs of this application.

102 I had earlier mentioned that a group of nine other individual defendants had brought their own motion to strike out the claim but then withdrew it at the hearing. It seems only fair in those circumstances to require those defendants to pay the plaintiffs' costs at least of preparation for the motion.

103 If counsel cannot agree on costs, they may make submissions to me.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 24th day of April, 1996

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Counsel for the Defendant Evoy:	G. Bruce Butler
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CV 05408

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SHEILA FULLOWKA, DOREEN SHAUNA HOURIE, TRACEY NEILL, JUDIT PANDEV, ELLA MAY CAROL RIGGS, DOREEN VODNOSKI, CARLENE DAWN ROWSELL, KAREN RUSSELL and BONNIE LOU SAWLER

Plaintiffs

- and -

ROYAL OAK MINES INC., MARGARET K. WITTE, also known as PEGGY WITTE, PROCON MINERS INC., PINKERTON'S OF CANADA LIMITED, WILLIAM J.V. SHERIDAN, ANTHONY W.J. WHITFORD, DAVE TURNER, THE GOVERNMENT OF THE NORTHWEST TERRITORIES AS REPRESENTED BY THE COMMISSIONER OF THE NORTHWEST TERRITORIES, NATIONAL AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA, Successor by Amalgamation to CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS and the Said CANADIAN ASSOCIATION OF SMELTER AND ALLIED WORKERS, HARRY SEETON, ALLAN RAYMOND SHEARING, TIMOTHY ALEXANDER BETTGER, TERRY LEGGE, JOHN DOE NUMBER THREE, ROGER WALLACE WARREN, JAMES EVOY, DALE JOHNSON, ROBERT KOSTA, HAROLD DAVID, J. MARC DANIS, BLAINE ROGER LISOWAY, WILLIAM (BILL) SCHRAM, JAMES MAGER, CONRAD LISOWAY, WAYNE CAMPBELL, SYLVAIN AMYOTTE, and RICHARD ROE NUMBER THREE

Defendants

Reasons for Judgment of the Honourable Mr. Justice J. Z. Vertes