Court File No. CV-18-00001938-0000

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KELLY LYNN DONOVAN

Plaintiff

(Responding Party)

and

REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD, and BRYAN LARKIN

Defendants

(Moving Party)

MOTION RECORD OF THE PLAINTIFF

VOLUME II

(Returning on February 22, 2021)

Kelly Lynn Donovan
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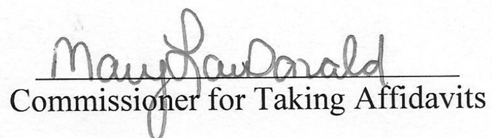
* Exhibits are bookmarked within the Affidavit document, (open "Bookmarks" by clicking on

the icon on the left).

This is **Exhibit "S"** referred to in the affidavit of Kelly Lynn Donovan sworn on February 10, 2021.



Commissioner for Taking Affidavits

Mary Louise Donald, a Commissioner, etc.,
County of Brant, for the Government of Ontario,
Ministry of the Attorney General.

From: **Christa Ambrose** christaa@filion.on.ca
Subject: Kelly Lynn Donovan V. Waterloo Regional Police Services Board and Bryan Larkin (Court File No. CV-18-1938)
Date: February 19, 2020 at 11:28 AM
To: Snaza.Velanovski@ontario.ca
Cc: Donald B. Jarvis DJarvis@filion.on.ca, Cassandra Ma cma@filion.on.ca, Kelly Donovan (kelly@fit4duty.ca) kelly@fit4duty.ca

CA

On Behalf of Donald B. Jarvis

Attached please find correspondence dated February 19, 2020, along with documents thereto with respect to the above-noted matter. Would you kindly provide this correspondence and documents to Justice Michael T. Doi. Thank you.

Christa Ambrose
Assistant to Donald B. Jarvis and Carol S. Nielsen

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Reply to Donald B. Jarvis
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February 19, 2020

SENT VIA E-MAIL & COURIER

Justice Michael T. Doi
Ontario Superior Court of Justice
A. Grenville & William Davis Court House
7755 Hurontario Street, Suite 100
Brampton, ON L6W 4T6

Dear Mr. Justice Doi:

Re: Kelly Lynn Donovan v. Waterloo Regional Police Services Board and Bryan Larkin (Court File No. CV-18-1938)

The Plaintiff's appeal in this matter was heard by the Court of Appeal for Ontario on October 11, 2019. For your reference, the Court of Appeal's decision is attached hereto at **Tab A**.

We are writing to seek your direction on the appropriate next step in this proceeding. As you will recall, the Defendants' Rule 21 Motion raised, *inter alia*, the issue of whether the subject matter of the Plaintiff's Amended Statement of Claim was within the jurisdiction of the Ontario courts pursuant to Rule 21.01(3)(a). The parties made full submissions in respect of this jurisdiction issue when the Motion was heard by this Honourable Court on February 13, 2019. In your Reasons for Judgment issued on February 21, 2019 (see **Tab B**), you found that the Motion was fairly and fully disposed of under Rule 21.01(1)(b) without need for recourse to the Defendants' Motion under Rule 21.01(3)(a). Notably, the Court of Appeal did **not** address the jurisdiction issue during the hearing of the Plaintiff's appeal or in its decision. In short, the Defendants' jurisdiction motion remains undecided and the Defendants are entitled to a decision on this issue (see *Sun Oil Co. v. City of Hamilton and Veale*, [1961] O.R. 209 (C.A.) at p. 6 (see **Tab C**)).

Given the fact that you did not rule on the Defendants' jurisdiction motion in your Reasons for Judgment, are you still seized with this matter or should the Defendants' jurisdiction motion be reargued before another judge? If you advise that you remain seized of the Defendants' jurisdiction motion, we respectfully ask that you provide the parties with an approximate time frame for the release of your decision in respect of the Defendants' jurisdiction motion.

Thank you for your immediate attention to this matter. We look forward to your earliest reply.

Yours truly,

Donald B. Jarvis
CM/

cc Ms. Kelly Donovan, Plaintiff *(via email)*
Ms. Virginia Torrance, Regional Municipality of Waterloo Police Services Board *(via email)*

TAB A

COURT OF APPEAL FOR ONTARIO

CITATION: Donovan v. Waterloo Regional Police Services Board, 2019 ONCA 845
DATE: 20191025
DOCKET: C66718

Hoy A.C.J.O., van Rensburg and Roberts JJ.A.

BETWEEN

Kelly Lynn Donovan

Plaintiff/Responding Party (Appellant)

and

Waterloo Regional Police Services Board and Bryan Larkin

Defendants/Moving Parties (Respondents)

Kelly Lynn Donovan, acting in person

Donald B. Jarvis and Cassandra Ma, for the respondents

Heard: October 11, 2019

On appeal from the order of Justice Michael T. Doi of the Superior Court of Justice, dated March 20, 2019, with reasons reported at 2019 ONSC 1212.

REASONS FOR DECISION

I. OVERVIEW

[1] The appellant appeals from the motion judge's order dismissing her action against the respondents under r. 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, without leave to amend, and ordering her to pay costs to the respondents. For the reasons that follow, we allow the appeal, set aside the

order of the motion judge, and grant the appellant leave to further amend her Amended Statement of Claim in respect of the claim against Bryan Larkin.

II. BACKGROUND

[2] In her Amended Statement of Claim, the appellant alleges that the respondents breached the terms of a Release and of a confidentiality provision contained in a settlement agreement (the "Agreement"), dated June 8, 2017. Under the Agreement, the appellant resigned her employment in June 2017, as a police officer with the respondent Waterloo Regional Police Services Board (the "Board"). She seeks damages against the Board and Bryan Larkin, the Chief of the Waterloo Regional Police Service.

[3] The appellant alleges that the respondents (1) breached the Release by appealing her claim for benefits to the Workplace Safety and Insurance Board ("WSIB") arising from a workplace injury; and (2) breached the confidentiality provisions of the Agreement by delivering an affidavit sworn by Chief Larkin, containing information about the Agreement, in defence of a class proceeding against the Board.

[4] The motion judge struck the claim related to the WSIB appeal on the basis that an employer cannot contract out of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A ("WSIA"). Pursuant to the Release, the Board, among other things, "release[s] and forever discharge[s] [the appellant] from any

and all...appeals". The appellant pleads that she applied to the WSIB in April 2017, before signing the Release, for benefits related to post-traumatic stress disorder ("PTSD"). After the Board signed the Release, it submitted an appeal of the WSIB's decision.

[5] The motion judge accepted that it was at least arguable that the Release captured the Board's review of the WSIB's initial entitlement decision: at para. 20. His decision that it was plain and obvious that the Amended Statement of Claim failed to disclose a cause of action in respect of the alleged breach of the Release was based on his conclusion that the result was governed by this court's decision in *Fleming v. Massey*, 2016 ONCA 70, 128 O.R. (3d) 401, leave to appeal refused, [2016] S.C.C.A. No. 113. The motion judge concluded that *Fleming* made it abundantly clear that the Release "cannot operate to preclude the Board, or the [appellant] ...from exercising rights and discharging obligations under the WSIA", because "as a matter of law, parties cannot contract out of the scheme under the WSIA": at para. 23. The motion judge also concluded that the privative clause in s. 118(4) of the WSIA, which provides, in relevant part, that an action or decision of the WSIB under the Act cannot be restrained by a court process or procedure, would preclude the appellant's claim for breach of the Release in relation to the WSIB proceedings: at paras. 24-25.

[6] The motion judge struck the claim related to the breach of confidentiality because he concluded that it could not be based solely on an affidavit prepared

for a court proceeding. The Agreement required the parties, except where required by law, to "keep the terms and existence of [the Agreement] in absolute and strict confidence at all times". While the motion judge found, at para. 33, that "it seems less clear whether Chief Larkin's affidavit sufficiently preserves the [appellant's] confidentiality", he concluded that because his affidavit was used in defending a class action in court, it was covered by absolute privilege. Accordingly, the motion judge concluded that the appellant's claim had no reasonable chance of success.

[7] The motion judge further concluded that the pleading contained insufficient allegations to establish an independent cause of action against Bryan Larkin with respect to either of the appellant's claims.

III. ANALYSIS

[8] We are not persuaded that it is plain and obvious that the appellant's claims against the Board cannot succeed. We agree with the motion judge that the appellant did not plead a tenable claim against Chief Larkin, but in the circumstances of the case we would allow the appellant leave to amend this claim.

(1) The Breach of Release Claim

[9] As already indicated, the motion judge made his order dismissing the appellant's action without leave to amend under r. 21.01(1)(b). As a result, and as he acknowledged in his reasons, he could not consider anything extrinsic to the

Amended Statement of Claim which was not referenced in the claim. Moreover, he had to accept the pleaded facts as true for the purpose of the r. 21 motion.

[10] On a generous reading of the Amended Statement of Claim, the appellant had applied for and had been receiving WSIB benefits at the time the Agreement containing the Release was signed. She pleads, at paras. 9-10, that she was diagnosed with PTSD in December 2015, and that, starting in February 2017, she could not attend work due to the severity of her PTSD symptoms. She pleads that in April 2017 she applied to the WSIB for benefits and that her claim was approved: at para. 11. Indeed, she pleads at para. 19 that after her resignation she "continued to receive benefits from WSIB in the form of psychological treatment". The appellant pleads, at para. 20, that in August 2018 she was made aware by WSIB that on January 11, 2018 the Board submitted an appeal of her claim.

[11] *Fleming* was a case that involved uninsured employment under Part X of the WSIA. At issue was the enforceability of a waiver signed by Fleming, who was injured in a go-kart race in which he was the race director. The waiver purported to release all of the respondents from liability for all damages associated with participation in the event. This court concluded that Fleming was an employee, and that the waiver contravened s. 114 of the WSIA, which provides specifically that workers who are not insured under the workers' compensation scheme, like Fleming, are permitted to sue their employers for workplace accidents. The court concluded that enforcement of the waiver would constitute a contracting out of the

protections of the WSIA, and that contracting out of this protection would be contrary to public policy. At para. 34, Juriansz J.A. wrote the passage that the motion judge relied on:

> Considering the sweeping overriding of the common law made by workers' compensation legislation and the broad protection it is designed to provide to workers in the public interest, it would be contrary to public policy to allow employers and workers to contract out of its regime, absent some contrary legislative indication. [Emphasis added.]

[12] However, Juriansz J.A. also wrote, at para. 45, that, "[r]eading the WSIA as a whole, it is apparent its objective is to ensure injured workers have access to compensation".

[13] The Release is not plainly contrary to the WSIA's objective, as identified by Juriansz J.A. Nor have the respondents identified any express statutory provision that the Release would contravene.

[14] Respectfully, it is not plain and obvious that *Fleming* would stand in the way of the appellant's claim in this case. Again, on the facts pleaded by the appellant, following her resignation, she continued to receive benefits from the WSIB in the form of psychological treatment, and it was not until several months after the parties signed an Agreement in respect of her resignation, which included the Release, that the Board initiated an appeal to the WSIB, to challenge her entitlement to benefits. This is very different from the *Fleming* case where the

waiver signed by the employee violated a provision of the WSIA specifically providing for the employee's right of action.

[15] And with respect to the motion judge's conclusion based on the privative clause in s. 118(4) of the WSIA, in our view it is not plain and obvious that the appellant's action in respect of the Release would contravene the WSIB's exclusive jurisdiction to determine matters set out in s. 118 of the WSIA and the privative clause contained in that section.

(2) The Breach of Confidentiality Claim

[16] Nor is it plain and obvious that Chief Larkin's affidavit is subject to absolute privilege and that, accordingly, the appellant's claim has no reasonable prospect of success.

[17] There is arguably an important competing interest at stake that weighs against absolute privilege: there is a confidentiality provision that is part of a settlement agreement. There is an overriding public interest in favour of settlement; promoting settlements contributes to the effective administration of justice in this province: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623, at para. 11. This is not a situation where a party seeks to rely on the provisions of a confidentiality agreement to shield itself from claims. Moreover, the statement at issue was not made by counsel and it is not apparent that it was necessary for the respondents to include the information that allegedly

breached the Agreement in the affidavit for the Board to defend against the certification motion.

[18] We conclude, as this court did in *Amato v. Welsh*, 2013 ONCA 258, 305 O.A.C. 155, at paras. 68-69, 97, that because this matter arguably involves competing interests and privileges, it should be decided with an evidentiary record and not on a pleadings motion.

(3) The Claim against Chief Larkin

[19] The appellant's claim against him is pleaded in contract and is based only on the fact that he swore the affidavit and signed the Release and Agreement on behalf of the Board. The appellant did not plead any facts showing that the Chief's actions were tortious: see e.g., *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 2 S.C.R. 263.

[20] However, the appellant represents herself in this matter. Having concluded that the motion judge erred in striking her claims against the Board, we would grant her leave to amend her claim against Chief Larkin to plead how his actions were tortious.

IV. DISPOSITION

[21] Accordingly, we would allow the appeal and set aside the order of the motion judge. If the appellant seeks costs of this appeal and of the motion before the motion judge, she shall, within 14 days, serve on the respondents and file with this

court brief written submissions, including proof of any disbursements she has incurred and seeks to recover. The respondents shall serve on the appellant and file with this court their responding submissions within 10 days thereafter.

"Alexandra Hoy ACJO"

"K. van Rensburg J.A."

"L.B. Roberts J.A."

TAB B

CITATION: Donovan v. Waterloo Regional Police Services Board, 2019 ONSC 1212
COURT FILE NO.: CV-18-1938
DATE: 2019 02 21

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
KELLY LYNN DONOVAN	)	Self-Represented
Plaintiff	)	
- and -	)	
WATERLOO REGIONAL POLICE SERVICES BOARD and BRYAN LARKIN	)	Donald Jarvis and Cassandra Ma, for the Defendants
Defendants	)	
	)	**HEARD:** February 13, 2019

REASONS FOR JUDGMENT

DOI J.

Introduction

[1] This is an action for breach of contract. The Plaintiff claims that the Defendants appealed her claim for workers' compensation benefits and thereby

breached the terms of a release under a Resignation Agreement they executed with her. She also claims that the Defendants delivered an affidavit in a separate court proceeding which identified her, contrary to the confidentiality terms of the Resignation Agreement.

[2] The Defendants brought this motion under Rules 21.01(1)(b), 21.01(3)(a) and 21.01(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, to strike the Amended Statement of Claim issued May 4, 2018. For the reasons that follow, the pleading is struck under Rule 21.01(1)(b) without leave to amend.

Background

[3] The Amended Statement of Claim discloses the following.

[4] The Plaintiff is a former police officer who resigned her position with the Defendant Waterloo Regional Police Services Board ("Board") after executing a Resignation Agreement on June 8, 2017 with the Board and her collective bargaining agent, the Waterloo Regional Police Association.

[5] The Amended Statement of Claim refers to the Resignation Agreement and pleads, among other things, the following provisions:

> Except where disclosure is required by law, or where disclosure is to Donovan's immediate family members or to persons providing professional financial/legal advice (all of whom agree to be bound by this non-disclosure and confidentiality clause), the parties undertake and agree that they will keep the terms and existence of this Resignation Agreement in absolute and strict

> confidence at all times, without time limitation, and not disclose its contents to any third party, person or entity. For added certainty, and without limiting the generality of the foregoing, the parties undertake and agree that they will not publicize, discuss, disclose or communicate in any way with any person, entity or organization, in any form whatsoever, the contents or terms of all or any part of this Resignation Agreement. If asked, the parties (and anyone subject to the terms of this non-disclosure and confidentiality clause) will indicate only that all outstanding matters between the parties were settled to their mutual satisfaction, the terms of which settlement are strictly confidential.
>
> [...]
>
> THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD [...] does hereby release and forever discharge KELLY DONOVAN ("DONOVAN") from any and all actions, causes of action, complaints, applications, appeals
>
> [...]
>
> AND FOR THE SAID CONSIDERATION, THE REGIONAL MUNICIPALITY OF WATERLOO POLICE SERVICES BOARD further agrees not to commence, maintain, or continue any action, cause of action or claim, request, complaint, demand or other proceeding, against any person, corporation or entity in which any claim could arise against DONOVAN for contribution or indemnity.

[6] After the Resignation Agreement was executed, the pleading alleges that the Defendants breached the terms of the contract.

The Claim

[7] On May 9, 2018, the Plaintiff commenced this action. Her Amended Statement of Claim seeks damages against the Board and the personally-named Defendant, Bryan Larkin, Chief of the Waterloo Regional Police Service, and her reinstatement as a police officer with the Board, for the Defendants' alleged breach of the Resignation Agreement by: (i) appealing her claim (Claim No. 30505408) for statutory care and benefits to the Workplace Safety and Insurance Board ("WSIB") arising from a workplace incident; and (ii) delivering an affidavit

sworn by Chief Larkin on December 21, 2017 in a separate court proceeding that contained information that is said to have disclosed her identity in breach of the confidentiality terms under the Resignation Agreement.[1]

[8] The Defendants responded to the claim by delivering a Notice of Motion dated June 7, 2018 to strike the claim.

The Test under Rule 21.01(1)(b)

[9] Under Rule 21.01(1)(b), a party may strike all of part of a claim for failing to disclose a reasonable cause of action. The framework for a Rule 21.01(1)(b) motion is well established. There is no evidence on a Rule 21.01(1)(b) motion. The material facts pleaded are deemed to be proven or true, except to the extent that the alleged facts are patently ridiculous or manifestly incapable of being proven. The court is entitled to read and rely on the terms of any document pleaded or incorporated by reference in the claim. As the facts pleaded are the basis for evaluating the claim's possibility of success, a claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The novelty of the cause of action is of no concern at this stage of the proceeding, and the statement of claim must be read generously to allow for drafting deficiencies. If the claim has some chance of success, it must be permitted to

---

1 On or about May 30, 2017, the Board was named as a defendant in a class action. The putative class members in the class action were current and former employees of the Board and their family members. The Plaintiff was not a putative class member in the proceeding. On July 13, 2018, Baltman J. dismissed the class action; *Rivers v. Waterloo Regional Police Services Board*, 2018 ONSC 4307.

proceed; *R. v. Imperial Tobacco*, 2011 SCC 42 at para. 22; *Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121 at paras. 14 and 15.

[10] To strike a claim under Rule 21.01(1)(b), it must be plain and obvious on a generous reading that the claim discloses no reasonable cause of action; *Conway v. L.S.U.C.*, 2016 ONCA 72 at para. 7; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980. In *Imperial Tobacco*, the rationale for this test was explained (at paras. 17 and 19 to 21):

> The Test for Striking Out Claims
>
> A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial.
>
> [...]
>
> The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> This promotes two goods — efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be — on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.
>
> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. [...] The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*.

> Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. [citations omitted]

[11] Leave to amend a claim will not be permitted when it is plain and obvious that no tenable cause of action is possible on the facts alleged: *Conway v. L.S.U.C.*, 2016 ONCA 72 at para. 16.

Position of the Parties

[12] The Defendants submit that the Amended Statement of Claim fails to plead the requisite elements to support a breach of contract claim against them. Their argument is two-fold. First, they submit that the Board's effort to seek a review of the Plaintiff's initial entitlement decision by the Workplace Safety and Insurance Board ("WSIB") (i.e., by filing an Intent to Object) under the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c.17, Sch. A, as amended ("WSIA"), was not a breach of contract because the WSIA expressly prohibits parties from contracting out of the statutory scheme. They further submit that Chief Larkin's affidavit cannot form the basis of a claim for breach of contract as it was prepared for use in a court proceeding and is subject to absolute privilege.

[13] The Plaintiff relies on the Resignation Agreement as the contractual basis for her claim. By commencing a review or appeal of her initial entitlement decision by the WSIB for statutory workplace insurance benefits, the Plaintiff

claims that the Defendants breached the terms of their settlement agreement with her. She further alleges that Chief Larkin's affidavit was made without regard to the confidentiality term under the Retirement Agreement as pleaded in the Amended Statement of Claim, and relies on this in further support of her breach of contract claim.

Analysis

[14] As the Plaintiff's action is for a breach of contract, the claim must prove: (i) the existence of a contract with the Defendants; and (ii) a breach of the contract; *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239 at para. 32.

[15] The Amended Statement of Claim pleads the Resignation Agreement as the underlying basis for the claim. Paragraph 5 of the claim pleads the confidentiality clause under the Resignation Agreement, and paragraph 6(a) pleads an excerpt of the Resignation Agreement by which the Board broadly agreed to release and forever discharge the Plaintiff "*from any and all actions, causes of action, complaints, applications and appeals …*" Paragraph 6(b) pleads a further provision of the Resignation Agreement by which the Defendants agreed "*not to commence, maintain or continue any action, cause of action, claim, request, complaint, demand or other proceeding, against any person,*

corporation or entity in which any claim could arise against DONOVAN for contribution or indemnity."

Claim for breach of contract by commencing a proceeding under the WSIA

[16] I am persuaded that the release executed by the Board under the Resignation Agreement did not preclude it from participating in the WSIB proceedings. I also find that it is plain and obvious that the claim arising from the Board's effort to review the Plaintiff's initial entitlement decision by the WSIB has no reasonable prospect of succeeding.

[17] The <u>Amended</u> Statement of Claim pleads that the terms of the Resignation Agreement include a release in favour of the Plaintiff against "*any and all actions, causes of action, complaints, applications, [and] appeals,*" among other things, as well as a further agreement "*not to commence any action, cause of action or claim, request, complaint, demand or other proceeding against any person corporation or entity in which any claim could arise against the Plaintiff for contribution or indemnity.*" The Plaintiff relies on these terms under the Resignation Agreement for her breach of contract claim against the Defendants for submitting an appeal of her initial entitlement decision by the WSIB on January 11, 2018.

[18] The Defendants submit that the Board's review of the Plaintiff's initial entitlement decision by the WSIB could not have led to any kind of finding of

liability or obligation owed by the Plaintiff. Absent any fraud or misrepresentation, which is not alleged here, the Defendants submit that the WSIB will not pursue a recovery of benefits from a worker if it reverses a previous decision that granted the worker entitlement to benefits; WSIB Policy 19-08-04: Recovery of Benefit-Related Debts, at pp. 1, 3 and 4; Decision No. 1658/02, 2002 WSIA 2718 at para. 20. Accordingly, the Defendants submit that the Board's review of the initial entitlement decision did not implicate the term under the Resignation Agreement by which the Board agreed to not commence a proceeding in which a claim could arise against the Plaintiff for contribution or indemnity.

[19] Assuming that the Defendants' view accurately reflects the policy intent of the above-mentioned WSIB Policy and its interpretation by the appeals tribunal, it still remains uncertain (albeit in a remote sense) as to whether the Plaintiff may, at some future time, incur a potential claim for contribution or indemnity based on some aspect of the Board's review of her initial entitlement decision. To definitively say otherwise would necessarily call for speculation as to future events and cause the decision to fall outside the plain and obvious test.

[20] Moreover, the Amended Statement of Claim also pleads a much broader release by the Board under the Resignation Agreement to release the Plaintiff from "*any and all … complaints, applications and appeals*." On a plain reading of this term on its face, it seems at least arguable that it captures the Board's review of the WSIB's initial entitlement decision, as the Plaintiff's submits. She also

notes that the Board sought a review of her initial entitlement decision by the WSIB several months after it executed the Resignation Agreement.

[21] Despite the foregoing, I accept that the Resignation Agreement cannot prevent the parties from participating in proceedings before the WSIB as parties cannot contract out from their rights and obligations under the legislative scheme governing workers' compensation in Ontario. As explained by Juriansz J.A. for the Court of Appeal for Ontario, workplace parties cannot waive their rights and obligations under the WSIA as a matter of law:

> I recognize that the courts should exercise extreme caution in interfering with the freedom to contract on the grounds of public policy. Considering the sweeping overriding of the common law made by workers' compensation legislation and the broad protection it is designed to provide to workers in the public interest, it would be contrary to public policy to allow employers and workers to contract out of its regime, absent some contrary legislative indication.

[22] *Fleming v. Massey*, 2016 ONCA 70 at para. 34; leave to appeal to the SCC dismissed with costs, 2016 CanLII 33997; citing *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 at 214.

[23] The finding by the Court of Appeal in Fleming makes is abundantly clear that the release provision under the Resignation Agreement cannot operate to preclude the Board, or the Plaintiff for that matter, from exercising rights and discharging obligations under the WSIA. As a matter of law, parties cannot contract out of the scheme under the WSIA. Accordingly, it is plain and obvious

that the Plaintiff's claim for breach of contract based on the Board's effort to seek a review of her initial entitlement decision by the WSIB simply fails to disclose a reasonable cause of action.

[24] In arriving at this finding, I also am mindful of ss. 118(1), (2), (3) and (4) of the WSIA which provide the WSIB with exclusive statutory jurisdiction that cannot be restrained by a proceeding in court:

> 118 (1) the Board has exclusive jurisdiction to examine, hear and decide all matters and questions arising under this Act, except where this Act provides otherwise.
>
> (2) Without limiting the generality of subsection (1), the Board has exclusive jurisdiction to determine the following matters:
>
> [...]
>
> 2. Whether personal injury or death has been caused by an accident.
>
> 3. Whether an accident arose out of and in the course of an employment by a Schedule 1 of Schedule 2 employer;
>
> [...]
>
> (3) An action or decision of the Board under this Act is final and is not open to question or review in a court.
>
> (4) No proceeding by or before the Board shall be restrained by injunction, prohibition or other process or procedure in a court or be removed by application for judicial review or otherwise in a court. [emphasis added]

[25] Of particular note is the strongly worded privative clause at s.118(4) of the WSIA that precludes a party from restraining proceedings before the WSIB by pursuing a claim or remedy in court; *Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 719 at para. 22. While the legislature cannot completely oust the jurisdiction of the Superior Court, which is

derived under s. 96 of the *Constitution Act, 1867*, I find that s. 118(4) precludes the Plaintiff from pursuing her breach of contract claim to restrain the Board from taking part in proceedings before the WSIB involving her workers' compensation claim under the WSIA; *Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121 at paras. 54-56, 59 and 66.

Claim for breach of contract by filing affidavit

[26] The Defendants argue that it is plain and obvious that the Plaintiff's claim based on Chief Larkin's affidavit has no reasonable prospect of success. I agree with this.

[27] The Amended Statement of Claim pleads that Chief Larkin swore an affidavit on December 21, 2017 to defend a class action lawsuit (Court File No. CV-17-2346-00) which made allegations alleged of systemic and institutional gender-based discrimination and harassment. Specifically, the claim pleads that Chief Larkin attached to his affidavit a chart prepared by the Human Resources Division of the police service to show complaints to the Human Rights Tribunal that female employees had made in the last five years, together with their status or resolution. The affidavit expressly states that this chart provides non-identifying information to preserve the identities of the complainants, with the exception of the representative class action plaintiff whose complaint to the Human Rights Tribunal remained outstanding when the affidavit was sworn.

[28] The claim pleads that the attached chart to Chief Larkin's affidavit is titled "*Police Officer initiated Ontario Human Rights Complaints*" and lists four (4) female officers who are identified as follows:

a. One female officer is named and the three remaining female officers are not.

b. Of the three-unnamed female officers, two are listed as "Constables" and one as "Sergeant."

[29] Of the two unnamed "Constables" who are mentioned in the chart, the Amended Statement of Claim pleads that one complaint is shown as having had been resolved in the following manner:

i. "SETTLED: - monetary settlement, - withdrawal of OHRT application - voluntary resignation."

[30] The claim pleads that only one female officer is listed on the chart as having "voluntarily" resigned. By process of elimination, the claim asserts that Chief Larkin's affidavit has the effect of identifying the Plaintiff as she is the only female constable employed by the Board over the past five years who had filed a human rights complaint and voluntarily resigned.

[31] In pleading a breach of contract, the Amended Statement of Claim states that Chief Larkin's public disclosure was not required by law, contained sufficient information to identify the Plaintiff, and violated the terms of the Resignation Agreement.

[32] The Defendants submit that Chief Larkin's affidavit does not disclose information in breach of the confidentiality term of the Resignation Agreement, and thus does not give rise to a reasonable cause of action for breach of contract. According to the Defendants, the Plaintiff's claim that the affidavit contains sufficient information for the plaintiff to be identified is wholly speculative and remote at law. In any event, as Chief Larkin's affidavit was delivered for use in court proceedings, the Defendants submit that it is covered by absolute privilege and cannot form the basis of the Plaintiff's claim for breach of contract. They rely on a body of jurisprudence which supports the proposition that statements made in the course of a judicial proceeding, including statements in pleadings and other documents made for the proceeding, are subject to absolute privilege and cannot ground a cause of action.

[33] From the information pleaded in the <u>Amended</u> Statement of Claim, I recognize that Chief Larkin's affidavit, on its face, does not directly identify the Plaintiff or the other complainants who are mentioned in it. I accept that the references in the affidavit to the four (4) female complainants are oblique and anonymized to some degree. However, given that the pool of female complainants is fairly small and features only four members, with one member apparently named given her known role as a representative plaintiff in the class action, it is unclear to me just how anonymous the remaining three complainants actually are to those with some knowledge of the police service. This may be

particularly true in the case of one complainant who is identified in the affidavit as having the rank of sergeant. In the circumstances, it seems less than clear whether Chief Larkin's affidavit sufficiently preserves the Plaintiff's confidentiality. Accordingly, I find that the issue of whether the unnamed reference in Chief Larkin's affidavit is sufficiently capable of identifying the Plaintiff and breaches the confidentiality term of the Resignation Agreement remains an open question.

[34] Regardless of the foregoing, however, it is clear that Chief Larkin's affidavit was prepared and used in a court proceeding. Accordingly, I find that the affidavit is covered by absolute privilege and cannot support the Plaintiff's claim in breach of contract.

[35] Brown J.A. for the Court of Appeal has explained that, "*The doctrine of absolute privilege contains several basic elements: no action lies, whether against judges, counsel, jury, witnesses or parties, for words spoken in the ordinary course of any proceedings before any court or judicial tribunal recognized by law; the privilege extends to documents properly used and regularly prepared for use in the proceedings;*" *Salasel v. Cuthbertson*, 2015 ONCA 115 at para. 35, citing *Amato v. Welsh*, 2013 ONCA 258 at para. 34. In determining whether absolute privilege applies to a communication, the analysis necessarily focuses on the occasion that the communication is made, not its content; *Salasel* at para. 46. This immunity extends to any and all causes of action, however framed, and is not limited to actions for defamation; *Salasel* at

para. 38, and *Samuel Manu-Tech Inc. v. Redipac Recycling Corp.*, [1999] O.J. No. 3242 (C.A.) at para. 20. A claim based on communications which take place during, incidental to, and in the furtherance of a court proceeding is subject to absolute immunity; *Cook v. Milborne*, 2018 ONSC 419 at paras. 17-19. The existing doctrine of absolute privilege affords a fulsome immunity that is broadly applied to all matters done *coram judice,* and is unaffected by whether the evidence was given in bad faith and actual malice or without justification or excuse; *Cook* at paras. 19-21; *Fabian v. Margulies* (1985), 53 O.R. (2d) 380 (C.A.) at para. 9, *Lincoln v. Daniels*, [1962] 1 Q.B. 237 (C.A.) at 257-8.

[36] In view of the foregoing, it is plain and obvious that the Plaintiff's claim for breach of contract arising from Chief Larkin's affidavit discloses no reasonable cause of action. His affidavit clearly was used in defending a class action in court, which the Amended Statement of Claim expressly acknowledges. To the extent that the claim rests on this affidavit, it has no reasonable chance of success in law and should not continue; *Cook* at paras. 21, 32-33 and 57; see also *Gray Investigations Inc. v. Mitchell*, [2007] O.J. No. 1936 (S.C.J.) at paras. 17-20, and *Dooley v. C.N. Weber Ltd.* (1994), 19 O.R. (3d) 779 (Gen.Div.).

[37] From my review of the Amended Statement of Claim, I further find that the pleading is insufficient to establish an independent cause of action against the personally-named defendant, Bryan Larkin. The pleading identifies him as the Chief of the police service and an employee of the Board. The claim gives no

indication that he acted outside the scope of his employment duties. While recognizing that he swore the affidavit that the Board relied upon in defending the class action, the claim does not set out separate facts against him or personal interests that are independent from the breach of contract claim against the Board. Rather, the claim against both Defendants is essentially the same. It was the Board, and not Chief Larkin, which was party to the Resignation Agreement, although he signed the agreement on behalf of the Board. As such, and in the circumstances of this case, I find that he is protected from personal liability; *Lussier v. Windsor-Essex Catholic District School Board*, [1999] O.J. No. 4303 (Div. Ct.) at paras. 17-18, citing *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.) at 104.

No Leave to Amend

[38] I recognize that leave to amend a pleading should not lightly be withheld; *Conway v. L.S.U.C.*, 2016 ONCA 72 at paras. 16-18. However, given the context of this case, it is plain and obvious that no tenable cause of action supporting a breach of contract claim under the Resignation Agreement is possible. The Amended Statement of Claim essentially frames a tandem breach of contract claim by relying on the Defendant's effort to review the Plaintiff's initial entitlement decision by the WSIB, and by also relying on Chief Larkin's affidavit to defend the class action proceeding. As explained above, it is plain and obvious that these material facts cannot possibly give rise to a breach of contract

given the parties' inability to contract out of the WSIA and the absolute privilege that attached to the affidavit. No opportunity to amend the pleading could alter this and realistically preserve the action. Accordingly, leave to amend is denied.

Conclusion

[39] The Amended Statement of Claim is struck under Rule 21.01(1)(b) without leave to amend.

[40] The Defendants' motion to strike was also brought under Rules 21.01(3)(a) and 21.01(3)(d), respectively. For the reasons set out above, I am satisfied that this motion is fairly and fully disposed of under Rule 21.01(1)(b) without the need for recourse to these other grounds.

[41] I strongly encourage the parties to agree on costs. If they are unable, the Defendants may deliver cost submissions not to exceed three (3) pages (excluding any cost outline and offer(s) to settle) within fifteen (15) days from this judgment, followed by the Plaintiff's cost submissions on the same terms within a further fifteen (15) days. No reply submissions are permitted without leave.

(Original signed by Justice Doi)

Doi J.

Released: February 21, 2019

CITATION: Donovan v. Waterloo Regional Police Services Board, 2019 ONSC 1212
COURT FILE NO.: CV-18-1938
DATE: 2019 02 21

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

KELLY LYNN DONOVAN

Plaintiff

- and -

WATERLOO REGIONAL POLICE SERVICES BOARD and BRYAN LARKIN

Defendants

REASONS FOR JUDGMENT

Doi J.

Released: February 21, 2019

TAB C

Sun Oil Co. v. City of Hamilton and Veale

[1961] O.R. 209

ONTARIO
[COURT OF APPEAL]
PORTER, C.J.O. MACKAY
AND MORDEN, JJ.A.
25TH JANUARY 1961

1961 CanLII 121 (ON CA)

Municipal Corporations IV B -- Motions & Orders -- Whether validity of by-law determinable on originating motion or motion to quash -- Municipal Act (Ont.), s. 296 -- R. 604 (Ont.) -- Whether by-law an "instrument".

After a municipal by-law has been duly passed, its validity cannot be determined upon an originating motion nor can the Court entertain a motion to quash. The effect of s. 296 of the Municipal Act, R.S.O. 1950, c. 243 cannot be avoided by bringing an originating motion to have a by-law declared inapplicable to a business covered thereby, on the ground of want of power to enact it. Assuming that a by-law is an "instrument" within R. 604 (Ont.), the only jurisdiction on an originating motion is to interpret the by-law and not to determine its validity. Held, on appeal, in so far as the Judge below purported to interpret an "automobile service station" licensing by-law, he was wrong in concluding that it did not apply to a proposed gasoline service station business and it was also clear that a separate licence was required to each location.

[Re Clements & Toronto, 20 D.L.R. (2d) 497, [1960] O.R. 18; Rigden v. Whitstable Urban Dist. Council, [1959] Ch. 422, folld; City of Toronto v. Can. Oil Companies Ltd., 45 O.L.R. 225, apld; City of Windsor v. Dapco Ltd., 19 D.L.R. (2d) 688,

[1959] O.W.N. 238, refd to]

APPEAL from an order of Stewart, J., on a motion respecting the applicability and validity of a by-law. Reversed.

J.T. Weir, Q.C., for appellants; R.C. Sharp, Q.C., and David Pozer, for applicant, respondent.

The judgment of the Court was delivered by

MORDEN, J.A.:-- This is an appeal by the City of Hamilton and its Building Commissioner from an order made by Mr. Justice Stewart on May 13, 1960.

Sun Oil Company Ltd., the respondent to this appeal, moved by originating notice for an order of mandamus directing the appellants to issue permits for the erection and operation of a gasoline service station upon certain lands fronting on Aberdeen Ave. in Hamilton. Before this motion was heard, the applicant served a further notice stating that it would also move "for a declaration that by-law 3022 of the Corporation of the City of Hamilton does not apply for the purpose of licensing and regulating owners of Gasoline Service Stations or alternatively if the said by-law does apply, that such an owner is not required to obtain more than one licence to carry on the business of a Service Station Operator in the City of Hamilton at different locations". By-law 3022 is the city's general licensing by-law.

The learned Judge of first instance, after hearing the motion on March 15, 1960, reserved his judgment until May 13th when he made a declaration "that By-law Number 3022, being a by-law of the Corporation of the City of Hamilton, does not apply for the purpose of licensing and regulating owners of gasoline service stations". In view of this declaration the learned Judge was not required to deal with the relief asked alternatively to it. No reasons were given. No disposition was made of first notice asking for mandamus.

1961 CanLII 121 (ON CA)

The appellants base their appeal to this Court upon two grounds -- (1) the learned Judge lacked jurisdiction to make the declaration and (2) he misdirected himself as to the meaning and effect of the by-law.

The view I take of the law applicable to the procedure taken by the applicant and of the effect of the Judge's failure to dispose of the motion for mandamus renders much of the argument we heard irrelevant. It is to be regretted that our decision on this appeal will not settle of the important issues between the parties. In my opinion, neither the learned Judge of first instance nor this Court can in these proceedings pass upon the validity of the whole or of any part of By-law 3022.

The paragraphs of the by-law dealing with automobile service stations were passed in 1951. Their validity cannot now be determined upon an originating motion: Re Clements & Toronto, 20 D.L.R. (2d) 497, [1960] O.R. 18. The Court cannot at this late date entertain a motion to quash any part of the by-law.

The effect of s. 296 of the Municipal Act, R.S.O. 1950, c. 243, cannot be avoided by bringing an originating motion for an order declaring that any part of the by-law is inapplicable to a particular trade or business, purportedly governed by it, on the ground that the city lacked the legislative power to enact that part. Nor can R. 604 be invoked where the validity of an instrument is the issue to be decided: Rigden v. Whitstable Urban Dist. Council, [1959] Ch. 422. To obtain a decision upon the validity of the by-law or any part of it, the applicant should have instituted proceedings by writ of summons. In proceedings as now constituted we are bound, as was Mr. Justice Stewart, to assume that the by-law is valid and for this reason we cannot consider and express our opinion upon many interesting submissions advanced by Mr. Sharp. For instance, he argued that in 1951, the city had no legislative power to pass a by-law licensing and regulating gasoline service stations and in support of this contention he cited the decision of LeBel J. (as he then was) in Can. Oil Companies Ltd. v. City of London, 5 D.L.R. (2d) 230, [1956] O.R. 878. In my opinion, it is unnecessary, in fact it would be improper,

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for this Court upon this appeal to decide whether that case and City of Toronto v. Can. Oil Companies Ltd. (1919), 45 O.L.R. 225, were correctly decided. For the same reason we can not express our opinion whether or not the by-law is invalid because it does not contain a series of rules governing the issue of licences.

Upon the assumption that By-law 3022 is valid in all respects then the only possible jurisdiction Mr. Justice Stewart had was to interpret it. This can only be found in R. 604 which reads: "Where the rights of any person depend upon the construction of any deed, will or other instrument, he may apply by originating notice, upon notice to all persons concerned, to have his rights declared and determined." This Court has recently on two occasions expressed grave and serious doubts whether a municipal by-law is an "instrument" within the meaning of the rule: City of Windsor v. Dapco Ltd., 19 D.L.R. (2d) 688, [1959] O.W.N. 238; and Re Clements & Toronto, supra. The appellants' counsel made no submissions upon this point. Counsel for the respondent argued that the doubts expressed by this Court were obiter dicta and that they should give way to the contrary practice of single Judges beginning in Blainey v. Toronto, [1935], 4 D.L.R. 328, O.R. 476. However, because I have concluded that if the learned Judge of first instance did in fact interpret the by-law, he was incorrect in his interpretation and should have refused to make the declaration he did, I am not compelled to decide whether or not R. 604 empowers the Court to interpret municipal by-laws.

The relevant parts of By-law 3022 are as follows:

1. The charges hereinafter set forth are hereby fixed and shall be levied and collected from all persons obtaining licences for the several trades, businesses or objects hereinafter mentioned.....

(36) For a licence for

Automobile Service Station

(c) A building or place where gasoline and oils are stored

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or kept for sale. Where only one service hose for supply of gasoline or motor fuel oil to motor vehicles,

-- an annual fee of $10.00

for each additional service hose,

-- an annual fee of $7.50

2. No person shall carry on in the City of Hamilton any trade, business, calling or affairs, mentioned in this By-law without first obtaining a licence therefor, and paying the fee for such licence required by this By-law.

(2) No such licence shall authorize any person to carry on any such trade, business, calling or affairs at any premises, other than those identified in the licence certificate issued.

(3) No licence issued pursuant to a by-law of the City Council shall be transferred either from the licencee to any other such person or corporation, or so as to authorize the carrying on of any such trade, business, calling or affairs at any building or place other than that for which the licence was issued, save upon application in writing filed with the City Clerk, together with a fee of one dollar.

It is plain to me that the applicant's proposed business comes within the ordinary meaning of "a building or place where gasoline and oils are stored or kept for sale". Very similar words were held by Masten, J., in City of Toronto v. Can. Oil Companies Ltd., 45 O.L.R. 225, to comprehend a gasoline service station. Mr. Sharp argued that the by-law should be interpreted as applying only to public garages as defined by s. 388(1) (121) (a) (before it was amended by 1958, c. 64, s. 29(7) of the Municipal Act and not to "automobile service stations" as defined by s. 388(1)(122)(a) of the Act which he submitted the city had in 1951 no power to license or regulate generally. This contention, in effect, raises the issue of the validity of s. 1(36) of the by-law which, for reasons I have endeavoured to state, cannot be decided in these proceedings.

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The respondent's counsel further argued that the by-law did not require an owner to obtain more than one licence to operate several service stations in the city. From the fact that he advanced this argument, I infer that the respondent already holds at least one licence granted by the City of Hamilton. The extracts I have quoted from the by-law require, in my view, a separate licence for each location. Here again Mr. Sharp challenges the power of the City Council to enact a by-law requiring more than one licence from the same person which he submits is beyond the powers conferred upon the city by s. 388(1) (121). This raises an issue of validity and not one of interpretation.

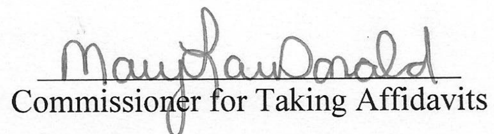
Fianlly, on the assumption that the by-law is valid and applies to service stations and requires a separate licence for each location, counsel for the respondent urged this Court to send the matter back to the City Council for reconsideration because the Council in refusing the licence "took into account matters which were not proper for the guidance of its discretion and further that the Council did not exercise its discretion honestly, impartially and in good faith". This is a matter we assume was argued before Mr. Justice Stewart. However, he did not decide it; the order he made does not determine it; and it is still open to the respondent to pursue. In the circumstances no appeal was taken or could be taken upon this part of the case and this Court has no original jurisdiction which would empower it to decide it.

For these reasons, I would allow the appeal with costs, set aside the order below and I would dismiss the motion, but only insofar as ti relates to the matters raised by the second notice, with costs.

Appeal allowed.

1961 CanLII 121 (ON CA)

This is **Exhibit "T"** referred to in the affidavit of Kelly Lynn Donovan
sworn on February 10, 2021.



Commissioner for Taking Affidavits

[illegible] Louise Donald, a Commissioner, etc.,
County of Brant, for the Government of Ontario,
Ministry of the Attorney General.

Mr. Donald Jarvis
Filion Wakely Thorup Angeletti LLP
Bay Adelaide Centre
333 Bay Street
Suite 2500, Box 44
Toronto, Ontario
M5H 2R2

Delivered by email

Re: Donovan v. Waterloo Police – Court File No. CV-18-1938

April 27, 2020

Dear Mr. Jarvis and Ms. Ma;

I clearly understand from your material filed with Justice Doi on April 3, 2020, that you adamantly disagree with the arguments I put forth in my March 17, 2020, submission. You were clear in your letter dated April 23, 2020, that your client intends to pursue a Rule 59.06(1) motion, as suggested by Justice Doi in his endorsement dated April 20, 2020.

I am writing you to bring a recent case to your attention, and to hopefully prevent unnecessary expense to both myself and your publicly funded client, the WRPSB, and Bryan Larkin. Hopefully, when your clients learn of this recent decision, “cooler heads” will prevail.

The case is; *Lantin et al v. Seven Oaks General Hospital*, 2019 MBCA 115. I have attached it for your reference.

Although the case referenced above occurred in the Court of Appeal of Manitoba, the Rules are identical to ours in Ontario. In the case above, the Court of Appeal allowed an appeal, and then afterwards the lower court amended their judgment (which had been overturned), and it was not a minor change. Court of Queen’s Bench Rules, Reg. 553/88, Rule 59.06(1) is identical to Rule 59.06(1) of the Rules of Civil Procedure.

At paragraph 28 of the decision, Justice of Appeal Mainella explains that a Justice of the lower court amending a decision dated before the order of the Court of Appeal was an error in law. Paragraph 31 states; “The idea of two judgments existing at the same time for the same parties on the same cause of action is both illogical and contrary to the law.” Using the same logic as in *Lantin*, at para. 32, “the only judgement that was in effect between the parties” was the one given by the Ontario Court of Appeal allowing my amended claim to proceed. In accordance with Rule 61.16(6.1), any omission from the judgment should be addressed with the Ontario Court of Appeal.

Your clients have asked the lower court to reconsider the Order made on March 20, 2019, because your clients believe that courts never had jurisdiction of my claim and it should therefore be dismissed. That would not be a minor change to the original order, and it would be a change to an order that no longer exists.

It is unfortunate that your clients' alternate grounds to dismiss my claim were not explicitly addressed in Justice Doi's decision, however, not having raised the omission on appeal appears to have been a critical error on their part, as Justice Doi's judgment is no longer in effect.

I understand I will be given the opportunity to properly argue my position when your motion is finally scheduled and heard. However, being made aware of the recent case above, and still deciding to bring this motion, may be considered improper or an act of bad faith.

To save us both from the unnecessary expense and delay, I propose that your clients reconsider their desire to attempt to re-open the issue of jurisdiction, withdraw their desire to proceed with a Rule 59.06(1) motion in Brampton and provide their statement of defence forthwith in order that this litigation can proceed on an evidentiary record, as was recommended by the Court of Appeal. I had already pointed out to you, that your clients' statement of defence has not been provided in accordance with the Rules, and that your letter to Justice Doi was submitted one day after the 20-day period to submit their statement of defence had elapsed.

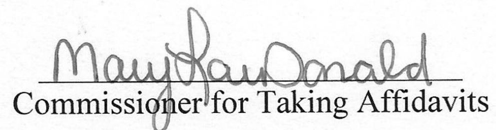
Should an amendment be proposed to the Order dated October 25, 2019, by the Ontario Court of Appeal, to satisfy your client's desire to explicitly address any outstanding matter in this proceeding, which does not change the outcome of the Order, I may be inclined to consent to the amendment without the need for the hearing of a motion, at your clients' expense. Alternatively, proceeding with their Rule 59.06(1) motion may provide grounds for additional orders or appeals.

I would also like to remind your clients that I have not withdrawn my June 5, 2019, offer to settle.

With respect,

Kelly Donovan

This is **Exhibit “U”** referred to in the affidavit of Kelly Lynn Donovan
sworn on February 10, 2021.



Commissioner for Taking Affidavits

... a Commissioner, etc.,
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May 6, 2020

SENT VIA E-MAIL

Kelly Donovan
14 Laurie Ann Lane
Paris, Ontario N3L 4H4

Dear Ms. Donovan:

Re: Waterloo Regional Police Services Board and Bryan Larkin ats. Kelly Lynn Donovan (Court File No. CV-18-00001938-0000)

We confirm receipt of your correspondence dated April 27, 2020. We have thoroughly reviewed the case that you provided, *Lantin et al. v. Seven Oaks General Hospital*, 2019 MBCA 115 ("*Lantin Appeal #2*"). It is our view that *Lantin Appeal # 2* is factually distinguishable from the instant proceeding and, in fact, consistent with our client's proposed Rule 59.06(1) motion.

In the trial decision of *Lantin et al. v. Sokolies et al.*, 2017 MBQB 40 ("*Lantin*"), the Manitoba Court of Queen's Bench awarded damages totalling $1,539,145.51 after the plaintiff successfully brought a medical malpractice action. This damages award was comprised of $175,000 in non-pecuniary damages, $1,300,000 in damages for loss of earning capacity; and $64,145.51 for a subrogated claim. The Order of the Trial Judge was signed on May 18, 2017.

The defendant appealed the amounts awarded for non-pecuniary damages and damages for loss of earning capacity to the Manitoba Court of Appeal (2018 MBCA 57, referred to hereinafter as "*Lantin Appeal #1*"). At this appeal, the Trial Judge was found to have failed to make any allowance for contingencies when assessing the plaintiff's loss of earning capacity. This error in law had resulted in an inordinately high damages award. Accordingly, the Court of Appeal lowered the damages awarded for loss of earning capacity from $1,300,000 to $525,000. The amount for non-pecuniary damages, however, was expressly left intact. The Court of Appeal's Order was entered on June 19, 2018.

Following *Lantin Appeal #1*, the plaintiff brought a Rule 59.06(1) "slip rule" motion before the Manitoba Court of Queen's Bench, seeking amendment of the May 18, 2017 Order by the Trial Judge (2018 MBQB 160, referred to hereinafter as "*Lantin Motion*"). Specifically, the plaintiff's motion sought a 3% per annum upwards adjustment of the non-pecuniary damages award pursuant to section 80(3) of *The Court of Queen's Bench Act*, which required the Court to make allowance for the plaintiff's lost opportunity to invest the non-pecuniary damages amount. The Motion Judge granted the plaintiff's motion and the resulting amendment added $43,682.88 to the original non-pecuniary damages award of $175,000 (or a total non-pecuniary damages award of $218,682.88).

The *Lantin Motion* decision was appealed by the defendant and overturned in *Lantin Appeal #2*. The Court of Appeal found that the Motion Judge was incorrect in concluding that *Lantin Appeal #1* made no difference to her ability to amend the May 18, 2017 Order. To the contrary, the June 19, 2018 Order of the Court of Appeal had replaced the Trial Judge's May 18, 2017 Order, such that the May 18, 2017 Order was effectively no longer in existence or available for amendment. By permitting the amendment, the Motion Judge essentially acted as though both the Trial Judge's Order and the Court of Appeal's Order were simultaneously in effect. This would lead to the illogical result of the plaintiff being entitled to a single award of non-pecuniary damages that was, at the same time, $175,000 or $218,682.88.

Notably, the plaintiff had not raised the issue of a section 80(3) adjustment until **after** the *Lantin Appeal #1* Order had been entered. This is a critical difference from the instant proceeding: as you are aware, the Defendants raised the issue of jurisdiction in their Notice of Motion and the matter was fully argued in the original motion before Mr. Justice Doi.

Further, in *Lantin Appeal #2*, the Court of Appeal expressly acknowledged the possibility of multiple final judgments in the same action where the judgments pertain to different issues in the action:

> [31] The idea of two judgments existing at the same time for the same parties **on the same cause of action** is both illogical and contrary to the law. The correct statement of principle is set out as follows in WB Williston & RJ Rolls, *The Law of Civil Procedure* (Toronto: Butterworths, 1970), vol 2 at 1022: "**More than one final judgment may be given in an action or proceeding if several causes of action or issues are decided at different times**, but if there is only one cause of action only one judgment can be given."
>
> [Emphasis added]

As stated in our April 3, 2020 submissions to Mr. Justice Doi, the Defendants seek a ruling on the previously-argued jurisdiction issue. Neither Mr. Justice Doi nor the Court of Appeal for Ontario has decided this issue. This fact is another material distinction between *Lantin Appeal #2* and the instant proceeding. We wholly agree that the only final judgment in effect regarding whether the Amended Statement of Claim discloses a reasonable cause of action is the October 25, 2019 decision of the Court of Appeal for Ontario. However, precisely because the Court of Appeal decided only that issue (i.e. whether the Amended Statement of Claim discloses a reasonable cause of action) and **not** whether the subject matter of the Amended Statement of Claim is within the jurisdiction of the Court, no conflict of judgments will arise if the Ontario Superior Court of Justice now rules on the jurisdiction issue. Put simply, there has never been any judgment, let alone a final judgment, with respect to the jurisdiction issue. This is the opposite of the situation before the Manitoba Court of Appeal in *Lantin Appeal #2*.

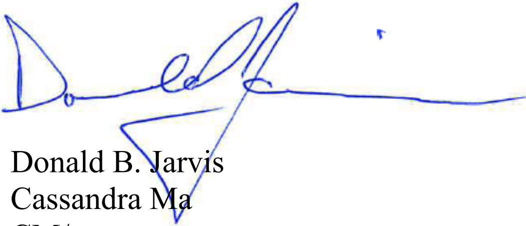
We also note that *Lantin Appeal #2*, being a decision of the Manitoba Court of Appeal, is not binding on the Ontario Courts.

In summary, our clients' proposed motion on jurisdiction is neither precluded by *Lantin Appeal #2* nor an act in bad faith. As you will recall from our various submissions to Mr. Justice Doi, the Defendants' position has always been that the jurisdiction issue must be determined by the Court at a preliminary stage, whether pursuant to Rule 59.06(1) or otherwise. Moreover, to be clear, the Defendants will be bringing this jurisdiction motion on the basis of Rule 59.06(1), Rule 21.01(3)(a), and any other applicable Rules. In any event, the purpose of this jurisdiction motion is to determine the central and fundamental question of whether your allegations against our clients may properly be heard by the Court. Ultimately, this will help to streamline the parties' proceedings before both the Court and the Human Rights Tribunal of Ontario, and be cost-effective for the parties. If our clients' position regarding jurisdiction is correct, the parties will save the expense and time associated with potentially unnecessary discovery and litigation before the Court. Such an approach has been regarded positively by the Courts in past cases.

Although you have raised the possibility of consensually amending the Court of Appeal's October 25, 2019 Order to address the outstanding issue of jurisdiction, this Order cannot be amended to include matters that were not argued before the Court of Appeal. It is precisely this state of affairs that led to our February 19, 2020 request for direction from Mr. Justice Doi.

Should you have any questions regarding the foregoing, or wish to discuss other measures for the efficient processing of all outstanding proceedings, please do not hesitate to contact our office.

Yours truly,



Donald B. Jarvis
Cassandra Ma
CM/

Encl.

cc Ms. Virginia Torrance, Regional Municipality of Waterloo Police Services Board

Date: 20170308
Docket: CI 09-01-59760
(Winnipeg Centre)
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Cited as: 2017 MBQB 40

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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

JOCELYN LANTIN, AS LITIGATION GUARDIAN FOR ALEXANDER LANTIN,	)	Counsel:
	)	
	)	Richard M. Beamish
plaintiffs,	)	for the plaintiffs
	)	
- and -	)	L. William Bowles and
	)	Michael T. Green
REX SOKOLIES AND SEVEN OAKS GENERAL HOSPITAL,	)	for the defendants
	)	
defendants.	)	JUDGMENT DELIVERED:
	)	March 8, 2017

McCAWLEY, J.

Introduction

[1] The plaintiff, Alexander Lantin ("A.J."), brings an action in negligence against the defendant, Seven Oaks General Hospital ("Seven Oaks"), having discontinued his action against the personal defendant, Rex Sokolies.

[2] Seven Oaks admits that it was negligent in its failure to communicate the findings in an x-ray taken of the plaintiff's chest on April 23, 2008, showing evidence of possible tuberculosis and recommending follow-up. However, Seven Oaks denies that, as a result of its negligence, it is responsible for the spread of

tuberculosis to the plaintiff's brain, resulting in injury and permanent disability, to the extent claimed. Accordingly, causation and damages are both at issue.

The Evidence

[3] A.J. is the eldest of four children. He and his family came to Canada from the Philippines in November 2006 and he immediately went into Grade 10 high school at Maples Collegiate.

[4] A.J. had been educated in a private Jesuit school in the Philippines and was comfortable speaking English. His family and extended family are all well educated and include doctors, engineers, lawyers, bankers, and accountants. The family places a high value on the importance of education to the extent that A.J.'s mother, Jocelyn Lantin, told the court "if you don't have a good education you are not accepted in the family." The clear expectation of his parents was that A.J. would go to university and continue on to a post-secondary degree.

[5] Like his siblings, A.J. did exceptionally well in school, as is evidenced by his high school transcripts in 2007. His mother described him as the "smartest child" of hers growing up and said he showed an entrepreneurial inclination from the time he was little. In addition to being academically accomplished, A.J. excelled at sports and particularly loved playing basketball. He was also a musician and in 2007 taught himself to play the guitar and became the lead guitarist in a band he formed.

[6] The evidence disclosed that A.J. loved school and never had to be told to study. He was particularly passionate about mathematics and was helped by

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what his mother described as a "photographic" memory. A.J. himself testified that math came easily to him. He described it as being as though he had an imaginary white board in his head where he could see all of the answers. In his first year of high school he voluntarily tutored other students in math and said he was interested in a career in accounting or as an actuary, although he did not know much about the latter.

[7] As the eldest child in the family, high expectations were also placed on him to be a role model to his brothers and sister and to ultimately look after his parents. Accordingly, a well paying professional job was important to him. Prior to becoming ill and being diagnosed with tuberculosis, he felt full of confidence that whatever he tried he would succeed at. However, everything changed after he got sick and, according to him, he was no longer able to do whatever it was that he set out to do.

[8] He testified he came to understand what it was like for the students he had tutored before, who had a difficult time understanding mathematical concepts, and said he had to relearn things he already knew as well as adapt and learn in different ways as a result of his brain injury. He also said that after his illness it felt like, if he put something on his imaginary white board, every three seconds someone erased it.

Chronology of Events

[9] A.J.'s first hospital visit took place in February 2008 when he was in Grade 11. Up until this time he had no physical or mental problems, but in early

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2008, he started to get sick. His symptoms included a runny nose, fever, an aching body and some fatigue, although he said the fatigue was not that serious. His mother testified that he was also having difficulty breathing. His parents took A.J. to Seven Oaks Emergency where they saw his family doctor, Dr. Milambiling. A.J. was sent for a chest x-ray which came back normal and it appeared that he was likely suffering from some kind of flu or virus.

[10] However, his symptoms worsened and, in March 2008, he went to the hospital a second time complaining of joint pain, more fatigue and fever. Again he saw Dr. Milambiling who ordered a number of tests. He also referred A.J. to a liver specialist who determined he had an enlarged spleen.

[11] A.J.'s symptoms continued to worsen. He was now experiencing night sweats, extreme fatigue, continuing body aches and he was losing weight. He said he had no energy to study and was drinking Red Bull to keep his energy up. When he started experiencing chest pains from coughing on April 23, 2008, his father again took him to the Emergency department of Seven Oaks, his third hospital visit. Chest x-rays were ordered by the attending Emergency physician, who viewed the results and found them to be within normal limits. A.J. was discharged. The next day, April 24, 2008, his chest x-ray was reviewed by a radiologist who dictated and had a report transcribed indicating that the x-ray showed the possibility of tuberculosis and required follow-up. These results were never communicated to anyone and it appears that the report was filed in error.

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[12] A.J.'s symptoms continued to get worse. He indicated that sometimes his night sweats were so bad he would lie on the floor so he would not soak his bed. By this time not only was he suffering from extreme fatigue, he was very weak and was missing a considerable amount of school.

[13] A.J. described an event that took place on May 25, 2008, when he was attending his girlfriend's mother's wedding, and became dizzy, lost his vision and had difficulty walking. By June 2008 his headaches were frequent and he was not going out much. He said he was having problems functioning and had another episode, like the one on May 25, 2008. As a result, on June 17, 2008, his parents took him again to Seven Oaks where he saw Dr. Dominique who scheduled an MRI for A.J.

[14] The MRI was scheduled for July 10, 2008, at the Health Sciences Centre. It was his fifth visit to the hospital. By this time A.J. was extremely sick and said he looked like a skeleton. He found it difficult to move and said he was missing family events and unable to do the things he used to including playing basketball and guitar. He said he felt "scared" and "frustrated." The MRI disclosed that he had what he described as "100 bubbles in my brain" – 80 to 100 lesions – and he was diagnosed and admitted to the hospital with tuberculosis. His mother testified that they understood his diagnosis of tuberculosis was not only extremely serious, but potentially fatal, and that the lesions in his brain were irreversible.

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[15] A.J. went through a battery of tests and x-rays and saw "lots of doctors." A few days before his seventeenth birthday, on July 24, 2008, he suffered a stroke, although he said it was two days before the doctors actually used the word "stroke" with him to describe what had happened. He became quite emotional in describing this event and described how confused, helpless and scared he felt. For a couple of days he had no movement at all on his right side, but he knew there was a small window within which to regain mobility and he was determined. He described his physiotherapy to the court which included using dumbbells and picking up Cheerio's and putting them into a cup. All of this was overwhelming to him, but he persevered.

[16] A.J. seemed to be making good progress, but on July 29, 2008, he suffered a grand mal seizure after returning from a physiotherapy session, which he again described in detail. He told his mother he could see himself being born and that visions of his life passed before him like a film. At one point, during this episode, he begged to die. Afterwards, he felt hopeless and thought that he would never be able to leave the hospital. He also asked to stop physiotherapy because he thought it had triggered the grand mal seizure.

[17] A.J. was referred to a psychiatrist while he was in the hospital. According to his mother, he saw the psychiatrist two or three times to talk about how he was feeling although A.J. could not remember this. She also said she started to blame herself for what had happened and wondered if there was something that she had missed. It was only later she discovered that someone at the hospital

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had failed to do their job and the radiologist report had likely been filed in error. The impact of what had happened to A.J. as a result are reflected in her words, “my own son died that day.”

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[18] A.J. was discharged from the hospital on August 15, 2008. He felt “embarrassed,” “hopeless,” and “really depressed.” In court he could not remember some things that occurred around this time due to mental confusion, although this appeared to have improved by the time he saw Dr. Yankovsky in November 2008.

[19] In September 2008, A.J. returned to high school and entered Grade 12, although his neurologist had suggested he take a year off. He said he did not want to miss a year of school and wanted to “get back to plan,” “stay on track,” and “not slow down.” He also thought going to school would help him regain who he was. He pushed himself hard. Although he was using a cane and testified a ten minute walk would now take him 30 minutes, he refused to take the bus. Even though he had trouble with his right foot, he would take the stairs at school. He told the court he could no longer play the guitar and eventually gave it up and left the band, and he could no longer participate in basketball and the other sports he had previously enjoyed. He said he even could not swim because his right side would sink and that he “felt like [he was] carrying a dead body within my body.”

[20] Learning was difficult and he found retaining information problematic. He said he had to relearn how to learn and study, and also had to find new tools

because he no longer had the aptitude for visual learning he once had. He said it felt "like the information was just passing through me" and would not stick, which he found extremely frustrating.

[21] These difficulties were confirmed by his mother who testified that A.J. was having a hard time and it was difficult for him to understand more difficult concepts. She said he found it hard to focus, was constantly tired and was unable to play basketball, study late at night or play the guitar.

[22] His mother also testified that A.J.'s interaction with the family was noticeably different. Whereas he used to joke around and tell stories, he spent more and more time by himself in his room, was easily irritated and was "not the old A.J."

[23] Despite this, he remained determined and promised he would walk faster than his youngest brother by his first birthday, although this did not happen. Although his marks at school had dropped, he insisted he still wanted to go into the Faculty of Business when he went to university.

[24] Much time was spent during the trial on A.J.'s marks at school. Particular attention was paid to his math mark. In Grade 10 (2006/2007), he took pre-calculus and got 98 per cent. In Grade 11 (2007/2008), he got 85 per cent and, in Grade 12 (2008/2009), his mark fell to 69 per cent. His school records showed he had a significant number of absences, and he was on a number of medications at this time.

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[25] A.J. testified that he needed pre-calculus 40S in order to get into the Faculty of Business as well as to be eligible for the grants and bursaries he hoped to get. In order to go directly into the Faculty of Business from high school he also needed an 85 per cent average in his 40S classes. A.J. testified that he realized at this time that he could not do math anymore and that he had to accept that fact. He said he "felt like a Windows 98 computer trying to compute – before I was a math book." However, he still had not definitively given up on his plan to go into accounting or to become an actuary.

[26] This is evidenced by the courses he enrolled in at first year university in September 2009, having graduated from high school the previous June. Although in his first term his average ("GPA") was 2.75 and in his second term it was 2.88, he dropped his Math 1310 course in the fall and only got a C in the winter term in Math 1300. He also voluntarily withdrew from his Math 1500 (calculus) course.

[27] He testified that, whereas he was doing well in small tests, writing an exam was overwhelming and he was struggling. In cross-examination, he admitted that the last math exam he ever wrote was in linear algebra in the winter of 2010.

[28] A.J. saw Dr. Rafay on March 8, 2010, who reported that A.J. had had no seizures since the previous July, and it appeared his tuberculosis had been resolved with minimal scarring in the brain. Due to the marked improvement in his neuroimaging and no recurrence of tuberculosis, it was decided he would be

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weaned off Dilantin (which he was taking for seizures) in July 2010. Due to A.J.'s continuing concerns about his ability to learn, Dr. Rafay contacted Dr. Mustapha to arrange a neuropsychological assessment.

[29] A.J. said that by this time he was of the view that math and medicine were "out" for him and he was no longer pushing for a degree in business. He indicated he did not apply to be admitted to the Faculty of Business because he did not have the necessary prerequisites. In the fall of 2010, he was doing well at university and his average had gone up from 2.88 to 3.38. By February 2011, he was off Dilantin and his grades appeared much better. Still, he was not taking any math courses because he thought learning it was too difficult for him and Dr. Rafay had suggested he stay away from math and lean towards science.

[30] On April 14, 2011, A.J. underwent a neuropsychological assessment which showed that he had a "superior" rating in math although when questioned about this he described the questions as basic arithmetic, not math. To be clear, this was not a math test but part of a neuropsychological assessment which included some basic arithmetic, a point which was somewhat contentious at trial, although A.J. did express some pleasant surprise at the result.

[31] In the summer and fall of 2012, A.J. entered the Faculty of Social Work having not been accepted into the Faculty of Nursing. He had appealed the rejection of his nursing application, but his appeal was unsuccessful. He felt it was his physical disability and his difficulty in math that prevented him from being accepted into nursing. Reflecting back, he also thought that, because of

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the physically demanding nature of nursing, social work might also be a better fit for him. This was presumably a reason for his not trying to bring his GPA up to get into nursing at a later time.

[32] A.J. found the social work program relatively easy and, with proper accommodation (including more time to do assignments and writing tests in his own room), he was able to manage better although he said he worked very hard at it. He made the Dean's Honour List maintaining a 4.00 average and graduating with an overall GPA of 3.59. He also said he was still suffering from fatigue.

[33] In the spring of 2012, A.J. had done a practicum on fetal alcohol spectrum disorder ("FASD") but found he was unable to work full-time and unable to drive at this time. Upon graduating in 2013, he got a job at Child and Family Services ("CFS") as a protection worker. Although he found the work stressful, it was tolerable but eventually it became exhausting and he was unable to keep up as well as do the necessary travel.

[34] A.J. had seen Dr. Solbrig in January 2013 about difficulties he was having swallowing. Dr. Solbrig also noted that A.J. was completing daily eight hour practicums for social work and planned to enter the work force in that speciality. He was also thinking about obtaining a graduate degree. In March 2013, he saw Dr. Lamba who reported that A.J. was relatively stable, his right leg was "variable; comes and goes," and his concentration was "difficult but manageable."

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[35] In April 2014, A.J. was still working at CFS and, although he was finding the job stressful, it was tolerable. He was thinking ahead about what he might do in a year and considered the possibility of going into the health care field, again perhaps medicine or nursing.

[36] When A.J. saw Dr. Solbrig in June 2014, he was complaining of more weakness in his right leg and he felt he was tiring more easily. He said his driving was limited to one hour and that working a full day was stressful. Some aspects of it were disturbing to him. He also felt he was suffering from issues with respect to his emotional and mental well-being, was eating less, not sleeping well, and decided to give his notice to CFS so he could take some time off to "reset." Although stress counselling was suggested to him he did not take advantage of that and indicated to the court he still was not ready to talk about how he felt.

[37] Dr. Bal, a neurologist he saw, noted that A.J. quit his job with CFS due to weakness on his right side. In cross-examination, A.J. admitted this was only partly true and that he recognizes that he was still in denial about a number of other issues he was facing. Dr. Bal also reported that A.J. denied any new neurological symptoms of concern.

[38] In late fall of 2014, CFS offered A.J. an office job in a management capacity with reduced hours which was less stressful than being on the front line. He took it and things got better. He also found it easier to cope with because the hours were regular and, although there was some math involved, it was not

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complex. He was quite pleased when he created an Excel spreadsheet to track cases which were not meeting appropriate standards and stated "I find math everywhere I go," again an indication of his continuing passion for that area of study. He was still experiencing weakness in his right leg as he reported to Dr. Lamba on December 7, 2015, and, as always, he continued to have the support of his family.

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[39] Dr. Lamba also reported that A.J.'s central nervous system appeared stable. On March 12, 2015, Dr. Bal reported to Dr. Lamba that A.J. was doing well and appeared to be asymptomatic for the previous two years although he advised him to continue with therapy.

Issues

Causation

[40] Seven Oaks admits liability for damages resulting from the delay in A.J.'s diagnosis from shortly after his visit to the Emergency department on April 23, 2008, and his diagnosis with tuberculosis around July 15, 2008. Given that the extent of his injuries is at issue, as well as the monetary damages to which he is entitled, causation remains a live issue.

[41] The leading case on causation is the decision of the Supreme Court of Canada in *Athey v. Leonati*, [1996] 3 S.C.R. 458. It establishes the proposition that causation is proved where a defendant's negligence materially contributes to the occurrence of an injury to the plaintiff. A contributing factor is "material" if it falls outside the *de minimis* range. The court also went on to find that it is not

necessary for a plaintiff to prove that the defendant's negligence is the sole cause of the injury as long as the defendant is part of the cause of the injury. In other words, a defendant may be held liable even though his or her act alone was not enough to create the injury itself. The court in *Athey* also made it clear that there is no basis for a reduction in liability because of the existence of other pre-conditions and the defendant must take the plaintiff as found.

[42] In an earlier decision, *Snell v. Farrell*, [1990] 2 S.C.R. 311, the Supreme Court of Canada had stated that the burden of proof remains with the plaintiff in a medical malpractice case, however, in the absence of evidence to the contrary adduced by the defendant, the court can infer causation even where positive or scientific proof of causation has not been adduced. The court adopted the principle that the trial judge is entitled to take a "robust and pragmatic approach to the facts" (at p. 324 referring to *McGhee v. National Coal Board*, [1973] 1 W.L.R. 1 in *Wilsher v. Essex Area Health Authority*, [1988] 2 W.L.R. 557, rev'g [1987] 2 W.L.R. 425 at p. 569) in determining causation.

[43] It goes without saying that a hospital owes a patient a duty of care to select competent staff. See *Yepremian et al. v. Scarborough General Hospital et al.* (1980), 28 O.R. (2d) 494 (C.A.). This includes coordination of personnel, facilities, equipment and test results. See *Braun Estate v. Vaughan* (2000), 145 Man.R. (2d) 35 (C.A.).

[44] Of particular importance to our considerations here is the decision of the Québec Court of Appeal in *St-Germain c. Benhaim*, 2014 QCCA 2207, 2014

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CarswellQue 12131, where the court confirmed that, where it is the negligence of a defendant that undermines a plaintiff's ability to provide affirmative proof of causation and delay in detection, the defendant cannot rely on its own actions to shield itself from liability and its subsequent consequences.

[45] The court heard from Dr. Earl Hershfield, who was qualified as an expert, on the spread and progression of tuberculosis and its effect on the patient. He examined A.J.'s records and provided a written report, and agreed with the radiologist who reviewed A.J.'s chest x-ray on April 24, 2008, that a diagnosis of tuberculosis was possible and follow-up was necessary. In fact, he went further to say that given what he saw, the approach should have been "tuberculosis until proven otherwise."

[46] Dr. Hershfield spoke in detail about the progression of the disease indicating that it takes eight to 12 weeks for one's cellular immune system to react to exposure to tuberculosis. He stated clearly that the earlier the diagnosis and treatment, the less serious the sequelae. He also testified it was difficult to know, in A.J.'s case, how long the infection had been present. However, the fact that the MRI, which was taken on July 10, 2008, showed multiple lesions in both hemispheres of A.J.'s brain, in his opinion, showed that the disease would already have had an effect on various functions of A.J.'s brain and brain cells would have already been destroyed or injured. It was also his opinion that the treatment of A.J. probably started "a little late to be effective."

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[47] Dr. Hershfield acknowledged that the question of preventing a stroke was a difficult one, but in his view it was related to the onset of tuberculosis based on the timing of A.J.'s diagnosis and treatment, and the complications that presented themselves. He also pointed out that A.J. had been suffering from a number of neurological problems including headaches, problems with his vision, and intellectual functioning, which Dr. Hershfield opined was due to the brain losing blood supply well before his diagnosis. Significantly, he also stated that the treatment was to stop further damage, but would not reverse any damage which had already occurred.

[48] In cross-examination, when questioned about the effect of the drug Dilantin, Dr. Hershfield agreed that it could make A.J. sleepy. When questioned about mental confusion as a common side effect of Dilantin, he observed that the compendiums list listed every possible side effect but, at the dose A.J. was taking it would not have made him drowsy or sleepy.

[49] The grand mal seizure which took place on July 29, 2008, in Dr. Hershfield's opinion, also indicated that the tuberculosis infection was active in A.J.'s brain which was also evidenced by A.J.'s difficulty in seeing and the motion he described of his head moving to one side. Insofar as the stroke was concerned, he agreed that it cannot be predicted and acknowledged that it could have occurred even if treatment had been started at the end of April or early May instead of July. However, he pointed out that this too could not be known and depends on the nature of the stroke.

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[50] Dr. Hershfield's testimony was unshaken on cross-examination. It is also supported by the medical reports from Dr. Rafay and the testimony of A.J. and his mother. In the absence of evidence to the contrary to show that failure to diagnose A.J.'s tuberculosis in April 2008 did not cause the progression of the disease and subsequent stroke and seizure, I am satisfied that the evidence in this case is clear and compelling and demonstrates that, on a balance of probabilities, the negligence of Seven Oaks delayed the detection of A.J.'s tuberculosis diagnosis, and his tuberculosis spread to his brain and ultimately caused a stroke and grand mal seizure.

Damages

[51] The court was advised that counsel had agreed on the amount of the Manitoba Health Services Commission ("MHSC") claim and the amount of special damages to be awarded.

[52] Seven Oaks also acknowledged that A.J. was left with some residual physical disability in his right leg which should result in an award for pain and suffering which they suggested should be in the amount of $75,000. The real issue between the parties was what, if any, damages should be paid for loss of earning capacity and whether it should be included in an award of general damages or in a separate calculation.

[53] The court heard the expert opinion of James J. Smith, FCA, CA•IFA, as to the loss of income suffered by A.J. arising from his brain injury and physical disability due to the lack of early diagnosis and treatment for tuberculosis by

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Seven Oaks. In Mr. Smith's opinion, as at December 31, 2012, the present value of A.J.'s anticipated future earnings, absent the negligence of the defendant, minus A.J.'s anticipated future earnings subsequent to the injury, through to his anticipated age of retirement (65), less a discount of three per cent applied to future losses, would result in damages in the range of $1 to $2 million dollars.

[54] In coming to this conclusion, Mr. Smith acknowledged that assessing the quantum of damages is imprecise due to the significant number of assumptions required to be made regarding A.J.'s career path, both prior to and following the incident, because he had not finished his education and he had no established career. By the time of trial, the court had some information as to A.J.'s income as a social worker, but Mr. Smith indicated this would not change his earlier opinion.

[55] One of the assumptions made by Mr. Smith was that it was most probable that A.J. would have become a chartered accountant and would have worked full-time until his retirement. Based on Manitoba figures, he calculated the present value of salary lost, comparing a chartered accountant to a social worker absent the incident ($1,612,725), and the present value of salary lost comparing a chartered accountant to the Manitoba average wage earned ($1,673,326).

[56] In cross-examination Mr. Smith acknowledged that the Manitoba average in the second calculation could well be the average for a high school graduate as compared to a university graduate which would make the estimated loss higher.

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[57] The defendant argued that there was a paucity of evidence with respect to A.J.'s current condition, as well as a lack of evidence of any mental impairment or of his prognosis, other than the evidence of himself and his family. It is the position of Seven Oaks that the causes of A.J.'s problems (becoming sick, missing school, being drowsy and unable to focus) were temporary in their effect, are no longer operative and that the plaintiff has failed to prove any continuing disability. It was also argued by counsel for Seven Oaks that A.J. unintentionally exaggerated his symptoms and that the court should "read between the lines" in assessing his evidence.

[58] It was further argued that A.J. is probably as proficient in mathematics now as he ever was and, after recovering, he failed to try to become an accountant or an actuary in mitigation of any damages. Furthermore, in choosing to go into social work, he chose a career he had always considered as a possibility and, accordingly, suffered no loss of earnings.

[59] By all accounts, prior to becoming sick, A.J. had demonstrated himself to be an exceptional young man, full of ambition and ability with a loving and supportive family behind him. The world was his oyster and he felt that he could accomplish whatever he set his mind to.

[60] As already noted, A.J. also grew up in a culture where the expectations placed on him were extremely high. Not only had he shown himself to be an exceptional student, he was also an exceptional athlete. He was driven in everything he did, as is evidenced by his decision to learn to play the guitar,

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practising several hours each day so he could form a band; not missing a year of high school; and persevering with his goals to have a career in math when he started university.

[61] On the basis of the evidence before me, I do not find that A.J. exaggerated his symptoms. It is important to observe that A.J. was 16 years old at the time he went through a traumatic experience, including being diagnosed with a potentially fatal disease, suffering a stroke and then a grand mal seizure. Even reading between some of the lines, the essential aspects of his evidence are supported by the medical reports and the evidence of his family.

[62] Similarly, some contradictions or inconsistencies in his evidence are to be expected. For example, he told the court that he was only able to drive between 30 and 45 minutes before tiring, but it appears that on June 4, 2014, he told Dr. Solbrig that his driving was limited to one hour. He also said that he was unable to perform his first job at CFS because of his inability to drive out of town, but acknowledged on cross-examination that his work at CFS included other stresses, both mental and emotional, that contributed to his decision to leave. Whereas these kinds of inconsistencies are factors to be considered in assessing the weight to be given his evidence, they were few in number and relatively insignificant, and I do not find that A.J. was attempting to misled the court in any way.

[63] It is also important to note that, as a result of what happened, A.J. suffers from episodes of depression. He testified that he felt like a failure and that he

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did not want to accept the fact that he could no longer excel at what he undertook. While in the hospital he was referred to a psychiatrist whom he does not remember seeing. He was also referred for psychiatric help after being discharged but testified he was not ready to talk and that apparently he has continued to decline treatment to this day.

[64] Part of his feelings in this regard may well come from his family, albeit unintentionally so. In addition to the huge pressure on him to succeed, A.J.'s mother testified that, until he came down with tuberculosis he was "flying high, he knew where he was going" until he had his wings "clipped." She went on to say that A.J. no longer looks to the future and lives day to day indicating that, but for the mistake of the hospital, he would have been assured of a bright, financially solid and rewarding future.

[65] Perhaps more attention should be paid to the tenacity A.J. has demonstrated in what has been a remarkable recovery in the circumstances. His grit and determination, despite his many challenges, have led him to graduate from high school without missing a year, continue on in university and do well, and graduate from social work and find a career there. He has also married and started a family. In my view he has demonstrated true success.

[66] But social work is not his chosen career. Prior to coming to Canada, A.J. had seriously considered going into medicine but he told the court he felt "destined" to do math. I do not accept that he exaggerated the importance of math in his life, or his commitment to following a career into business or

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accounting or perhaps becoming an actuary. Despite having other possibilities on his career "list" or "radar," the courses he chose to take in high school and in his first year at university support his contention that he was committed to a career in math and did not change his mind until he truly felt he was unable to attain that goal.

[67] It was argued that A.J.'s mathematical abilities were not diminished as a result of his illness or, if they were, it was not to any significant degree. Counsel for Seven Oaks points to the fact that Dr. Hershfield conceded in cross-examination that a common side effect of Dilantin is mental confusion, and that he was gradually weaned off Dilantin so that by February 2011 he had finished taking that drug. Although A.J.'s grades appeared to improve, he testified he was still struggling and learning was difficult. As noted earlier, in April 2011, A.J. underwent a neuropsychological assessment which showed he had "a superior" rating in math and that he was pleasantly surprised by the result. However, as I have already found, this was not a math test but a neuropsychological assessment and, in the absence of any evidence to the contrary, I accept A.J.'s evidence that the questions included in the assessment were basic arithmetic not the kind of complex math that he would be required to take in his university math courses.

[68] It was also pointed out that A.J. did very well in social work, maintaining an A to A+ average but, as he testified, he found it "easy." He was also able to

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obtain various accommodations so that when he was writing tests he was not under the same kind of pressure as he would have otherwise been.

[69] To the extent he was criticized for never trying another math course after first year university, and never applying to become an accountant or actuary, I do not agree this reflects a lack of ambition, drive or commitment. I am satisfied this is more indicative of a recognition on his part that math was now "out," which Dr. Rafay had also suggested he not pursue.

[70] Perhaps most significantly, the medical evidence is that the brain damage suffered by A.J. as a result of the late diagnosis of his tuberculosis and subsequent treatment, which Dr. Hershfield said was too late to have much effect, is irreversible. Although Dr. Hershfield made reference to the promising developments in neuroplasticity and brain health, he never suggested that A.J. would be back to where he was prior to his illness. Neither did the evidence that he was left with minimal scarring in the brain indicate this. A.J. was clear that the aptitude he once had was compromised after his brain injury.

[71] It was also argued that A.J.'s career plan was vague at best, and that he had never looked into what a career in accounting involved in any significant way and did not know what an actuary did. While true, this must be understood in the context of a 16 year old who was in Grade 11, practising the guitar, playing in a band, and playing basketball and other sports whenever he could. Although it is clear that he was gifted in math and this was his passion, the fact that he had done little in the form of any formal career planning does not, to my mind,

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demonstrate a lack of interest on his part, but rather that he was more interested in just being sixteen, and should not be faulted for this.

[72] Looking at all of the evidence as a whole, I am satisfied that it is most probable that A.J. would have gone into the Faculty of Business to pursue a career in accounting, but for the intervention of his illness in 2008 and resulting consequences caused by the defendant's negligence.

General Damages

[73] The court was provided with a number of cases dealing with the question of general damages, all of which have been read and considered. Whereas counsel for the defendant suggests an award of $75,000 for pain and suffering, counsel for A.J. suggests a range of between $150,000 to $200,000, adjusting for inflation because a number of the cases relied upon (for example *Chiu v. Chiu*, 2002 BCCA 618, 174 B.C.A.C. 267 and *Crackel v. Miller*, 2004 ABCA 374, 35 Alta. L.R. (4th) 226, aff'g 2003 ABQB 781, 23 Alta. L.R. (4th) 312) were decided earlier.

[74] To state the obvious, no cases are exactly the same as the case under consideration and accordingly earlier decisions, while helpful to provide some guidance, can only do just that.

[75] For example, the court in *Payne v. Miles*, 2013 BCSC 1545, 2013 CarswellBC 2558, awarded general damages in the amount of $210,000. In that case the plaintiff was aged sixteen at the time she was struck in a marked crosswalk by a motor vehicle. One of the factors the court took into

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consideration was that she was at a critical time in her development and she was preparing to make the transition from adolescence to independent adulthood. In that case, she recovered relatively quickly from most of the physical injuries, but also developed possible personality change secondary to her brain injury, a major depressive disorder that was in remission with medication and a cognitive disorder. The court found that there was a substantial possibility that she would have completed her university degree and achieved some form of employment which paid more than the average income earned by women holding a university degree and that her ability to do so and pursue a post-secondary education was substantially diminished. Her loss of earning capacity was assessed in the amount of $800,000.

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[76] I have already reviewed in some detail the evidence of the effect of Seven Oaks' failure to diagnose and treat A.J.'s tuberculosis early on, the resulting stroke and grand mal seizure, and the physical, emotional, and psychological trauma it has caused this young man. On the basis of the applicable case law, and having heard counsel's submissions, I am satisfied an appropriate award of general damages is $175,000.

Loss of Earning Capacity

[77] The parties urged the court to take a substantially different approach to assessing A.J.'s claim for loss of earning capacity. The plaintiff urges the court to rely on the report of Mr. Smith to estimate the actual income that will be lost. Counsel for Seven Oaks argues that the calculations prepared by Mr. Smith

require such significant speculation that the court can have little confidence in any result and that an award of general damages in an amount that seems reasonable to compensate for what is described as A.J.'s "very uncertain" loss of earning capacity, is the appropriate approach.

[78] In *Athey*, the Supreme Court of Canada stated (at para. 27):

> Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.); *Malec v. J. C. Hutton Proprietary Ltd.* (1990), 169 C.L.R. 638 (Aust. H.C.); *Janiak v. Ippolito*, [1985] 1 S.C.R. 146. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* (1977), 18 O.R. (2d) 337 (C.A.); *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).

[79] In *Pallos v. Insurance Co. of British Columbia* (1995), 53 B.C.A.C. 310, 1995 CanLII 2871, the court considered the loss of income earning capacity suffered by the plaintiff who had been struck by an unidentified motor vehicle. The plaintiff was left with permanent injury and permanent pain which limited his capacity to perform certain activities. The Court of Appeal of British Columbia referred to a decision of Dickson J. (as he then was) in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, cited by Southin J. in *Earnshaw v. Despins* (1990), 45 B.C.L.R. (2d) 389, 1990 CanLII 596 (BC CA), in which a distinction between loss of earnings and loss of earning capacity was made. Loss of earning capacity was referred to as "loss of a capital asset," either in whole or by

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some impairment. The court also observed that no loss can be determined with any degree of exactitude.

[80] In *Pallos*, the court noted that treating a person's capacity to earn income as a capital asset, the value of which may be lost or impaired by injury, is a different approach from that taken in other cases where the court is asked to determine the likelihood of some future event leading to loss of income. In these cases, if there is a "real possibility" or a "substantial possibility" of such a future event, an award for future loss of earnings may be made. Furthermore, the court stated (at para. 27):

> .... There is nothing in the case law to suggest that the "capital asset" approach and the "real possibility" approach are in any way mutually exclusive. They are simply different ways of attempting to assess the same head of damages, future loss of income. ...

[81] Not insignificantly, in considering various ways of assessing damages the court stated (at para. 43):

> .... In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so. ...

[82] Counsel for Seven Oaks asserts that, because A.J. was not established in a particular line of work, nor had he completed his education, there are too many uncertainties to permit any reasonable estimate of probabilities to be made. Accordingly, it is submitted that any attempt at a calculation of loss of earning capacity must be abandoned and an award of general damages made recognizing that probably some loss of earning capacity has occurred.

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[83] I am not persuaded. I do not accept the defendant's argument that A.J. was seriously considering becoming a nurse, a social worker or something else entirely prior to his illness. As I have found, whereas A.J. was aware that other career possibilities existed for him, he was, both before and after the events of 2008, committed to a career in mathematics most probably as an accountant. It was only when he realized, as a result of his diminished capacity, that complex math was no longer a realistic possibility for him did he consider other alternatives. This contingency (his becoming an accountant) was more than "substantially possible" and was in fact highly probable on the basis of the evidence before me.

[84] Counsel for Seven Oaks argues that Mr. Smith's report was based on a number of assumptions which are inaccurate. However, consistent with my earlier findings, I am satisfied of the following:

- A.J. lost sufficient ability in math to become an accountant or an actuary;
- it is highly probable that, absent the negligence of the defendant, A.J. would have become an accountant;
- if A.J. had become an accountant, he would have earned at least the average salary of an accountant in Manitoba;
- A.J. suffers from physical impairments which affect his ability to drive due to his inability to fully control his right foot; and

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- it is likely A.J.'s level of functioning will not improve in the future to positively affect his employability.

[85] I am also satisfied that, due to the diminution of A.J.'s abilities as a result of Seven Oaks' negligence, including the physical, emotional and psychological consequences, it is likely that he will not rise to a senior management level in social work or in any other field. Although one cannot predict whether A.J. will continue to work until the age of 65 and remain a social worker for the rest of his career, these are reasonable assumptions to make in determining A.J.'s loss of income earning capacity again recognizing that the best the court can do to make a reasonable estimation based on reasonably formulated expert opinion.

[86] Mr. Smith quite candidly admitted that that one cannot determine the damages suffered by A.J. with any level of precision. However, he also maintained that the conclusions he reached on the assumptions he made were not simply speculative. Predicting the future is not an exact science and precision is not the test. The range suggested by Mr. Smith of $1 to $2 million dollars in my view is not unrealistic and is far more reflective of the loss of earning capacity suffered than the $40,000 suggested by the defendant, which, I note, is what the court ordered in 1995 in the *Pallos* case. That case also involved a 34 year old plaintiff with a Grade 11 education and no special skills who had spent the whole of his working life doing heavy labour and after his injury was only able to perform lighter work. The circumstances here are significantly different.

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[87] I accept Mr. Smith's opinion that A.J. probably falls on the lower end of the range and accordingly award him damages for loss of earning capacity in the amount of $1.3 million dollars.

[88] The plaintiff is entitled to judgment in the amount of $1,475,000 plus the amount of the MHSC account and special damages agreed upon by counsel as well as interest at the rate of 1.25 per cent per annum.

[89] Costs may be spoken to if counsel are unable to agree.

____

McCawley J.

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Citation: Lantin et al v Seven Oaks General Hospital, 2018 MBCA 57

Date: 20180516
Docket: AI17-30-08869

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice William J. Burnett
Mr. Justice Christopher J. Mainella

BETWEEN:

<table>
<tr><td>JOCELYN LANTIN, AS LITIGATION GUARDIAN FOR ALEXANDER LANTIN

(Plaintiffs) Respondents</td><td>M. T. Green and
L. W. Bowles
for the Appellant</td></tr>
<tr><td>- and -</td><td>R. M. Beamish
for the Respondent</td></tr>
<tr><td>SEVEN OAKS GENERAL HOSPITAL

(Defendant) Appellant</td><td>Appeal heard:
January 23, 2018</td></tr>
<tr><td>- and -</td><td></td></tr>
<tr><td>REX SOKOLIES

(Defendant)</td><td>Judgment delivered:
May 16, 2018</td></tr>
</table>

On appeal from *Lantin et al v Sokolies et al*, 2017 MBQB 40

BURNETT JA

Introduction

[1] The plaintiff was awarded damages due to the failure of the defendant Seven Oaks General Hospital (the defendant) to diagnose and treat tuberculosis in a timely fashion. The defendant appeals the amounts

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awarded to the plaintiff for loss of earning capacity and non-pecuniary damages.

[2] The trial judge failed to make any allowance for contingencies in her analysis of the plaintiff's loss of earning capacity, with the result that the award for that loss was inordinately high. There is, however, no basis for appellate intervention with respect to the award for non-pecuniary damages.

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Background

[3] In her reasons, the trial judge provided a comprehensive summary of the evidence relating to the plaintiff and his family, as well as his illness, treatment, recovery, education and employment.

[4] Briefly stated, the trial judge found that, prior to the events giving rise to this action, the plaintiff did exceptionally well in school, was particularly passionate about mathematics, excelled at sports and was also a musician. In terms of education, the trial judge noted that the plaintiff's family and extended family are well educated and place a high value on education, and that it was his parents' clear expectation that the plaintiff would go to university and continue on to a post-secondary degree.

[5] In early 2008, the 16-year-old plaintiff was taken to the defendant on a number of occasions with various flu-like symptoms. On April 23, 2008, a chest x-ray was taken. A radiologist wrote a report indicating that the possibility of tuberculosis should be considered. The report was filed in error, and there was no follow-up. The defendant admits that this action constituted negligence.

[6] The plaintiff's symptoms continued to worsen. In July 2008, he was admitted to hospital. An MRI disclosed that he had lesions in his brain, and he was diagnosed with tuberculosis.

[7] The trial judge found that the defendant's negligence delayed the detection and diagnosis of the plaintiff's tuberculosis, that the tuberculosis spread to his brain, and that it ultimately caused a stroke and grand mal seizure. While causation was an issue at trial, the defendant has not appealed the trial judge's ruling on that issue.

[8] In September 2008, the plaintiff returned to high school. He graduated the following June, and in September 2009 he enrolled in first-year university. In the summer and fall of 2012, the plaintiff entered the Faculty of Social Work. He found the social work program relatively easy, and he was placed on the Dean's Honour List. The plaintiff graduated with an overall GPA of 3.59. Following his graduation in 2013, the plaintiff obtained employment at Child and Family Services (CFS) as a protection worker. In that position the plaintiff was required to do a lot of driving which he found physically and mentally exhausting.

[9] In July 2014, the plaintiff resigned as a protection worker but, later that fall, CFS offered the plaintiff further employment in an administrative capacity. According to the plaintiff, CFS "really liked [his] work ethic", and he was hired as a quality assurance assistant. The plaintiff no longer did front line work, and he described the new position in the following terms:

> That position is responsible for reviewing and analyzing the, the different work, front line workers, permanent ward workers, what social workers do based on the case management standards, our agency's policies and procedures. So I try to support them,

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> analyze what, what different categories we need to address, where our strengths are, where are [*sic*] weaknesses are and support, support them and making sure that they're doing their best but at the same time meeting the expectations of the province.
>
> . . .
>
> And for this job position I'm able to work on my own pace, not as a front line worker where the pace is somewhat dictated by, by the, the different families you serve or your supervisor.

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[10] At the commencement of the trial, plaintiff's counsel advised that the issues were the extent to which the plaintiff had been injured as a result of the failure to diagnose and treat tuberculosis in a timely fashion and the proper quantification of that injury.

[11] In support of his claim, the plaintiff and his mother Jocelyn Lantin (the mother) testified about the effects of the illness and the brain damage. In addition to the plaintiff and the mother, the plaintiff called Dr. Earl Samuel Hershfield, an infectious disease specialist, and James John Smith (Smith), an accountant who provided "opinion evidence with respect to the loss of income suffered by [the plaintiff]".

[12] The defendant attempted to provide expert evidence from David Victor Ness (Ness), who had studied the reliability of career predictions made by high school students. The trial judge refused to allow him to testify.

<u>The Trial Judge's Decision</u>

[13] The trial judge described the plaintiff as an exceptional young man, with a supportive family, who grew up in a culture where the

expectations placed on him were extremely high. In her view, the plaintiff had demonstrated a "remarkable recovery in the circumstances" (at para 65):

> Perhaps more attention should be paid to the tenacity [the plaintiff] has demonstrated in what has been a remarkable recovery in the circumstances. His grit and determination, despite his many challenges, have led him to graduate from high school without missing a year, continue on in university and do well, and graduate from social work and find a career there. He has also married and started a family. In my view he has demonstrated true success.

[14] The trial judge was satisfied that:

- the plaintiff lost sufficient ability in mathematics to become an accountant or an actuary;
- it is most probable that the plaintiff would have gone into the Faculty of Business to pursue a career in accounting;
- it is highly probable that, absent the defendant's negligence, the plaintiff would have become an accountant;
- if the plaintiff had become an accountant, he would have earned at least the average salary of an accountant in Manitoba;
- the plaintiff suffers from physical impairments which affect his ability to drive due to his inability to control his right foot;
- it is likely that the plaintiff's level of functioning will not improve in the future to positively affect his employability; and

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- due to the diminution of the plaintiff's abilities, it is likely that he will not rise to a senior management level in social work or in any other field.

[15] The trial judge also felt that, "[a]lthough one cannot predict whether [the plaintiff] will continue to work until the age of 65 and remain a social worker for the rest of his career, these are reasonable assumptions" (at para 85).

[16] The trial judge concluded (at paras 86-87):

> Mr. Smith quite candidly admitted that one cannot determine the damages suffered by [the plaintiff] with any level of precision. However, he also maintained that the conclusions he reached on the assumptions he made were not simply speculative. Predicting the future is not an exact science and precision is not the test. The range suggested by Mr. Smith of $1 to $2 million dollars in my view is not unrealistic and is far more reflective of the loss of earning capacity suffered than the $40,000 suggested by the defendant.
>
> I accept Mr. Smith's opinion that [the plaintiff] probably falls on the lower end of the range and accordingly award him damages for loss of earning capacity in the amount of $1.3 million dollars.
>
> [emphasis added]

The Issues and Standard of Review

[17] The defendant raises four issues. In particular, it says that the trial judge erred:

1. by awarding damages that were not justified on the evidence;

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2. in finding that the plaintiff's ability in mathematics was diminished;

3. in finding that any impairment will be permanent, and that the plaintiff's brain damage is irreversible;

4. in refusing to admit the evidence of Ness.

[18] This Court's ability to review a trial judge's assessment of damages was described in *Naylor Group Inc v Ellis-Don Construction Ltd*, 2001 SCC 58 (at para 80):

> It is common ground that the Court of Appeal was not entitled to substitute its own view of a proper award unless it could be shown that the trial judge had made an error of principle of law, or misapprehended the evidence (*Lang v. Pollard*, [1957] S.C.R. 858, at p. 862), or it could be shown there was no evidence on which the trial judge could have reached his or her conclusion (*Woelk v. Halvorson*, [1980] 2 S.C.R. 430, at p. 435), or the trial judge failed to consider relevant factors in the assessment of damages, or considered irrelevant factors, or otherwise, in the result, made "a palpably incorrect" or "wholly erroneous" assessment of the damages (*Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, at p. 235; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, at p. 810; *Widrig v. Strazer*, [1964] S.C.R. 376, at pp. 388-89; *Woelk*, *supra*, at pp. 435-37; *Waddams*, *supra*, at para. 13.420; and H. D. Pitch and R. M. Snyder, *Damages for Breach of Contract* (2nd ed. 1989) 15§5). Where one or more of these conditions are met, however, the appellate court is obliged to interfere.
>
> [emphasis added]

See also *Reilly v Lynn*, 2003 BCCA 49 at para 99, supplementary reasons, 2003 BCCA 519, leave to appeal to SCC refused, 2004 CarswellBC 13; *HL v Canada (Attorney General)*, 2005 SCC 25 at paras 306, 326; *Schenker v*

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Scott, 2014 BCCA 203 at para 46; and *Dansereau v The City of Winnipeg*, 2014 MBCA 18.

[19] In *Dansereau*, Mainella JA said (at para 6):

> Deference is owed to a judge's award of damages absent the judge making an error in law or principle, coming to a conclusion without evidence, or making an award that was wholly erroneous by being either inordinately low or inordinately high in the circumstances (*Woelk et al. v. Halvorson*, [1980] 2 S.C.R. 430 at 435-36). In arriving at a damages award, a judge's assessment of the evidence, or proportioning of damages, is a question of fact that cannot be set aside on appeal absent demonstration of palpable and overriding error.

[20] The parties agree, as do I, that the second and third issues are to be reviewed on the standard of palpable and overriding error. In *Benhaim v St-Germaine*, 2016 SCC 48, Wagner J (as he then was) described that standard (at paras 38-39):

> It is equally useful to recall what is meant by "palpable and overriding error". Stratas J.A. described the deferential standard as follows in *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46:
>
>> Palpable and overriding error is a highly deferential standard of review . . . . "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.
>
> Or, as Morissette J.A. put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII), (TRANSLATION) "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions."

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[21] With respect to the second and third issues, there was an evidentiary basis for the trial judge's findings that the plaintiff's ability in mathematics is diminished and that the brain damage is irreversible. While I might not have made the same findings, I have not been persuaded that, in making those findings, the trial judge made a palpable and overriding error.

[22] Similarly, in refusing to admit the evidence of Ness, I see no reversible error.

[23] The appeal as it relates to issues 2, 3 and 4 is therefore dismissed.

[24] The balance of these reasons will address whether the trial judge erred in her assessment of damages for loss of earning capacity and general damages.

Smith's Report and Testimony

[25] In his report, Smith estimated the plaintiff's damages "as the present value of [the plaintiff]'s anticipated future earnings absent the incident, less his anticipated future earnings subsequent to the injury, through to his anticipated age of retirement."

[26] On two occasions in his report, Smith emphasised:

> Due to the significant assumptions required regarding [the plaintiff]'s future career paths both prior to and subsequent to the incident, the quantum of damages suffered by [the plaintiff] is not determinable with any significant [or "reasonable"] level of precision.

For that reason, Smith included a range of damages based on differing assumptions.

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[27] At trial, Smith confirmed that his report was based on various assumptions and that, at the time he prepared the report (November 7, 2012), the plaintiff's earnings, short term and in the future, were not known. As he testified:

> His future income, even if we started with today's income of 40,000, those calculations are premised on the basis that that income would not substantively change. <u>We had no way of knowing what would actually occur.</u>
>
> [emphasis added]

[28] Smith further qualified his opinion with the observation that "some people can work to their capacity and someone can choose to work under their capacity, so we're really not in a position to give you a hard number by any means."

[29] In his report, Smith considered two scenarios. The first scenario calculated damages on the basis that the plaintiff did not complete post-secondary education, and the second scenario calculated damages on the basis that he completed his Bachelor of Social Work and gained employment in that field where he would continue until retirement. In each scenario, Smith calculated the plaintiff's potential loss compared to the average earnings of a university graduate, a chartered accountant and an actuary.

[30] Smith testified that:

> All three of these are illustrative and, certainly, the court shouldn't be restricted by these scenarios. These were based on some discussions as -- that we had with the parties as to what they thought [the plaintiff] might enter into, but <u>I can tell from experience that notwithstanding you have someone saying they</u>

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> want to become a CA even when they're, in fact, entering the course, you can't guarantee that they will, in fact, stay in it. So [the plaintiff] could have taken on any number of things.
>
> These are simply scenarios and I think they provide an indication of if you assume a certain loss of income, this would be the general result, but I can't tell you that he would have made a hundred thousand dollars or two hundred thousand dollars more. I can simply use them as illustrations of if you accept that loss of income, this is the result.
>
> [emphasis added]

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[31] At trial, Smith confirmed that the first scenario in his report was not worthy of consideration given that the plaintiff had obtained a degree in social work and was employed as a social worker. This left the second scenario, where Smith assumed that the plaintiff would remain a social worker throughout his working career. In this scenario Smith estimated the present value of the loss of earnings by comparing the plaintiff's projected earnings as a social worker with the projected average earnings of a university graduate, a chartered accountant and an actuary. Smith estimated those losses as $56,210, $1,673,326 and $2,061,870, respectively.

[32] All of the figures in Smith's report were average levels of income, and in his words, "they're all based on, on averages so they're inherently going to be wrong. The question is only by how much."

[33] Significantly, Smith acknowledged that, "our calculations do not contain any contingency factor and/or discount to reflect the possibility of accidents, illness, early death, extended life or impact of other lifestyle choices."

[34] When asked why he had not factored any contingency into his calculations, Smith said that he was reluctant to use any numbers that are effectively those of an actuary, that it was "a little beyond our competence" and "a little outside of our background."

[35] In making his calculations, Smith assumed that the plaintiff would never rise to a management level in the social work field.

[36] Smith also made a "standalone calculation" of the financial impact to the plaintiff if he assumed that the plaintiff had always intended to be a social worker and was unable to reach a senior management position. That calculation resulted in a loss of earnings of $465,146.

[37] In his report Smith concluded:

> Consequently, based upon the information and documents reviewed, the explanations provided to us and subject to the qualifications and restrictions noted herein, the damages calculated are in the range of $50,000 to $2,000,000 as at December 31, 2012.
>
> It is our belief, that while possible, the lower end of the range is unlikely and it is more likely that the loss will be somewhere between $1,000,000 and $2,000,000.
>
> [emphasis added]

The Parties' Positions

[38] The defendant claims that the trial judge should not have used the loss of earning capacity approach to calculate damages because there were too many future and hypothetical events to consider and insufficient evidence to predict the plaintiff's career path. The defendant submits the

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trial judge should have used the capital asset approach, which recognizes that, although loss of potential earnings is not measurable in a pecuniary way, there has still been a loss that can be compensated with general damages for a lost capital asset. The defendant says that the trial judge also erred in the manner in which she applied the earnings approach. She was obliged to consider all of the future and hypothetical events that are real possibilities, but she failed to do so.

[39] The defendant argues that the award for loss of earning capacity was grossly inflated because the plaintiff's overall capacity to earn income had not been significantly diminished. The defendant submits the trial judge erred in finding that, absent the negligence of the defendant, the plaintiff would have become an accountant, that, in light of his illness, he would never rise to a management position in his current job as a social worker, and that he would remain employed as a social worker.

[40] Finally, the defendant says that the trial judge's non-pecuniary damage award of $175,000 was unreasonably high. A more appropriate general damage award in this case would be $80,000.

[41] The plaintiff submits that the choice of methodology was in the discretion of the trial judge. Here the trial judge considered and applied the appropriate law when she decided to use the loss of earning capacity approach, and this discretionary decision was made only after a thorough consideration of the evidence. The trial judge then made a discretionary determination as to the appropriate level of damages having considered the range opined on by Smith.

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[42] The plaintiff also says that the damages awarded for pain and suffering were appropriate.

General Principles

[43] It is useful to begin with reference to the principles which apply when assessing damages for a loss of future earnings:

1. It is the loss of capacity to earn which must be compensated, and it is the capacity which existed prior to the injury that must be valued. "A capital asset has been lost: what was its value?" (*Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229 at 251).

2. A trial judge has a discretion as to methodology. While a particular approach may be more useful in certain circumstances, both the loss of earning capacity approach and the capital asset approach are acceptable means of assessing a plaintiff's loss of earning capacity (see *Perren v Lalari*, 2010 BCCA 140 at para 32; *Westbroek v Brizuela*, 2014 BCCA 48 at para 64; *Gillespie v Yellow Cab Company Ltd*, 2015 BCCA 450 at para 2; and *Knapp v O'Neill*, 2017 YKCA 10 at paras 17-19).

   In Lewis N Klar *et al*, *Remedies in Tort* (Toronto: Thompson Reuters, 1987) (loose-leaf updated 2017, release 11) vol 4 at 27-147, the authors observe (at para 63.4):

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> [T]he quantification of [the] loss of earning capacity may be proven on either an earnings approach or a capital asset approach. The former will be more useful when the loss is more easily measurable, and the latter will be more useful when the loss is not as easily measurable in a pecuniary way.

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3. The objective is fair compensation and requires an informed assessment or best estimate of "what the plaintiff <u>would have earned</u>, had the injury not occurred" (*MB v British Columbia*, 2003 SCC 53 at para 49). As stated in *Hay v Hofmann*, 1999 BCCA 26 (at para 67):

> [A] trial judge, in deciding on an award of damages under the heading of anticipated future loss, whatever term one actually uses, ought to endeavour to make an informed estimate or assessment of anticipated loss as opposed to merely undertaking to do a computation. Because one is considering the future which has about it always an aspect of the unknowable, contingencies positive and negative fall to be considered. Ultimately, <u>a best estimate is required</u> and while there will almost invariably be mathematical calculations to be considered, a purely mathematical approach will usually not be appropriate because such an analysis is too limited in scope.
>
> [emphasis added]

4. If the loss of earning capacity approach is utilized, it is an error in principle to fail to consider positive and negative contingencies (see *Andrews* at p 263; *Liebrecht v Egesz*, 2000 MBCA 132 at para 45; *Reilly* at paras 101, 121; *Hussack v Chilliwack School District No 33*, 2011 BCCA 258 at para 92; and *Schenker* at paras 57, 69).

5. The less certainty with respect to the plaintiff's future prospects or the greater the risk, the more likely it will be that a contingency allowance of some kind, either general or specific, will be required (*Liebrecht* at para 45).

6. General contingencies are those which, as a matter of human experience, are likely to be the common future of all of us (*Graham v Rourke* (1990), 74 DLR (4th) 1 at 14-15 (Ont CA). These will include unemployment, illness, accidents, age-related dysfunction, the risk of future disability and the risk of a layoff or business depression (see *Andrews* at p 253; *Wallace v Thibodeau*, 2008 NBCA 78 at para 40, leave to appeal to SCC refused, 32955 (16 April 2009); and *Gignac v Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras 52, 54). Specific contingencies are those which are peculiar to a particular plaintiff (*Graham* at pp 14-15; and *Kern v Steele*, 2003 NSCA 147 at para 60).

7. General contingencies are not readily susceptible to evidentiary proof and may be considered in the absence of such evidence (*Graham* at pp 14-15). However, in order to rely on a specific contingency, there must be evidence which is capable of supporting the conclusion that the occurrence of the contingency is a real, as opposed to speculative, possibility (*Graham* at p 15; and *Gerula v Flores* (1995), 126 DLR (4th) 506 at 518 (Ont CA).

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8. At the end of the inquiry, a trial judge should consider whether the award of damages is fair and reasonable in all of the circumstances (see *Simpson v Felicioni*, 1985 CarswellMan 312 at para 24 (CA); *Jablonski v Nault*, 1990 CarswellMan 324 at para 25 (QB); *Hay* at para 68; *Parypa v Wickware*, 1999 BCCA 88 at para 70; *Reilly* at para 101; *Kern* at para 66; *Westbroek* at para 65).

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Analysis and Decision

[44] In the present case the trial judge erred when she found that:

1. Smith assumed that it was most probable that the plaintiff would have become a chartered accountant and would have worked full-time until his retirement;

2. the range suggested by Smith was $1,000,000 to $2,000,000; and

3. Smith opined that the plaintiff fell at the lower end of the range.

[45] With respect to the first error, Smith made no such assumption. Smith was clear in his testimony that it was the court's responsibility to decide whether any of the assumptions in his report were reasonable or correct. However, while the trial judge erred, I accept her finding that it is highly probable that, absent the defendant's negligence, the plaintiff would have become an accountant.

[46] With respect to the second error, Smith said in his report that "the damages calculated are in the range of $50,000 to $2,000,000"; "that while possible, the lower end of the range is unlikely" (clearly referring to the range of $50,000 to $2,000,000); and that "it is more likely that the loss will be somewhere between $1,000,000 and $2,000,000."

[47] Smith calculated the plaintiff's loss of earning capacity if the plaintiff completed post-secondary education and was employed as a social worker, which he compared to the earning capacity of an accountant. That calculation resulted in an income differential of $1,612,725. At the hearing before us, counsel for the plaintiff agreed that the high end of any range would be $1,612,725, not $2,000,000.

[48] With respect to the third error, counsel for the plaintiff also agreed that Smith did not opine that the plaintiff would fall at the lower end of any range.

[49] The second and third errors were both palpable and overriding, as they formed the basis for the trial judge's award of $1,300,000:

> I accept Mr. Smith's opinion that [the plaintiff] probably falls on the lower end of the range [of $1,000,000 to $2,000,000] and accordingly award him damages for loss of earning capacity in the amount of $1.3 million dollars.
>
> [emphasis added]

There is nothing in the trial judge's reasons, other than this statement, to explain how the figure of $1,300,000 was determined.

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[50] The trial judge further erred when she failed to make any adjustment for contingencies.

[51] Given these errors, it is my view that the trial judge's award for the plaintiff's loss of earning capacity resulted in "'a palpably incorrect' or 'wholly erroneous' assessment of the damages" (*Naylor Group Inc* at para 80), that no deference is owed to the trial judge's assessment, and that it is necessary to decide whether this Court is in a position to properly assess that loss.

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[52] A similar situation arose in *Schenker*. There, Harris JA, speaking for the Court, concluded (at paras 56-57):

> Although the judge did make findings on a number of relevant matters, she did not apply those findings in a reasoned analysis to explain and justify the award. Rather, she appears to have plucked a number from the air leaving the Court and the parties to speculate on the basis for the award.
>
> In my view, the trial judge failed to provide adequate reasons justifying her award, misapprehended material evidence bearing on a fair award, and made an award that cannot be supported by the findings of fact she made. In the result, I am satisfied that the judge's failure to analyze the evidence (including the economic evidence), assess probabilities and the implications of her findings of fact to the assessment of Ms. Schenker's pecuniary loss were errors of principle which resulted in a wholly erroneous estimate of the damages.

[53] The Court then considered whether it was in a position to assess Ms Schenker's loss (at paras 83-84):

> Given my conclusion that the judge fell into error in her award for future loss of capacity, the question becomes whether it is possible to substitute a proper award that is consistent with the

> evidence and the findings of fact. In my view, we are in a position to undertake that analysis. Much of the evidence is uncontested. The trial judge made some findings of fact that, when analyzed in conjunction with the assistance provided by the economists' reports, allows for us to make a fair determination.
>
> Before undertaking that analysis, it is important to reiterate what is well-known. Determining a fair award is a matter of assessment, not calculation. In what follows I make use of the economic statistics because they are helpful in the circumstances of this case to identify, in general ways, the order of magnitude of loss based on certain key assumptions. In the final conclusion, the award remains a matter of assessment.

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[54] There is considerable merit to the defendant's submission that the loss of earning capacity approach should not have been used by the trial judge given the numerous and significant assumptions that she was required to make. I also have sympathy for the defendant's submission that the uncertainties surrounding the plaintiff's health, future employment and earnings are significant and difficult to quantify. However, the authorities are clear that the trial judge had a discretion as to methodology, and I am satisfied that the defendant's legitimate concerns can be properly addressed when allowances are made for specific and general contingencies. In particular, I am satisfied, as was the Court in *Schenker*, that it is possible to substitute a proper award that is consistent with the evidence, the trial judge's choice of methodology and her specific findings of fact.

[55] Smith's calculation of loss of earning capacity is based entirely on statistical information. The Supreme Court of Canada commented on the value of statistical information (albeit in the context of causation) in *Benhaim*. There the Court observed that statistical information must be viewed with some caution (at para 74), that "[w]ithout an evidentiary bridge

to the specific circumstances of the plaintiff, statistical evidence is of little assistance" and that the inferences that follow from statistical evidence "must be made with reference to the whole of the evidence" (at para 75).

[56] It is important to consider the nature and extent of the plaintiff's impairment resulting from the defendant's negligence. According to the trial judge, the plaintiff had made a remarkable recovery, but was left with diminished ability to do mathematics, a weakness in his right foot causing difficulty walking and driving (for more than 30-60 minutes), fatigue and occasional depression. The trial judge noted that the plaintiff's tuberculosis had been resolved with minimal scarring in the brain and that there was marked improvement in his neuroimaging, but she concluded that the medical evidence was that the plaintiff's brain damage is irreversible. The trial judge also referred to medical reports which confirmed that the plaintiff's central nervous system appeared stable and that the plaintiff was doing well and appeared to be asymptomatic for the previous two years.

[57] No medical or other expert evidence was adduced at trial to address the plaintiff's current physical or mental impairments and his prognosis, or to opine on how those impairments might affect his employability. There is no doubt that the failure to adduce such evidence has contributed to the difficulty in assessing the plaintiff's loss of earning capacity and the damages that would be fair and reasonable in the circumstances of this case.

[58] Smith's report was dated November 7, 2012, approximately three and one-half years prior to trial. Smith assumed that, while the likelihood of the plaintiff improving to pre-illness levels was unlikely, it remained

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possible. He noted that, if the plaintiff's impairment declined or improved significantly, there would be a corresponding (i.e. significant) impact to his calculations. In this regard, Dr. Hershfield testified that the body often finds a way to work around impairments such as those suffered by the plaintiff, that the plaintiff himself acknowledged his ability to adapt, and that, over time, there was a considerable improvement in his marks.

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[59] In my view, Smith's report and his testimony are of limited value in assessing the plaintiff's loss of earning capacity. At best, his evidence is "helpful . . . to identify, in general ways, the order of magnitude of loss based on certain key assumptions" (*Schenker* at para 84). As noted previously, Smith agreed that, due to the assumptions required regarding the plaintiff's career paths, the quantum of damages was not determinable by him with any significant or reasonable level of precision. It was for that reason that he provided a range, as opposed to a specific amount, for damages based on differing assumptions.

[60] Given the nature of the exercise, a range is a useful tool when assessing or estimating a plaintiff's loss of earning capacity. See, for example, *Knapp* where Savage JA, speaking for the Court, said (at paras 18-19):

> It can be helpful under either approach for the judge to consider the *quantum* of the award in light of the range of possibilities indicated by economic analysis. Mathematical aids and economic analysis facilitate a "bracketing" exercise that indicates the high and low extremities of possible awards in a given case, as was recently considered by this Court in *Grewal v. Naumann*, 2017 BCCA 158 at paras. 70-73 (majority per D. Smith J.A.) and paras. 56-58 (Goepel J.A., dissenting).

> Courts, where they can, should endeavor to use factual and mathematical anchors as a foundation to quantify loss of future earning capacity, including economist reports and a plaintiff's pre-accident employment history, training, and capabilities: *Jurczak v. Mauro* at paras. 35-37; *Lampkin v. Walls*, 2016 BCSC 1003 at paras. 181-184, 192-210; *Carey v. Richert* at paras. 14-19; *Summers v. Boneham* (1994), 45 B.C.A.C. 306, 1994 CanLII 1520. In addition, a plaintiff's personality, work ethic, and attitude should all be considered where possible; it may constitute an error to ignore such factors: *Spencer v. Rosati* (1985), 50 O.R. (2d) 661 at paras. 11-13, 1 C.P.C. (2d) 301 (C.A.).

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[61] By the time of trial (April 2016), the plaintiff had completed his social work degree, and when the trial judge issued her reasons, she noted that he was married with two children and was employed in a management capacity. It is therefore no surprise that the trial judge concluded that the plaintiff would fall at the lower end of the range of damages, consistent with her findings that the plaintiff had made a remarkable recovery, had demonstrated grit and determination, and was now employed in a management capacity, albeit not at a senior level.

[62] When one considers all of the circumstances, I agree that the plaintiff would fall at the lower end of the range. But what is the appropriate range, and what allowance must be made for specific and general contingencies?

[63] Once the trial judge found that it was "most probable" that the plaintiff would have gone into the Faculty of Business to pursue a career in accounting (at para 72) and "highly probable" that he would have become an accountant (at paras 83-84), the upper end of the range based on Smith's evidence became $1,600,000.

[64] While there is a statistical basis for Smith's calculation of the upper end of the range, the lower end is considerably more speculative. When asked in cross-examination where the $1,000,000 came from, Smith testified:

> A It's the range. I'm rounding the millions because we have no way of being that precise.
>
> Q So you're, you're, you're so uncertain of the conclusions that you're rounding in the millions?
>
> A I wouldn't phrase it that way but that's not inaccurate.
>
> [emphasis added]

[65] In addition to the highly speculative nature of Smith's estimate of the low end of the range, it is clear that the trial judge should have made an appropriate adjustment for the following specific contingencies:

1. the possibility that the plaintiff would not become an accountant;
2. the possibility that the plaintiff would not remain in social work;
3. the possibility that the plaintiff would not earn the average income of a chartered accountant; and
4. perhaps most importantly, the possibility that the plaintiff would attain a low to mid-level management position.

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[66] First, while I accept that it is highly probable that the plaintiff would have become an accountant, there remains the distinct and very real possibility that he would not have done so. The plaintiff said that social work was on "his radar" when he was considering future careers in high school, and Smith said that in his experience even when a person enters an accounting program, "you can't guarantee that they will, in fact, stay in it." According to Smith, the plaintiff "could have taken on any number of things." In my view, there is a real possibility that the plaintiff might have done something other than accounting, and a modest adjustment for that contingency must be made.

[67] Second, the calculation made by Smith was based upon the plaintiff remaining in social work. While the trial judge felt that this was a reasonable assumption, the plaintiff himself testified that this was unlikely. It is, of course, impossible to predict what occupation the plaintiff might undertake. However, his mother testified that money was important to him, and I believe that it is reasonable to assume that, whatever the occupation, the plaintiff would earn a greater income.

[68] Third, there is also a real possibility that the plaintiff would not earn the average income of a chartered accountant. In *Reilly*, a young lawyer who had recently been called to the bar was struck by the defendant's vehicle. The trial judge found that Mr. Reilly had suffered a permanent brain injury. The Court of Appeal concluded (at paras 116-18):

> [The award for damages] must be adjusted to reflect the degree of likelihood that these events would come to pass. When he was injured, the respondent had not yet commenced the practice of law and it could not be said with certainty where that career would take him.

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> Although in a case of this nature one cannot put into percentage terms the likelihood or possibility that a plaintiff will achieve a certain level of earnings, in the absence of a proven earnings history, no level of earnings can be treated as a certainty: see ***West v. Cotton*** (1995), 10 B.C.L.R. (3d) 73 (C.A.) and ***Nelson v. Nelson*** (1994), 98 B.C.L.R. (2d) 182 (C.A.).
>
> . . .
>
> On the basis of the findings of the trial judge, it is our view that there was a relatively high likelihood that, but for his injuries, the respondent would have practiced law in B.C. and earned at least the average income of male B.C. lawyers. Taking everything into account, we would put the degree of likelihood at 85%. With this adjustment, the $2,000,000 figure becomes $1,700,000.
>
> [emphasis added]

[69] Fourth, there would appear to be the very real possibility that during his career the plaintiff will achieve a management position. While the trial judge found that the plaintiff would not rise to a senior management level in social work or in any other field—a finding which I am prepared to accept—she also found that he had accepted a position "in a management capacity" (at para 38) less than 18 months following his graduation from the social work program.

[70] In his report, Smith said that his alternatives assumed that the plaintiff "will be unable to reach a management level in any field chosen", and in cross-examination, he confirmed that he assumed that the plaintiff's income would be $40,000 to $50,000 per annum, and not $80,000 per annum, on the assumption that the plaintiff would never get a management position in social work. This assumption is no longer valid as the plaintiff obtained a management position at CFS in 2014.

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[71] Smith made a standalone calculation of the plaintiff's loss ($465,146) on the basis that "[i]t is reasonable to assume that regardless of [the plaintiff]'s ultimate career path, his impairments would reduce his ability to reach senior management positions." In making that calculation, Smith assumed that the plaintiff's earnings between the ages of 33 and 65 would remain at $26.03 per hour versus $41.93 per hour.

[72] In these circumstances and, in particular, given the plaintiff's current circumstances, it is reasonable to assume that the plaintiff will ultimately have (at minimum) a low to mid-level management position and that his earnings will exceed $26 per hour. I would therefore reduce the range for this uncertainty alone by 50 per cent of $465,146, rounded to $230,000.

[73] Having considered the specific contingencies applicable to the plaintiff, it is my view that the low end and the top end of Smith's range of $1,000,000 to $1,600,000 should be reduced by 35 per cent, rounded to $650,000 to $1,040,000.

[74] Smith was clear that he had made no allowance for general contingencies:

> Our calculations do not contain any contingency factor and/or discount to reflect the possibility of accidents, illness, early death, extended life or impact of other lifestyle choices.

[75] A further adjustment is therefore required for the general contingencies referred to in para 43, point 6 of these reasons, as well as those identified by Smith, including retirement prior to age 65. In my view,

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on the basis of the authorities referred to in this decision and the available evidence, the low end and the top end of the range should be further reduced by 20 per cent, resulting in an approximate range of $520,000 to $830,000.

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[76] Both the trial judge and Smith correctly observed that one cannot determine the plaintiff's damages with any level of precision. At the end of the analysis, it is necessary to consider whether the award is fair and reasonable in light of all the evidence. As noted in *Parypa* (at para 70):

> Ultimately, the court must base its decision on what is reasonable in all of the circumstances. Projections, calculations and formulas are only useful to the extent that they help determine what is fair and reasonable.

[77] In *Simpson*, O'Sullivan JA expressed a similar view (at para 24):

> I recognize the value of actuarial calculations and economic evidence within the limits of their usefulness but still, at the end of the day, a judge must ask whether the end result is reasonable.

[78] Given all of the evidence and applying my judgment as best I can to the plaintiff's present circumstances (*Reilly* at para 128), I believe that $525,000 is an informed assessment of the plaintiff's anticipated loss of earning capacity and is fair and reasonable compensation for that loss.

[79] Having carefully considered counsel's submissions and the awards made in other cases, I am not persuaded that the trial judge erred in her award of $175,000 for non-pecuniary damages.

[80] The plaintiff will therefore receive $525,000 for lost earning capacity, non-pecuniary damages of $175,000 and the amounts awarded by

the trial judge for the Manitoba Health Services Commission account, special damages and interest.

[81] The defendant shall have its costs in this Court.

___________________________________ JA

I agree: ___________________________________ JA

I agree: ___________________________________ JA

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Date: 20181018
Docket: CI 09-01-59760
(Winnipeg Centre)
Indexed as: Lantin et al. v.
Seven Oaks General Hospital
Cited as: 2018 MBQB 160

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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

	)	Counsel:
	)	
JOCELYN LANTIN, AS LITIGATION GUARDIAN FOR ALEXANDER LANTIN,	)	Richard M. Beamish for the plaintiffs
	)	
plaintiffs,	)	
- and -	)	Michael T. Green and L. William Bowles for the defendant, Seven Oaks General Hospital
REX SOKOLIES AND SEVEN OAKS GENERAL HOSPITAL,	)	
	)	
defendants.	)	JUDGMENT DELIVERED: October 18, 2018

McCAWLEY J.

[1] This matter was dismissed as against the defendant, Rex Sokolies, by consent.

[2] Counsel for the plaintiffs bring a motion for an order that the judgment signed on May 18, 2017 in this action be amended to include a clause providing for loss of opportunity to invest non-pecuniary damages in accordance with s. 80(3) of ***The Court of Queen's Bench Act***, C.C.S.M. c. C280 (the ***Act***").

BACKGROUND

[3] The plaintiffs brought an action against the defendant, Seven Oaks General Hospital (the "hospital"), which resulted in an order for general damages in the amount of $175,000, loss of earning capacity in the amount of $1,300,000, and payment of an MHSC account in the amount of $64,145.51. The trial decision specifically awarded interest in the amount of 1.25% per annum, but failed to include a clause in respect of loss of opportunity to invest general damages, which is required by s. 80(1) and 80(3) of the ***Act***.

[4] A form of judgment was approved as to form by the hospital's counsel, signed on May 18, 2017, and filed on May 24, 2017. The hospital appealed the award of loss of earning capacity and general damages. The Court of Appeal reduced the award for loss of earning capacity to $525,000 and upheld the award for general damages. A form of certificate of decision was prepared by counsel for the hospital and approved as to form and content by counsel for the plaintiffs, which certificate was issued by the Court of Appeal on June 19, 2018. The court ordered that the plaintiffs recover the sum of $764,145.51 representing general damages of $175,000, loss of earning capacity of $525,000, and the MHSC account of $64,145.51. The question of interest was never considered by the Court of Appeal.

[5] In determining the amount of interest owing, disagreement arose with respect to loss of opportunity to invest general damages. Counsel for the plaintiffs acknowledged that, through a simple error or omission, he had not

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included in the form of judgment prepared an allowance for loss of opportunity for the plaintiffs to invest the amount of damages awarded and says this should be corrected. Counsel for the defendant hospital take the view that, as the Court of Appeal has issued a final judgment on the question of damages, the trial court has no jurisdiction to grant the order sought, first because it would effectively vary, amend or add to a decision of the Court of Appeal and, second because the trial judge is *functus officio*.

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[6] By letter dated June 13, 2018, counsel for the plaintiffs wrote to this court, with a copy to counsel for the hospital, bringing his omission to the attention of the court. Counsel for the defendant hospital wrote the following day disputing that any error or omission had been made.

[7] By letter dated June 29, 2018, both counsel were advised by the court that, through an oversight, an award of loss of opportunity to invest general damages had not specifically been included, as was required under the ***Act***, although that had been the court's clear intention.

[8] Given their disagreement, counsel were invited to make submissions which resulted in the within motion.

[9] It is important to note that, upon review by the Court of Appeal, the only part of the trial judgment which was varied related to loss of earning capacity. Counsel for the defendant hospital argue, however, that in the absence of a specific award of loss of opportunity to invest general damages, an allowance for an amount under s. 80(3) of the ***Act*** must be taken to have been included in the

general damage award. No authority for this proposition was provided to the court, and it is contrary to the court's indication that it was always intended that an allowance be made for loss of opportunity to invest at a rate of 3% per annum.

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[10] Counsel for the defendant hospital also argue that s. 80(3) of the ***Act*** only requires that the court to "consider" making such an allowance. However, the section provides:

> **Non-pecuniary damages**
> 80(3) ... a judge **shall** make allowance for the loss of opportunity for the successful party to invest the amount of the damages.
>
> [emphasis added]

[11] In my view, the clause is mandatory and the court is required to make such an order.

[12] Counsel for the plaintiffs pointed out that, had an allowance for loss of opportunity to invest been included in the form of judgment provided to counsel for the defendant hospital, any disagreement on this point would have come to light at that time and, in the usual way, clarification could have been sought from the court prior to the form of judgment being entered. However that may be, counsel for the hospital maintains that the "slip rule" does not apply and the matter cannot be rectified at this stage of the proceedings.

[13] There is no question that the court has no jurisdiction to re-open or amend a final decision except in very limited circumstances. These are:

(a) where there has been a slip in drawing up the judgment, or

(b) where there has been an error in expressing the manifest intention of the court.

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[14] This rationale has found its way into the ***Manitoba Court of Queen's Bench Rules*** which state:

Amending
59.06(1) An order that,

(a) contains an error arising from an accidental slip or omission; or

(b) requires amendment in any particular on which the court did not adjudicate; may be amended on a motion in the proceeding.

[15] The court was provided with numerous instances where courts have relied on the "slip rule" to correct errors or omissions in the form of an order in circumstances where they have not reflected the manifest intention of the court, or where there has been an inadvertent error made in drawing up the judgment. Frequently, these relate to interest and costs.

[16] The question here is whether the fact that an appeal and a determination by the Court of Appeal makes any difference to the application of the "slip rule" in the circumstances of this case. In my view, it does not.

[17] The omission of a clause granting to the plaintiffs an award for loss of opportunity to invest non-pecuniary damages at 3% per annum, to which they are entitled at law, is clearly an accidental slip or omission. Further, I do not accept the suggestion that the Court of Appeal might have decided the question

of general damages differently had the omitted interest been specifically included in the form of judgment and, accordingly, the rule should not apply. The question of interest was never considered by the Court of Appeal and interest on the judgment was stated simply as "interest." Neither do I accept that the correction of an obvious slip must be characterized, as it was here, as "the trial judge's being able to increase damages after the fact." This is simply a matter of rectifying an inadvertent error or slip.

[18] One could take the view that the form of judgment initially entered was incomplete in that it did not include a clause which was statutorily required and was intended to be included both by the court and by counsel for the plaintiffs. To correct this slip so that the judgment properly accords with the law and the court's intention is not tantamount to interfering with the decision of the Court of Appeal, nor does it constitute a new ruling.

[19] To the extent it was argued that it would be unfair to impose an additional financial burden on the defendant hospital some two and a half years after trial and further that litigants need certainty, it is important to point out that the certificate of decision of the Court of Appeal issued less than three months from the date of this hearing.

[20] It was also suggested that the court is *functus* although this argument was not vigorously pursued during counsel's submission. As the foregoing indicates, I am not persuaded by this argument particularly in light of the court's responsibility to use its powers to minimize delay and improve efficiency in the

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conduct of legitimate applications and motions. See ***R. v. Cody***, 2017 SCC 31, [2017] 1 S.C.R. 659 at para. 39.

[21] The plaintiffs’ motion is granted.

[22] Costs may be spoken to if counsel are unable to agree.

McCawley J.

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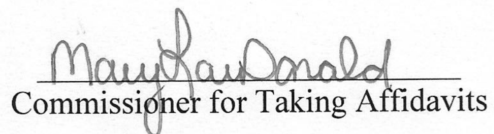
This is **Exhibit "V"** referred to in the affidavit of Kelly Lynn Donovan
sworn on February 10, 2021.



Commissioner for Taking Affidavits

ary Louise Donald, a Commissioner, etc.,
County of Brant, for the Government of Ontario,
Ministry of the Attorney General.

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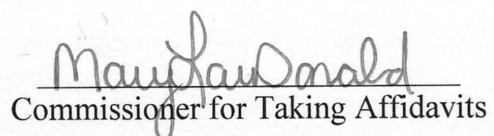
This is **Exhibit "W"** referred to in the affidavit of Kelly Lynn Donovan sworn on February 10, 2021.



Commissioner for Taking Affidavits

Mary Louise Donald, a Commissioner, etc., County of Brant, for the Government of Ontario, Ministry of the Attorney General.

P.O. BOX 3070
200 MAPLE GROVE ROAD
CAMBRIDGE, ONTARIO N3H 5M1

TELEPHONES:
CAMBRIDGE, KITCHENER,
WATERLOO (519) 653-7700
ALL OTHER AREAS (519) 570-3000
FACSIMILE (519) 650-1793

WATERLOO REGIONAL POLICE

Address all correspondence to:

BRYAN M. LARKIN
CHIEF OF POLICE

Attention:

ACCESS TO INFORMATION

FILE #190371

June 5, 2019

Bruce Ricketts
56 Baypointe Crescent
Ottawa, Ontario
K2G 6R1

Dear Mr. Ricketts:

I am writing regarding your request for access to information, our file 190371. A search was conducted for 'copies of any and all documents that will indicate all fees and disbursements paid to Donald B. Jarvis for services provided to Waterloo Regional Police Service and/or Regional Municipality of Waterloo for the matter regarding Kelly Donovan, between the dates of May 1, 2017 and May 10, 2019.

Forty-nine (49) pages of responsive records were located and after receiving authorization from the individual named in the records, partial access is granted to the information contained therein.

The fee of $9.80 has been waived.

Access is denied to some information pursuant to the following exemption in the Municipal Freedom of Information and Protection of Privacy Act (the Act):

12 A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation

Some portions of the record are deemed 'not responsive' as those portions do not contain information with respect to fees and disbursements.

Please contact our office by phone at (519) 650-8500, extension 8262 or by email at foi@wrps.on.ca, if you have any questions.

You may request a review of this decision by the Information and Privacy Commissioner, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. You have thirty (30) days to make this appeal.

In the event you wish to launch an appeal, please provide the Commissioner's office with:

1) The file number listed at the beginning of this letter;
2) A copy of this decision letter; and
3) A copy of the original request for information you had sent to this institution (if available).

In addition, you must send a $10.00 appeal fee to the Commissioner's office. Please include the fee in your letter of appeal. Appeal fees should be in the form of a cheque, or money order, payable to the Minister of Finance.

Enclosed are the records.

Sincerely,

Paul Cormier
Records Manager and Freedom of Information Coordinator
PC: kb

WATERLOO REGIONAL POLICE SERVICE

P.O. Box 3070
200 Maple Grove Road
Cambridge, Ontario N3H 5M1
519-570-9777

FILE #190371

May 15, 2019

Dear Ms. Kelly Donovan:

The Waterloo Regional Police Service has received a request for access to records pursuant to the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA).

The records contain information in the custody of the Waterloo Regional Police Service, specifically: All fees and disbursements paid to Donald B. Jarvis for services provided to Waterloo Regional Police Service and/or Regional Municipality of Waterloo for the matter regarding you between the dates of May 1, 2017 and May 2, 2019. Your views regarding disclosure of these records would be appreciated.

Please indicate on the attached form, "Affected Party Response", whether or not you would consider disclosure of these records to be an invasion of your personal privacy. If you object to the release of this information, please outline your objections in as much detail as possible. You may provide your response in writing, via email, or by telephone. Your response must be received by June 4, 2019.

For further information concerning MFIPPA, and your rights and responsibilities under MFIPPA, please refer to the attached document, "Affected Party Personal Information". If, after reviewing all of the documents included, you have further questions, you may contact the Access to Information Unit at 519-570-9777, extension 8262, or by email at foi@wrps.on.ca.

Sincerely,

Paul Cormier
Records Manager and Freedom of Information Coordinator
PC:kb
Attachments

WATERLOO REGIONAL POLICE SERVICE

P.O. Box 3070
200 Maple Grove Road
Cambridge, Ontario N3H 5M1
519-570-9777

FILE #190371

May 13, 2019

Dear Mr. Ricketts:

Your request for records has been received by the Access to Information Unit and a file has been opened on today's date. Your request will be processed pursuant to the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA). Please note that reference number 190371 has been assigned and should be referred to in all future communication.

We acknowledge receipt of the $5.00 application fee. You will be advised of any additional fees upon completion of your request.

You have requested records that will indicate all fees and disbursements paid to Donald B. Jarvis for services provided to Waterloo Regional Police Service in relation to a named individual. Please advise whether you would like us to seek consent from that individual to release the information to you. Your file will be placed on hold pending receipt of your response.

Please contact the Access to Information Unit by phone at 519-570-9777, extension 8262 or by email at foi@wrps.on.ca, if you have any questions.

Sincerely,

Kimberly Bowman

Per: Paul Cormier
Records Manager and Freedom of Information Coordinator

PC:kb

WATERLOO REGIONAL POLICE SERVICE

P.O. Box 3070
200 Maple Grove Road
Cambridge, Ontario N3H 5M1
519-570-9777

FILE #200029

February 26, 2020

Bruce Ricketts
56 Baypointe Crescent
Ottawa, Ontario
K2G 6R1

Dear Mr. Ricketts:

Re: Matters regarding Kelly Donovan

Bruce Ricketts
56 Baypointe Crescent
Ottawa, Ontario
K2G 6R1

Dear Mr. Ricketts:

I am writing regarding your request for access to information, our file 200029. A search was conducted for 'copies of any and all documents that will indicate all fees and disbursements paid to Donald B. Jarvis for services provided to Waterloo Regional Police Service and/or Regional Municipality of Waterloo for the matter regarding Kelly Donovan, between the dates of May 10, 2019 and December 20, 2019.

The fee of $3.60 has been waived.

Some portions of the record were deemed 'not responsive' as those portions do not contain information with respect to fees and disbursements. Those portions of the record have been redacted accordingly.

If you have any questions, please contact the Access to Information Unit by phone at 519-570-9777, extension 8262, or by email at foi@wrps.on.ca.

Sincerely,

Kimberly Bowman
Analyst, Access to Information Unit
Auth: Paul Cormier, Records Manager and Freedom of Information Coordinator

WATERLOO REGIONAL POLICE SERVICE

P.O. Box 3070
200 Maple Grove Road
Cambridge, Ontario N3H 5M1
519-570-9777

FILE #200818

November 27, 2020

Bruce Ricketts
56 Baypointe Crescent
Ottawa, Ontario
K2G 6R1

Dear Mr. Ricketts:

Re: Matters regarding Kelly Donovan

Bruce Ricketts
56 Baypointe Crescent
Ottawa, Ontario
K2G 6R1

Dear Mr. Ricketts:

I am writing regarding your request for access to information, our file 200818. A search was conducted for 'copies of any and all documents that will indicate all fees and disbursements paid to Donald B. Jarvis for services provided to Waterloo Regional Police Service and/or Regional Municipality of Waterloo for the matter regarding Kelly Donovan, between the dates of December 20, 2019 and October 22, 2020.

The fee of $3.80 has been waived.

Some portions of the record were deemed 'not responsive' as those portions do not contain information with respect to fees and disbursements. Those portions of the record have been redacted accordingly.

If you have any questions, please contact the Access to Information Unit by phone at 519-570-9777, extension 8262, or by email at foi@wrps.on.ca.

Sincerely,

Kimberly Bowman

Kimberly Bowman
Analyst, Access to Information Unit
Auth: Paul Cormier, Records Manager and Freedom of Information Coordinator

WRPS payments to lawyer

(Since Resignation)

2017	
July	$127.13
August	$1,525.50
September	$127.13
September	$1,779.75
December	$960.50

2018	
January	$2,042.48
March	$3,432.38
March	$446.35
April	$686.48
(Claim was Filed)	
May	$6,126.01
May	$10,031.48
June	$10,383.49
June	$3,016.82
July	$8,406.30
July	$254.25
July	$2,443.63
Juy	$590.43
August	$463.30
August	$1,644.15
August	$1,428.04
August	$9,806.99
August	$1,398.38
September	$2,995.91
September	$971.80
September	$254.25
September	$2,923.88
September	$358.78
October	$574.89
October	$4,238.37
November	$12,337.31
December	$20,832.40
December	$30.79
December	$717.55

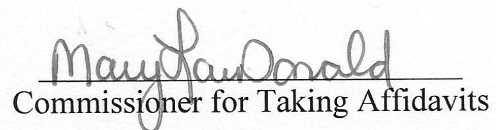
2019	
January	15446.99
January	14940.63
January	1285.38
February	37291.27
February	386.7
February	2603.66
February	4370.28
March	2938.95
March	2757.2
March	6144.38
April	659.03
April	1144.13
April	146.9
May	$4,124.50
May	$7,380.32
May	$2,472.28
June	$19,766.53
June	$381.38
September	$3,734.65
September	$104.53
September	$128.54
September	$104.53
September	$128.54
October	$1,285.38
October	$30,296.71
October	$1,156.84
November	$4,401.35
November	$12,727.59
December	$128.54
December	$723.20
December	$3,269.94

2020	
10-Jan	128.54
26-Feb	572.71
26-Feb	240.13
26-Feb	1459.11
24-Mar	154.95
24-Mar	624.33
24-Mar	6613.05
15-Apr	309.34
15-Apr	9941.81
15-May	7869.04
15-May	12233.66
18-Jun	5435.70
18-Jun	3733.24
21-Jun	7179.74
21-Jun	4813.80
28-Aug	2546.74
28-Aug	1522.68
28-Sep	7578.06
28-Sep	9766.03

	2017–2018	2019	2020
Subtotals:	**$113,356.90**	**$182,430.85**	**$82,722.66**

Total Legal Fees Paid by WRPSB Since Resignation:	**$378,510.41**
Legal Fees Awarded to Plaintiff, including Interest:	**$7,558.56**
	$386,068.97

This is **Exhibit "X"** referred to in the affidavit of Kelly Lynn Donovan
sworn on February 10, 2021.



Commissioner for Taking Affidavits

[illegible] ouise Donald, a Commissioner, etc.,
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The Record

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WATERLOO REGION

Experts to probe 9 police suicides

By Laura Booth Record Reporter
Waterloo Region Record
Thu., Jan. 3, 2019 | 2 min. read

Article was updated Apr. 13, 2020

WATERLOO REGION — Ontario's chief coroner is launching an expert panel to review the suicides of nine police officers in 2018, including an officer from the Waterloo Regional Police.

"I'm going to identify experts that would deal with mental wellness, deal with operational stress injury, deal with health and wellness within a police service — so bring experts from all of those different groups to convene a diverse panel," Dr. Dirk Huyer told The Record Thursday.

The panel has yet to be selected, but members will be presented with the cases of all nine officers. They will look for trends and commonalities to determine whether there were potential points of prevention or intervention, said Huyer.

"Ultimately, our job is to help prevent further deaths," he said.

Information about the officers, gleaned from family, health and employment records, along with information from the police services involved, will be examined.

The panel will also look at the mental health strategies in place at the police services that employed the officers.

"Are the strategies solid? Because if the strategies are solid, then is there a reason that they're not getting the help that is available to them?" said Huyer.

While the coroner will not disclose the names of the officers or the police services that will be subject to the expert panel review, he confirmed that one of the nine officers was with Waterloo Regional Police.

Huyer said he has contacted all of the police services affected.

On Thursday, Waterloo Regional Police Chief Bryan Larkin confirmed he's spoken with the chief coroner about the review.

"We fully support and welcome a review that will help determine how mental health support can be better provided to first responders," Larkin said in a statement. "We look forward to the review's findings and we are hopeful this review will result in greater awareness and more discussion concerning mental illness."

Huyer said all nine deceased officers were active members or "very" recently retired, and they are believed to be the only officer deaths by suicide in the province for all of 2018.

"That's a significant number; it's far greater than we have seen in many years," said Huyer, adding that over the past five years, there's generally been fewer than five suicides per year.

The coroner's expert panel will publish its findings and recommendations in a report Huyer expects to be completed by the summer. The report will be made public, although the families of the deceased officers will decide if the officers will be identified.

Huyer said the decision to launch the panel was spurred by the high number of suicides among officers, along with the decision by the Ontario Provincial Police to launch an internal review into suicides and attempted suicides involving its members over the past five years.

The OPP review, which will try to identify what is preventing officers with mental health issues from seeking help, was launched after three OPP officers died by suicide within a three-week period last summer.

Sgt. Sylvain Routhier, Det. Insp. Paul Horne, and Const. Joshua De Bock died by suicide, the OPP said in August.

lbooth@therecord.com, Twitter: @BoothRecord

With files from The Canadian Press

More from The Record & Partners

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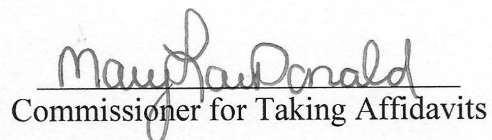
This is **Exhibit "Y"** referred to in the affidavit of Kelly Lynn Donovan sworn on February 10, 2021.



Commissioner for Taking Affidavits

Mary Louise Donald, a Commissioner, etc., County of Brant, for the Government of Ontario, Ministry of the Attorney General.

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GTA

Canadian police officers fear stigma of reporting mental health issues: survey

By **Wendy Gillis** Staff Reporter
Fri., Jan. 29, 2021 | 6 min. read

A suicidal cop is denied help by a police chief who "didn't like this officer."

A male supervisor tells another manager she'll turn officers into "pussies" when she suggests taking an active approach to workplace mental health.

An inspector says cops who responded to a "horrible suicide" must be offered mental health support "so we can say we did it."

A cross-Canada survey of more than 800 officers has found that despite beefed-up officer wellness programs and growing awareness about the psychological toll of the job, stigma still surrounds mental illness in policing.

Most cops polled, especially women and junior officers, believe reporting mental health issues could have negative repercussions on their career.

"They'll tell you there's no stigma. It's an outright lie. You've got to present the persona of being indestructible or your career is over," a male constable with nearly three decades on the job says in a recently published study out of Western University by London officer-turned-academic Lesley Bikos.

The research is the first phase of reporting from a nationwide, anonymous survey launched in 2019 that's believed to be the first of its kind — data collection from more than 700 officers that Bikos, a PhD candidate, hopes will provide an on-the-ground picture of policing culture in a turbulent, changing time for the profession.

"The big, common theme that kept coming up, over and over again, was stigma," Bikos said in an interview.

Bikos also conducted more than 100 interviews with officers ranging in rank from constable to senior management in 31 police services across the country, unearthing troubling anecdotes about workplace mental health incidents. The stories included in Bikos' report are anonymized, but include details such as gender and years of service.

The mental health toll of policing has drawn increased attention in recent years, particularly in 2018, when nine active or recently retired Ontario police officers died by suicide.

Ontario's coroner's office launched a review into the deaths, which concluded the suicide rate was statistically higher than in the general public and "anecdotally ... may reflect increases in mental health issues across the policing sector."

Acting on a central recommendation from the review, Ontario coroners have begun tracking first-responder suicides. According to preliminary data provided to the Star, seven officers died by suicide in 2019, while four more died last year, including Const. Mike Austin, who died inside Toronto police headquarters.

The deaths have helped promote openness about mental health issues in policing.

This week, for Bell Let's Talk Day, chiefs and police associations across Canada urged their members to reach out for support and take advantage of wellness programs; according to the National Police Federation, the union representing thousands of RCMP officers, there was a 69-per-cent increase between 2014 and 2019 in members seeking mental health support.

Meanwhile, peer support networks have stepped in to help officers who may not want to go through their employer.

Although half those who participated in the online survey said mental health stigma has reduced in their workplace — generally, Bikos found, police forces now openly acknowledge mental health issues and some have developed more supports — there remains a widespread culture that prioritizes stoicism and toughness.

"The belief that those who experience mental illness are labelled weak, incompetent, and lazy largely remained, despite senior management messaging and programs/resources," Bikos writes in the study, published in *Policing: An International Journal.*

"They had the real sense, whether it's perception or reality, that this was all window dressing," Bikos told the Star of the mental health supports and messaging.

Traditional masculinity was often identified as the largest cultural barrier to reducing stigma for both male and female officers, according to the study. But men had "deeply internalized" the idea that mental illness equated weakness and incompetence.

"Somewhere in my heart and mind I will always see this as a form of weakness," said one male officer who is currently off on mental health leave after nearly two decades as an officer.

"Til the day I die, it will always feel that way just a little bit. I failed as a cop. I couldn't deliver. That's a huge part of the shame."

Only 24 per cent of those surveyed said they felt that could report mental illness without fear.

The risk was most acutely felt by women officers, low ranking officers, and those already on leave for mental health reasons.

The latter group offered valuable insights because they had actual experience reporting mental illness. Bikos said some used the resources available through the police service — "we could classify that as progress." Others felt isolated and were off for long periods of time, or retired early; in interviews, some said they'd been off for years and never heard from their service except for administrative reasons.

"That's the issue. You can have supports in place, but if it's not culturally accepted and leaders don't demonstrate compassion and walk the talk, it leaves the impression that their concern is not genuine," Bikos said.

Bikos stressed that she interviewed dedicated and progressive managers who attempted to create change, but they were too often outnumbered.

One female senior manager said she was trying to convince two other male supervisors that they should create a policy to take a more active approach to the mental health of officers.

"Their response was, 'You're going to turn them into pussies.' I mean, that says it all," the female officer said.

"Well, newsflash! People are killing themselves. It's ugly, there is so much stigma and it hinders us from moving forward."

Waterloo police Const. Angie Rivers has been on leave with post-traumatic stress disorder since 2015, stemming from alleged workplace sexual harassment and bullying. She was later part of a class-action lawsuit that alleged gender-based discrimination within the Waterloo police service, allegations the force denied. In 2019, Ontario's top court ruled that the lawsuit could not proceed.

In an interview, Rivers said it took her a long time to realize she was suffering from mental health issues, which at one point included suicidal thoughts, in part because she says officers weren't told symptoms to be aware of.

It was also "socially unacceptable for me to be ill," Rivers said.

"The internal culture where I come from looks down very heavily on people with mental health issues," Rivers said.

These cultural barriers can make it challenging for officers to come forward for assistance, "which is why I think you see officers reaching for help in unhealthy ways, such as drugs and alcohol or violence."

Cherri Greeno, a spokesperson for Waterloo Regional Police, noted the service had not reviewed Bikos' study and said she could not comment on Rivers' case due to "labour laws and ongoing current proceedings."

But she said Waterloo police "has progressive and comprehensive programs, initiatives, training and supports in place ... to ensure our members feel supported and are able to receive help when they need it." These include an annual mandatory check-ins with a mental health professional, which she said is aimed in part at "helping to end the stigma associated with mental health challenges." She also noted the service is developing an in-house psychological services program.

Greeno said a recent internal member survey found that, overall, respondents felt greater attention is being paid to mental health and work-life balance. Seventy-one per cent of officers agreed the service provides sufficient support for mental wellbeing.

Bikos' study also found that officers with mental illness were called back to work prematurely and sent out on duty, "despite clear signs they were not healthy," posing a potential danger to both officers and the public. In general, untreated mental illness in

officers creates risk ranging from lost productivity to heightened chance of suicide to increased aggressiveness and use-of-force incidents.

To begin working towards eliminating stigma around mental illness, policies that normalize mental illness as a job hazard, “not a personal failure,” increased supports that are confidential, including access to police-specific counselling that’s backed up to allow for intensive treatment, and improved return-to-work policies are needed, Bikos said.

Bikos also says an “honest review of organizational culture and its impacts on the workplace must be done.”

If you are considering suicide, there is help. Find a list of local crisis centres at the Canadian Association for Suicide Prevention. Or call 911 or in Ontario call Telehealth at 1-866-797-0000

Wendy Gillis *is a Toronto-based reporter covering crime and policing for the Star. Reach her by email at wgillis@thestar.ca or follow her on Twitter: @wendygillis*

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Court file no. CV-18-00001938-0000

KELLY LYNN DONOVAN
Plaintiff

v. WATERLOO REGIONAL POLICE SERVICES BOARD, and BRYAN LARKIN

Defendants

Ontario
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT BRAMPTON

MOTION RECORD OF THE RESPONDING PARTY
VOLUME II

(Returnable February 22, 2021)

KELLY DONOVAN
#148 – 36 Hayhurst Road
Brantford, Ontario
N3R 6Y9
Phone: 519-209-5721
Email: donovandih@gmail.com

Served upon: djarvis@filion.on.ca, cma@filion.on.ca