CITATION: Platnick v. Bent, 2016 ONSC 7340
COURT FILE NO.: CV-15-520683
DATE: 20161201

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Howard Platnick, Plaintiff/Responding Party

AND:

Maia Bent and Lerners LLP, Defendants

BEFORE: S. F. Dunphy, J.

COUNSEL: *H. Winkler, A. Lokan and E. Pond,* for the Defendant/Moving Party Maia Bent

L. Moscu and N. Holmberg, for the Defendant Lerners LLP

H. Schwartz, for the Intervenor

T. Danson, for the Plaintiff/Responding Party

HEARD: June 27, November 17-18, 2016

ENDORSEMENT

[1] The defendant Maia Bent has brought this motion pursuant to s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 to dismiss the plaintiff's libel suit against her on the basis that the proceeding arises from a communication – in this case an email - relating to a matter of public interest. The plaintiff disputes the motion but has also served a Notice of Constitutional Question and takes the position that, in the event s. 137.1 of the *CJA* applies in this situation, its application violates his rights under s. 7 and s. 15(1) of the *Charter of Rights and Freedoms* pursuant to the *Constitution Act, 1982*.

[2] The email communication giving rise to this litigation was made by Ms. Bent – then president-elect of the Ontario Trial Lawyers Association – to a confidential "Listserve" accessible only by those OTLA members who subscribed to it. The email alerted subscribers to an incident that had occurred during the course of her representation of a client in a catastrophic injury claim and provided them with advice for the conduct of similar claims in future. The email made

reference to two expert reports provided by the plaintiff in terms he claims were defamatory. The email was subsequently leaked by one of its recipients to a broader audience resulting, according to the plaintiff, in his being dropped as a service-provider by many of the insurance companies for whom he had worked over the years developing along the way a lucrative practice. He claims substantial damages arising.

[3] For the reasons that follow I am allowing this motion and dismissing this action. I have found that the email communication in question related to a matter of public interest within the meaning of s. 137.1(3) of the *CJA*. The proper role of expert witnesses in general and authors of "executive summary reports" in particular is of importance to the administration of justice and to the accident benefit scheme that has been under near continuous refinement in recent years. The plaintiff has failed to discharge the onus placed upon him by s. 137.1(4) of the *CJA*. Whether the claim can be considered to be one of "substantial" merit I need not determine since there is no credible or compelling evidence from which I can derive reasonable grounds to believe that the defences pleaded by the defendant are not valid. There is credible and compelling evidence before me that the defences of justification and qualified privilege in particular are reasonably likely to succeed as the portions of the email referring to the plaintiff appear to have been substantially true and correct or are fair and reasonable comment upon those facts. I am also not satisfied that the public interest in permitting the plaintiff's suit to proceed outweighs the public interest in protecting the communication made in this case. The plaintiff's suit has in fact had a substantial chilling effect on discussion and debate about the proper use and utility of this type of derivative expert's report in the accident benefit claims process whereas substantially all of the damages alleged by the plaintiff arise either from the unauthorized and unanticipated leak of the email communication to a broader audience by others and the "broken telephone" manner by which its contents were conveyed to some of the plaintiff's clients, neither of which avenues of damage appear reasonably likely to be shown to have been caused by the defendant. Finally, the plaintiff has failed to satisfy me that the operation of s. 137.1 of the *CJA* infringes any of his rights under s. 7 or s. 15(1) of the *Charter*.

Overview of Facts

(i) The November 14, 2014 email

[4] On Monday, November 14, 2014, Ms. Bent made an email posting to a "Listserve" maintained by the OTLA concerning a personal injury claim that she had settled the previous week.

[5] The "Listserve" is an automated email service. OTLA members who subscribe to it can log in with their password to view messages posted there if they choose. Members are also able to opt to receive the communications directly to their own email inbox. Only those OTLA members who chose to subscribe to the Listserve and who agreed to the terms of a confidentiality agreement were granted access. There were approximately 670 subscribers to the Listserve in November 2014. Not all of the members of the Listserve were active in the sense of actually logging in regularly to view emails posted there. It is not known how many of the 670 subscribers saw Ms. Bent's email of November 14, 2014.

[6] The OTLA is an association of plaintiff-side personal injury lawyers. Ms. Bent was then President-elect of the OTLA, soon to assume the mantle of President in 2015. At the relevant time, the OTLA had approximately 1,600 members. The OTLA is an active organization whose mandate includes the continuing legal education of its members and advocacy to government and media on issues relating to accident victim's rights and other issues of interest to its members.

[7] The intended audience for Ms. Bent's email was thus lawyers who, like her, devote the bulk of their practice to representing accident victims making claims against insurance companies, primarily in the motor vehicle area. Her email used acronyms and expressions known to practitioners in the area but less familiar to the general public or even lawyers practicing outside of the personal injury field.

[8] The email of November 14, 2014 was brief and is set forth in full below:

> "Dear Colleagues,
>
> I am involved in an arbitration on the issue of catastrophic impairment where Sibley aka SLR Assessments did the multidisciplinary assessments for TD Insurance. Last Thursday, under cross-examination the IE neurologist, Dr. King, testified that large

> and critically important sections of the report he submitted to Sibley had been removed without his knowledge or consent. The sections were very favourable to our client. He never saw the final version of his report which was sent to us and he never signed off on it.
>
> He also testified that he never participated in any "consensus meeting" and he never was shown or agreed to the Executive Summary, prepared by Dr. Platnick, which was signed by Dr. Platnick as being the consensus of the entire team.
>
> This was NOT the only report that had been altered. We obtained copies of all the doctor's file and drafts and there was a paper trail from Sibley where they rewrote the doctors' reports to change their conclusion from our client having a catastrophic impairment to our client not having a catastrophic impairment.
>
> This was all produced before the arbitration but for some reason the other lawyer didn't appear to know what was in the file (there were thousands of pages produced). He must have received instructions from the insurance company to shut it down at all costs on Thursday night because it offered an obscene amount of money to settle, which our client accepted.
>
> I am disappointed that this conduct was not made public by way of a decision but I wanted to alert you, my colleagues, to always get the assessor's and Sibley's files. This is not an isolated example as I had another file where Dr. Platnick changed the doctor's decision from a marked to a moderate impairment."

(ii) Context of the email

[9] The arbitration in question was in respect of a claim lodged by Ms. Bent's client Dr. Carpenter seeking benefits from what was alleged to have been a catastrophic injury sustained in a 2007 automobile accident. Her catastrophic injury claim was initially denied by the insurer and proceeded to arbitration before the Financial Services Commission of Ontario.

[10] In the course of assessing the claim, the insurer had engaged the services of an assessment company named "Sibley SLR" to co-ordinate the process of obtaining independent medical assessments from various medical professionals selected by them in order to determine whether the claim of Dr. Carpenter satisfied the criteria for a finding of catastrophic impairment within the meaning of the Statutory Accident Benefits Schedule (or "SABS") regulations enacted pursuant to the *Insurance Act*, R.S.O. 1990, c. I.8.

[11] Dr. Platnick was engaged by Sibley to prepare an "Executive Summary Report" (or "ESR") of the several individual assessments prepared by each of the other Independent Medical Examiners (or "IME's"). According to Dr. Platnick, such a report is prepared after the IME's have conducted their assessments and delivered their reports to Sibley on behalf of the insurer. An ESR is essentially a paper review process and does not require Dr. Platnick to meet the claimant or even necessarily to speak with any of the expert IME's who perform the actual assessments. By training, Dr. Platnick is a general practitioner and as such does not have the specialist qualifications of the various experts whose reports he summarizes. He has for the past decade or longer devoted himself almost exclusively to performing the role of medical expert with a client base consisting primarily of insurance companies or the assessment companies hired by them to evaluate claims. He has however done some work for plaintiff law firms in the past.

[12] Although characterized as an "Executive Summary Report", it is clear, at least in the case of the two ESR's of Dr. Platnick at issue in this case, the reports are *not* an objective summary of the underlying medical reports themselves so much as a summary of the conclusions reached by Dr. Platnick himself, applying their expert observations to his own understanding of the operation of the SABS regulations and the criteria incorporated therein. The underlying medical reports in the two cases commented upon by Ms. Bent contained very significant observations from the IME's that were favourable to the claimant but were omitted in Dr. Platnick's summary report.

[13] The ESR prepared by Dr. Platnick in the Carpenter case concluded:

> "It is the *consensus conclusion* of this assessment that [the claimant Dr. Carpenter] does not achieve the catastrophic impairment rating as outlined in the SABS and utilizing the OCF-19 Form due to impairments/injuries as a result of the April 12, 2007 motor vehicle accident" (emphasis added).

[14] The characterization of Dr. Platnick's *personal* conclusion as a "consensus conclusion" in the ESR was most certainly false and misleading. The conclusion stated was not a "consensus conclusion" of any other expert. It was Dr. Platnick's own conclusion. Dr. Platnick had not spoken to or even contacted any of the other physicians whose reports formed the basis of his own report. He did not ever see the patient. His review was strictly a desk review. When submitting his report, he testified that he expected that Sibley would contact the other experts *afterwards* to secure their

agreement with his "consensus conclusion". In other words, he hoped that his conclusion would *become* a consensus conclusion – it clearly was not a consensus conclusion at the time he submitted his report.

[15] It is undisputed that the conclusions in the report were his and his alone, even if based *entirely* upon the observations and conclusions of others. One of the other experts categorically refused to sign on to Dr. Platnick's report and Sibley appears to have abandoned the effort to secure the signatures of the others as a result. The report of Dr. Platnick was not amended or withdrawn in consequence. It formed part of the basis for the insurance company's determination to deny the claim and was submitted as supporting evidence justifying that decision in the claims process before FSCO.

[16] Prior to the hearing of the arbitration, Ms. Bent had taken the step of obtaining an order requiring the production of the complete claim file including that of Sibley and of all of the IME's. Dr. Platnick claimed to have neither notes nor drafts and thus produced no documents. The IME's who had actually seen the patient did have notes and drafts and these were produced. Ms. Bent was able to demonstrate instances where material information favourable to her client's case had failed to make its way into the final reports submitted to the arbitrator. Dr. King, who testified at the hearing, was unable to explain changes made to his report that he said he had not made himself nor had he ever seen Dr. Platnick's report that purported to be an executive summary of, among others, his own report and had not concurred in its conclusions.

[17] Dr. King's testimony occurred on a Thursday. That evening, the insurer offered to settle the case on terms that Ms. Bent characterized as a capitulation. Not only did the insurance company agree to accept the catastrophic injury claim of Dr. Carpenter but it also agreed to pay her costs on a scale Ms. Bent characterized as quite unusual in such cases. It is quite probable that OTLA lawyers to whom the November 14, 2014 email communication was directed would have understood her characterization of the settlement in that same light.

[18] Ms. Bent's email to the Listserve was sent the following Monday, November 14, 2014.

[19] As is evident from the text of the email and its context, her primary object in sending it was to advise OTLA colleagues always to obtain full disclosure of the files in catastrophic impairment cases as she had done, her experience in the Carpenter case providing a very concrete example of why this practice can prove critically important.

[20] Dr. Platnick did not testify at the Carpenter Arbitration. His attendance became unnecessary as a result of the swift settlement of the case that intervened following Dr. King's testimony. In agreeing to the settlement, TD Insurance ultimately chose to disregard Dr. Platnick's opinion as expressed in his ESR and accept the catastrophic impairment claim of Dr. Carpenter.

[21] Although Dr. Platnick's affidavit emphasized in the most emphatic terms possible the purely passive nature of his role in preparing ESR's, cross-examination revealed that the claimed level of isolation from the process of preparing the underlying IME reports was actually quite case-specific.

[22] The "other" case of Dr. Platnick mentioned in the last paragraph of Ms. Bent's email (discussed further below) was also an instance of an ESR prepared by Dr. Platnick in the context of a catastrophic impairment claim. However, despite the categorical assurance that he does *not* contact the assessing IME in preparing such reports, in this other case he did exactly that at the request of the assessment company and succeeded in persuading the IME in question (Dr. Dua) to produce an amended "final" report that happened to correspond to the economic interest of his client and resulted in a changed recommendation from that physician. I shall review the circumstances of this second case below. In that other case as well, Dr. Platnick's client ultimately disregarded his opinion and accepted the catastrophic impairment claim.

(iii) Re-publication of the alleged libel

[23] The statement of claim pleads that the email of November 14, 2014 was published both to the OTLA membership and to "the greater insurance industry" but contains no particulars of the means by which it was alleged to have been communicated by the defendant to the latter group who were of course not members of the OTLA or its members-only Listserve.

[24] The plaintiff also pleaded that the Ms. Bent gave an interview that was published in the December 29, 2014 issue of "*Insurance Business*" – a publication that appears to have post-dated much of the damages that his affidavit alleges he suffered. This pleading was supported by no evidence whatsoever and appears on its face to be manifestly untrue. While the article referenced an interview with a member of a public-advocacy group named "Association of Victims for Accident Reform" also known as "FAIR", it made no claim to having "interviewed" Ms. Bent and attributed no comments to her beyond the contents of her email.

[25] Ms. Bent's affidavit and cross-examination evidence denied having granted an "interview" with the magazine, claimed no information as to how the email came into the hands of the magazine and affirmed that there had been an unauthorized leak of the email from the group to whom it was directed, which leak had been confessed to.

[26] Dr. Platnick's affidavit provides no particulars of how the communication was published to the "greater insurance industry" as he had pleaded. His affidavit characterized Ms. Bent's email as an "Industry-Wide Communication" but offered no particulars as to how Ms. Bent was alleged to have communicated with anyone other than the subset of OTLA members subscribing to the Listserve. Dr. Platnick suggested that Ms. Bent knew or ought to have known "the dynamics of the insurance industry; the tensions between the plaintiffs' bar and the defence bar; and therefore these types of defamatory communications could take on a life of their own and go viral throughout the industry". He alleges that there is an "active rumour mill" that re-circulated inaccurate stories about him attributed to Ms. Bent. He claims that one such rumour suggested that he had committed perjury on the witness stand while under oath. Ms. Bent's email contained no such allegation.

[27] I can attach no material weight to such bald and unsubstantiated statements regarding the gossip of others.

[28] The defendant clearly does not bear unlimited responsibility for every inaccurate or distorted repetition of her written communications disseminated by persons unknown to other persons unknown. Defamation is determined objectively by considering the words used as they would reasonably be understood by their audience, not by a consideration of how the words might subsequently be distorted through "broken telephone".

[29] There is no credible evidence to suggest that Ms. Bent published the email to anyone beyond the limited constituency of the defendant's colleagues who are OTLA members belonging to the Listserve. The evidence establishes that members of that group had an acknowledged obligation to maintain confidentiality of the communications posted there and there is no credible basis to conclude that she should have reasonably foreseen a breach of that obligation in this instance, the plaintiff's bald suggestion to the contrary notwithstanding. There is no evidence of the confidentiality obligation being routinely ignored by members of the Listserve on other occasions nor is there any pleading (still less evidence) that Ms. Bent knew or ought to have known of a substantial risk of republication in violation of the confidentiality rules associated with membership in the OTLA Listserve.

[30] The uncontradicted evidence before me is that Ms. Bent was quite upset to learn of the leaking of the email and took immediate steps as an officer of the OTLA to conduct an investigation to locate the source of the leak. The source of the leak was located and a confession received as a result.

[31] I cannot find on the record before me that there is any basis to conclude that Ms. Bent could have reasonably foreseen that the confidentiality obligations undertaken by recipients of the email would be breached and that the email would make its way into the broader insurance community including the clients upon whom Dr. Platnick depended, still less that it would do so in the distorted "broken telephone" fashion claimed by Dr. Platnick in this case.

(iv) Damages alleged by Dr. Platnick

[32] Dr. Platnick alleges that his practice began to suffer in a material way very shortly after the email was sent out on November 14, 2014. Very soon thereafter, he claims existing appointments were cancelled and new mandates stopped arriving. He claims that he was told in December or early January by unnamed persons that he had been "blacklisted" in the insurance industry. He claims that despite his efforts to contact clients and explain his side of the story, his work-flow had significantly dried up by January 2015. He claims that some insurance companies had pulled all of their files in which he had been involved and demanded that he review all of his prior reports for them. He provided no particulars of any of the clients or names of individuals communicating

this information to him. While some insurance companies have again begun to use his services, others have not and he estimates that his practice is now only about half of what it was beforehand.

(v) Prior proceeding involving Ms. Bent and Dr. Platnick

[33] The last paragraph of the November 14, 2014 email referenced a prior case involving Dr. Platnick. The parties filed a considerable body of evidence concerning that other case involving another client of Ms. Bent whom I shall refer to as "Frank" to preserve his privacy since he is not a party to this litigation.

[34] The controversy between the parties concerned Dr. Platnick's role in preparing an executive summary of a report dated November 4, 2011 made by Dr. Dua, an IME psychiatrist engaged by the same insurer to assess Frank's claim of catastrophic impairment arising from a 2007 motor vehicle accident.

[35] Dr. Dua's report found that Frank "sustained a catastrophic impairment under any or, a combination of any, of the criterion as the described in the Statutory Accident Benefits Schedule, Accidents (SABS) as it relates to mental and behavioural disorders". The report concluded:

> "Overall, [Frank] has Moderate impairment (Class 4), as he is able to care for himself but has problems with interpersonal relationship and difficulties with his concentration, persistence and pace. He is battling severe depression and has made serious suicide attempts. He is also having significant sleep disruption and fatigue. He is also unable to work on account of his physical and mental disorders. In my opinion, he has approximately 45% WPI impairment due to mental or behavioural disorder".

[36] Frank had reached his medical and rehabilitation benefit limits in January 2012 and required a determination of his catastrophic injury claim in order to receive further benefits. Ms. Bent's office followed up with the insurer and was given copies of the reports of all of the medical assessments that had been conducted by the insurer in October-December 2011, including that of

Dr. Dua. Her clerk was informed that a determination of the claim would not be made by the insurer until a summary report had also been received.

[37] Despite being promised a decision no later than February 24, 2012, no decision was received by that date. On February 27, 2012, Ms. Bent wrote the insurer to protest the delay, noting that the delay was placing the patient at risk of considerable harm and claiming that there was no need to wait for a summary report in light of the catastrophic determination already made by Dr. Dua in the November 4, 2011 report commissioned by the insurer.

[38] On March 1, 2012, Ms. Bent filed a complaint regarding the delay of the insurer with FSCO.

[39] On March 8, 2012, the insurer accepted Frank's catastrophic impairment claim. The complaint filed by Ms. Bent was however still pending before FSCO even though Frank's claim had been accepted.

[40] On April 11, 2012, FSCO responded to the complaint of Ms. Bent with a letter indicating that her delay complaint was well founded and that a warning letter had been issued to the insurer. The letter also noted that the insurer had received the summary report on March 8, 2012 and made its determination (the fax copy of the summary report shows a transmission date of March 7, 2012 – nothing turns on the discrepancy in dates).

[41] Dr. Platnick's summary report, received by Ms. Bent from FSCO in April *after* her client's claim had already been accepted, summarized Dr. Dua' report in a manner that was quite at odds with the conclusion contained in Dr. Dua's "final" report:

> "Dr. Dua rated him overall at moderate impairment (Class 3). A value for mental and behavioural impermanent has been assigned at 40% whole-person impairment.
>
> Dr. Dua concludes that [Frank] does not satisfy Criterion 8 with a Class 4 (marked impairment) or a Class *5* (extreme impairment) due to mental or behavioral disorders".

[42] Dr. Platnick's explanation of the discrepancy between his summary report and the report quoted report of Dr. Dua was involved and quite unknown to Ms. Bent until after this litigation began.

[43] Dr. Platnick claimed that the assessment company asked him to contact Dr. Dua some time after Dr. Dua had already rendered her final report of November 4, 2011. It was also presumably no earlier than January 2012 given the information communicated to Ms. Bent by the insurer at that time. He was asked to contact Dr. Dua and discuss her ratings with her "because it appeared to the vendor company that she offered an opinion outside her area of expertise and one that was not compliant with the statutory/regulatory regime".

[44] It is to be recalled that Dr. Dua had been retained by the same vendor company on behalf of the same insurer and it might have been supposed that the insurer would select experts reasonably familiar with the statutory and regulatory regime to which they were requested to apply their particular expertise. Be that as it may and following Dr. Platnick's intervention, Dr. Dua issued a *new* version of her report. Confusingly, she chose to date this second version November 4, 2011 as well and made no reference to an earlier signed and submitted version of the same report. This second version of Dr. Dua's "final" report, bearing the same date as the original, contained a changed SABS classification (that would justify rejecting Frank's claim) but continued to provide conclusions highly favourable to accepting Frank's catastrophic impairment claim.

[45] It was this second version of Dr. Dua's "final" report that Dr. Platnick summarized without reference to the first report nor his role in persuading Dr. Dua to change it. According to Dr. Platnick, Dr. Dua changed her conclusion and re-issued her report after speaking to him, but he did not *cause* her to change it. The changes, he claims, were her own. Dr. Dua provided no evidence for this motion.

[46] Whether Dr. Platnick's explanations regarding the operation of the Statutory Accident Benefit Schedule is technically accurate or not, his *summary* of Dr. Dua's report was in the nature of a selective digest of only those facts and conclusions favouring a rejection of the catastrophic claim and omitted much of the substance of her report that was to a quite different effect. It also made no mention of the earlier version of the same report or his own role in its revision.

(vi) Procedural history of the motion

[47] Pursuant to s. 137.2(1) of the *CJA*, a motion under s. 137.1 may be made at any time after the proceeding is commenced. Once made, s 137.2(2) of the *CJA* requires the motion to be heard no later than 60 days after the Notice of Motion is first filed with the court while s. 137.2(4) requires the hearing date to be sought *before* serving the Notice of Motion.

[48] The Statement of Claim in this case was issued on January 27, 2015 and the Statement of Defence of Ms. Bent was dated March 31, 2015. No Reply had been served before this motion was argued (a motion to do so after the fact is dealt with in separate reasons reported as Platnick v. Bent (No. 2), 2016 ONSC 7474 (CanLII)).

[49] On January 8, 2015, counsel for Ms. Bent advised the plaintiff's counsel that he intended to bring a motion for summary judgment. There followed a period of weeks where counsel for the plaintiff sought further details regarding the intended summary judgment motion.

[50] Ms. Bent's counsel appeared in Civil Practice Court to obtain a hearing date on April 8, 2016 after having delivered a draft of her notice of motion on April 1, 2016. Firestone J. directed a scheduling hearing before me on April 28, 2016 and the Notice of Motion was then delivered on April 27, 2016.

[51] At Civil Practice Court the plaintiff had indicated his intention to file a Notice of Constitutional Question challenging the validity of s. 137.1 of the *CJA*. As well, the plaintiff took the position that the matter simply could not be heard in the 60-day time frame dictated by s. 137.2(2) of the *CJA* given counsel's prior travel commitments. The purpose of the initial hearing before me on April 28, 2106 was thus to establish a full case timetable and to fix a date for hearing the motion on the merits.

[52] At the initial hearing of the motion, Mr. Danson indicated that he had a prior travel commitment in late June and could not have the matter ready to be heard before his departure nor would there be enough time to deal with potential interventions that might be brought forward in response to the Notice of Constitutional Question he intended to finalize without delay.

[53] Section 137.2(2) of the *CJA* is unambiguously mandatory in calling for a hearing of the motion within 60 days. Without deciding whether this requirement could be satisfied by *starting* the hearing within 60 days, I was not persuaded by the argument that the scheduling hearing before me on April 28, 2016 could be treated as starting "the" hearing of the motion as Mr. Danson suggested. Mr. Danson had filed no responding material and was quite understandably unwilling to proceed to argument without doing so. The initial hearing before me had only ever been intended to address the matter of scheduling. I was also satisfied that it would not be unreasonable to conduct the hearing within the 60 days required by s. 137.2(2) of the *CJA*. Pleadings had been closed for a year, the plaintiff had been on notice of the need to be prepared to put his "best foot forward" since early January and had notice of the intended motion and its grounds since April 1 even if the sworn affidavit and evidence in support was only received shortly before appearing in front of me. Many more complicated motions and proceedings are able to proceed on much shorter timelines in other areas and the type of hearing contemplated by the statute is emphatically *not* intended to be a full trial on the merits conducted in "hurry-up" mode. Rather, a summary hearing with an eye to keeping expenses moderate is intended.

[54] I therefore established a schedule geared towards a hearing on June 27th, being the 60th day after the Notice of Motion was served. June 9th was reserved as a date to hear motions if any for intervention arising from the Notice of Constitutional Question.

[55] Prior to June 9, 2016, the Attorney General of Ontario indicated that it would be intervening to support the constitutionality of s. 137.1 of the *CJA*. Mr. Danson sought to use the occasion to bring a fresh motion to argue (again) for a later hearing date given his travel schedule and the constraints he perceived that this would put upon his ability to respond to the motion adequately. I confirmed the June 27, 2016 hearing date at that time but ruled that Mr. Danson could elect to restrict himself to arguing the merits of the motion on June 27th, reserving until a later time argument on the *Charter* issue should it prove necessary. He did so.

[56] At the conclusion of the hearing of the motion on the merits conducted on June 27, 2016, I advised Mr. Danson that it would be necessary for him to make an appointment with the motions office for a hearing of his challenge to the validity of the *Protection of Public Participation Act,*

2015, S.O. 2015, c. 23. In view of the intervention of the Attorney-General for Ontario, the *Charter* motion was later fixed for a two-day hearing on November 17-18, 2016.

[57] The plaintiff filed a motion that was heard at the opening of the resumed hearing on November 17, 2016 seeking leave to file additional evidence and to amend his pleading by adding a Reply and by adding his personal services company as an additional plaintiff. The motion to adduce new evidence was dismissed at the hearing with reasons to follow. The motion to amend was taken under reserve. Both of these issues are dealt with in separate reasons (*Platnick v. Bent (No. 2)*, 2016 ONSC 7474 (CanLII)).

Issues

[58] The following issues are raised by this application:

a. Was the communication in respect of a matter of public interest?

b. Has the plaintiff discharged his onus of proving there are "grounds to believe that... the proceeding has substantial merit"?

c. Has the plaintiff discharged his onus of proving that there are "grounds to believe that...the moving party has no valid defence in the proceeding"?

d. Has the plaintiff discharged his onus of showing that the public interest in allowing the proceeding to continue outweighs the public interest in the communication?

e. What is the relevance of "*Charter* principles" to the construction of s. 137.1 of the *CJA*?

f. Does the application of s. 137.1 of the *CJA* violate the plaintiff's rights under s. 7 of the *Charter*?

g. Does the application of s. 137.1 of the *CJA* violate the plaintiff's rights under s. 15(1) of the *Charter*?

h. Is s. 137.1 of the *CJA* a reasonable limit prescribed by law such as can be demonstrably justified in a free and democratic society?

Analysis and Discussion

[59] The *PPPA* was enacted by the Legislature in 2015 after a lengthy period of study and review spanning over five years. Among other things, the *PPPA* amended the *CJA* to introduce s. 137.1 and s. 137.2. Following legislative reforms enacted in Quebec in 2009 as well as a number of public reports calling for reform of the law of defamation as it relates to matters of public interest, the Attorney General established the "Anti-SLAPP Advisory Panel" to solicit public input and study possible reforms to the laws of Ontario in 2010. "SLAPP" stands for "Strategic Lawsuit Against Public Participation". After receiving public comments and input, the advisory panel delivered its report to the Attorney General on October 28, 2010.

[60] On October 15, 2012 Bill 132 was introduced in the Legislature as the "Protection of Public Participation Act, 2012". It was a first attempt to translate the recommendations of the Advisory Panel into law. Bill 132 did not however proceed past first reading. On June 4, 2013, a fresh attempt was made with the first reading of Bill 83 entitled "Protection of Public Participation Act, 2013". Bill 83 proceeded to second reading before dying on the order paper in 2014 with the election in June of that year. Following the 2014 Ontario election, Bill 83 was re-introduced as Bill 52, receiving first reading on December 1, 2014. The *PPPA* received Royal Assent on November 3, 2015 and by its terms applied to actions commenced after it received first reading. Prior to its passage, Bill 52 was debated in committee and on the floor of the Legislature and was the object of considerable public input both for and against.

(i) Was the communication in respect of a matter of public interest?

[61] The plaintiff's position is that the email was purely a matter of private and not public interest. In support of this position, the plaintiff cites the confidential nature of the Listserve communication destined as it was solely for a select group of OTLA members and the fact that the mandate of the OTLA includes protecting what he describes as the financial interests of its members in the improving the conduct of their private law practices. The subject matter of the

communication is, according to the plaintiff, essentially a private matter of sharing trial tactics. The plaintiff characterized the communication as a "private teaching moment". The plaintiff submits that the concept of "public interest" must be construed in a "*Charter*-compliant" manner so as to foster and not inhibit access to justice.

[62] I shall consider the plaintiff's suggestion of an "overarching" principle of interpreting s. 137.1 of the *CJA* in a "*Charter*-compliant manner" in further detail below. Suffice it to say for present purposes that the suggestion is singularly unhelpful since it begs the question of whether a particular interpretation is non-compliant with the *Charter* and because there are competing *Charter* values at stake in construing s. 137.1 of the *CJA*, not least of which is the freedom of expression of the defendant who invokes its fast-track process.

[63] In my view, the plaintiff's characterization of the nature of Ms. Bent's email and the public interest in the matters addressed by it are both entirely too narrow. There is also more than a slight inconsistency between the plaintiff's attempt to characterize the "private" email as an "Industry-Wide Communication" when seeking to attach liability for republication to Ms. Bent while at the same time emphasizing the limited and private nature of the communication when denying its characterization as an expression in relation to a matter of public interest.

[64] The fact that the email communication itself was made in a private forum with a restricted audience does not preclude the subject matter from being considered to be one involving the public interest. It is the *subject matter* of the communication that must be scrutinized and not the *medium* of communication itself. This is made clear both by the plain language used in s. 137.1(3) of the *CJA* ("an expression made by the person that relates to a matter of public interest") and by the broad definition of "expression" in s. 137.1(2) of the *CJA* to include "any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity".

[65] The Supreme Court of Canada recently considered the issue of "public interest" in an analogous context to the present case in *Grant v. Torstar Corp.*, 2009 SCC 61 (CanLII). The guiding principles regarding the definition of "public interest" that I would draw from a review of *Grant* include:

a. "...the judge must consider the subject matter of the publication as a whole. The defamatory statement is not to be scrutinized in isolation" (*Grant* at para. 101);

b. "The authorities offer no single "test" for public interest, nor a static list of topics falling within the public interest" (*Grant* at para. 103);

c. "...the fact that much of the public would be less than riveted by a given subject matter does not remove the subject from the public interest. It is enough that some segment of the community would have a genuine interest in receiving information on the subject." (*Grant* at para. 102); and

d. "Public interest is not confined to publications on government and political matters, as it is in Australia and New Zealand. Nor is it necessary that the plaintiff be a "public figure", as in the American jurisprudence since *Sullivan*. Both qualifications cast the public interest too narrowly. The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence." (*Grant* at para. 106).

[66] The email was directed at members of the OTLA who specialize in plaintiff-side representation of accident victims. The questions addressed in the email include the role of claims assessment companies retained by insurance companies to examine claims, the role of IME's producing expert reports (especially "Executive Summary Reports") in connection with that process and the use made of those expert reports in catastrophic impairment arbitrations before FSCO. The primary object of the email was to underscore to other plaintiff-side lawyers the importance of obtaining production of the entire file in order to scrutinize expert reports filed in light of the experience gained in that case.

[67] At a high level, the question of the relationship between insured and insurer and the role of IME's and assessment companies in that system was found to be a matter of public interest in *Assessmed Inc. v. Canadian Broadcasting Corp.*, 2004 CanLII 28479 (ON SC) at paras. 268-271; aff'd 2006 CanLII 18619 (ON CA).

[68] The independence of experts is an issue of considerable importance to the administration of justice generally and to the administration of the Dispute Resolution System implemented as part of Ontario's no-fault accident benefits scheme in particular. Lessening the prevalence of the partisan "hired gun" expert and moving closer to the ideal of the non-partisan "amicus curiae" expert is a matter is of great importance to the administration of justice in Ontario and thus a matter of considerable public importance.

[69] Comparing the "original" final examining physician reports with the ESR prepared by Dr. Platnick in the two cases examined in the evidence before me clearly raises very serious questions about both the independence and utility of this type of report in the determination of accident claims disputes. A report of this nature may well be of great use to insurance defence counsel or claims adjusters seeking to marshal arguments against allowing a particular claim from the various medical assessments accumulated in the course of administering a claim.

[70] The question of whether a purely derivative "expert report" arising from a paper review of specialist reports prepared by others undertaken by a general practitioner without specialist qualifications of his own and hired by the (same) insurer may be treated as anything like an independent and objective expert *summary* of the underlying reports is a serious one. It is most certainly a question that is of great public importance.

[71] A warning to members of the legal profession about the danger of failing to expend the resources to obtain and review all of the underlying files going into such Executive Summary Reports accomplishes much more than simply helping lawyers win more cases to increase their own private income – it improves the administration of justice generally and is thus in respect of a matter of great public interest.

[72] Dr. Platnick agreed on cross-examination that the participation of physicians in the IME process is a matter of public controversy. His own participation in the process has been commented upon in a number of reported FSCO decisions – sometimes in a negative light; sometimes not. The role of IME's and the claim assessment companies retained by insurance companies who hire them is something that has been commented upon in a number of reported cases: *Burwash v. Williams*, 2014 ONSC 6828 (CanLII) and *Macdonald v. Sun Life Assurance*

Company of Canada, 2006 CanLII 41669 (ON SC). The subject has been discussed in articles in a number of trade publications including the Law Times, Canadian Lawyer as well as the *Insurance Business* Canada article cited in the statement of claim.

[73] These issues were considered and reviewed by Cunningham J. in his *Final Report on the Ontario Automobile Insurance Dispute Resolution System* released in 2014.

[74] The plaintiff suggested that the communication was on the level of trial tactics and cannot be considered to the type of communication aimed at by s. 137.1 of the *CJA*. I disagree. The plaintiff's statement of claim itself provides a sufficient admitted basis to conclude that the communication was in relation to a matter of public interest. The original communication was made solely to members of the OTLA Listserve. The "public" represented by those members were described in the statement of claim as being in an "adversarial conflict" with the insurance companies and vendor companies who retain the plaintiff none of whom are pleaded or claimed to have been recipients of the email on its initial publication.

[75] It was not the *private* communication to the Listserve that is alleged to have caused the plaintiff damage but its subsequent *re-publication* that is claimed to have caused damages to him. That re-publication was pleaded to have occurred, among other means, through a letter sent by the head of a public-interest advocacy group (FAIR) to various MPP's which was then further leaked to a journalist for a trade publication called "*Insurance Business*" and extracted in an article in the December 29, 2014 issue.

[76] The *admitted* facts that the communication was circulated to Ontario MPP's by a public-interest advocacy group and then subsequently re-published in a trade publication specializing in the insurance industry both strongly support the conclusion that the expression related to a matter of public interest.

[77] The plaintiff submitted that the burden of Ms. Bent in establishing her email as an expression relating to a matter of public interest should be a *higher* burden than the ordinary civil standard of balance of probabilities, suggesting that "clear and convincing" is the appropriate standard given the "unprecedented advantages" conferred upon her by the statute relative to the

"unprecedented (and unconstitutional) disadvantages the Act imposes on Dr. Platnick, particularly the imposition of a reverse onus in a summary procedure".

[78] I cannot agree with such an approach. Section 64(1) of the *Legislation Act* S.O. 2006, c. 21, Sched. F, requires me to interpret s. 137.1 of the *CJA* "as being remedial" and requires that it "shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects". My task is not to eviscerate s. 137.1 of the *CJA* of its meaning because it strikes a different balance of competing interests than the common law had previously done. Rather, my task under s. 64(1) of the *Legislation Act* is to attempt as far as possible to breathe into the enactment the life that the Legislature intended it to have.

[79] I find that the subject matter of the email of Ms. Bent was an expression relating to a matter of public interest within the meaning of s. 137.1(3) of the *CJA*. Accordingly, subject to s. 137.1(4) of the *CJA*, I am *required* to dismiss this claim.

(ii) What is the onus of proof under s. 137.1(4)(a) of the CJA?

[80] Having found the expression to be in relation to a matter of public interest, the onus now shifts to the responding party plaintiff under s. 137.1(4)(a) of the *CJA* discharge the burden of proof placed upon him:

> "s. 137.1 (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
> (a) there are grounds to believe that,
> (i) the proceeding has substantial merit, and
> (ii) the moving party has no valid defence in the proceeding"

[81] The plaintiff suggests that the "reverse onus" placed upon him – something he also claims is unconstitutional - should be satisfied on the "no genuine issue for trial" test. On this test, the plaintiff submits, Dr. Platnick should have only to establish on a balance of probabilities that there is a genuine issue for trial. In order to promote the value of access to justice, the plaintiff suggests that "only frivolous, vexatious claims or claims that present no genuine issue for trial" may be prevented from reaching the courts for full adjudication by s 137.1 of the *CJA*.

[82] A similar argument was raised before me in *Able Translations Ltd. v Express International Translations Inc.*, 2016 ONSC 6785 (CanLII) (released shortly before the resumption of this motion on November 17, 2016 and referenced by all parties in their argument). I do not propose to repeat my reasons for rejecting that position in more than a summary fashion here.

[83] I am persuaded that the Legislature intended the courts to place the burden of proof under s. 137.1 of the *CJA* in a middle ground somewhere between the civil standard of proof (which is too high a standard to apply to so summary a proceeding) and the frivolous and vexatious pleading standard so familiar to our courts. The purpose of the Legislature, as stated in s. 137.1(1) of the *CJA,* evidences a clear intent to protect and foster participation in public discussion of issues of public interest:

> 137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,
>
> (a) to encourage individuals to express themselves on matters of public interest;
>
> (b) to promote broad participation in debates on matters of public interest;
>
> (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
>
> (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action

[84] The formulation of the "reasonable grounds to believe" test adopted by the Supreme Court of Canada in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100, 2005 SCC 40 (CanLII) at para. 114 appears to me to offer a very useful and practical approach to accomplish the intentions of the Legislature faithfully here. That test requires that "there is an objective basis for the belief which is based on compelling and credible information": *Muguesera* at para. 114.

[85] The "compelling and credible information" test must of course be adapted to the circumstances in which it is being used. The court is not a ministerial officer acting on information generated from a variety of sources. "Information" is provided to a judge on a motion by way of evidence. Further, the motion in which the evidence is presented is a relatively summary motion

that can be brought at any stage in the proceeding – including potentially before pleadings have been closed. As such, applying too readily the expectations of "best foot forward" and the "full toolbox" of our evolving summary judgment practice would expect more than can reasonably be demanded of parties called upon to respond within the strictures of the time limits and procedures prescribed by s. 137.1 and s. 137.2 of the *CJA*. Among other considerations, the *PPPA* did not intend that the parties would be expected to front-end load most of the costs of litigation into a summary motion of this sort.

[86] The examination of the evidence undertaken by the judge must be approached with a sensible and reasonable degree of appreciation for the summary nature of the motion and the quality of evidence that can reasonably be expected or demanded. That being said, the court ought not to be satisfied with mere speculation since that will never provide "compelling and credible" grounds to believe. What is called for is a "Goldilocks" approach that neither sets the bar neither too high as to filter out meritorious claims unduly nor so low as to filter out few if any. In my view, a sensitive and reasonable application of *Mugesera* accomplishes this goal.

[87] In my view, the responding party under s 137.1(4)(a) bears the burden of establishing on objective evidence that shows beyond mere suspicion and based on "compelling and credible information" both that the claim has "substantial merit" and that there is "no valid defence". How high a probability of success in establishing the claim or the affirmative defence must be made out is something that will have to be worked out on a case-by-case basis.

(iii) Has the plaintiff established "grounds to believe that the proceeding has substantial merit"?

[88] The plaintiff in a libel action bears the burden of proving that (a) the words complained of were published; (b) the words complained of refer to the plaintiffs; and (c) the words complained of, in their natural and ordinary meaning, or in some pleaded extended meaning, are defamatory of the plaintiffs: *Assessmed* at para. 100.

[89] There is no dispute regarding the publication of the email. It is admitted that it was disseminated to the OTLA members subscribing to the Listserve.

[90] There is also no dispute that at least some portion of the email refers to Dr. Platnick. He is named in it.

[91] The two statements made regarding Dr. Platnick in the email – that he signed a report as a "consensus report" that was not and that he changed the recommendation of another doctor in a different report – would arguably tend to lower the reputation of Dr. Platnick in the eyes of a reasonable person if true.

[92] Dr. Platnick has therefore established grounds for believing that his *claim* has some merit before considering the strength or validity of the defences raised. Defamation is a strict-liability tort. The limited burden of proof upon the plaintiff would appear reasonably likely to be able to be satisfied in this case.

[93] Can it also be said that Dr. Platnick has also thereby established that the proceeding has "*substantial*" merit? Given my findings on the remaining questions, I do not find it necessary to answer that question in this case. Precisely how much additional weight the Legislature intended to place upon the plaintiff by requiring him or her to establish grounds to believe the proceeding has "substantial merit" is best left to a case where the matter requires a decision. This is not such a case.

(iv) Has the plaintiff established that there are "grounds to believe that...the moving party has no valid defence in the proceeding"?

[94] The parties offered two conflicting approaches to s. 137.1(4)(a)(ii) of the *CJA*. Dr. Platnick suggests that if there are grounds for believing that there are genuine issues to be tried in relation to the defences then it follows that there must be grounds to believe that those defences are not valid. Ms. Bent on the other hand suggests that if there are grounds to believe that any of the defences have a sufficient "air of reality" about them to satisfy the test for setting aside default judgment under Rule 19.08 of the *Rules of Civil Procedure*, there are not sufficient grounds for believing the defence is not valid.

[95] The plaintiff's interpretation would turn the statute on its head. Instead of the plaintiff bearing the burden under s. 137.1(4(a)(ii) of the *CJA* of showing there are grounds to believe the

defences are not valid, the burden on the motion would effectively shift to the defendant to prove at least one affirmative defence is valid to the civil standard of proof.

[96] It cannot reasonably be supposed that a *higher* standard was intended to be applied to the examination of the affirmative defences of the moving party under s. 137.1(4)(a)(ii) than applies to the assessment of the claim itself under s. 137.1(4)(a)(i) when the same "grounds to believe" language is applied to both.

[97] The plaintiff's suggested interpretation would make nonsense of the statute placing the onus on the plaintiff, add nothing to the existing law that already permits a defendant to bring a summary judgment motions and would entirely defeat the objects of the legislation as stated in s. 137.1(1) of the *CJA*.

[98] The "air of reality" test suggested by the defendant does indeed satisfy the desired goal of describing a standard of proof that occupies a place between the full civil standard of proof and the low threshold of "frivolous and vexatious". However, while I find the reference to the jurisprudence developed under Rule 19.08 of the *Rules of Civil Procedure* to be useful and instructive, I would be slow to attempt to apply existing jurisprudence drawn from the *Rules of Civil Procedure* wholesale to s. 137.1 of the *CJA*.

[99] I shall leave to subsequent cases the task of describing with greater precision where on the continuum between "frivolous" and "proven on the balance of probabilities" a defence must lie to satisfy s. 137.1(4)(a)(ii) of the *CJA*. Having examined the evidence offered by both sides on this motion, and making all necessary allowances for the relatively preliminary state of the proceedings, I have determined that at least two of the defences proposed by Ms. Bent in this case appear quite likely to succeed (based on the record developed of course) making it unnecessary for me to refine the test any further than I have done.

[100] I turn now to examine the defences raised by Ms. Bent that I find have risen to this level of proof.

Substantial Justification

[101] Ms. Bent has pleaded the defence of substantial justification, i.e. that the words used by her and their import are substantially true. In my view, the credible and compelling evidence before me establishes that it is reasonably likely that Ms. Bent will succeed at trial in establishing this defence.

[102] There are two references to Dr. Platnick in the email. The first refers to his report in the Carpenter case that described the conclusion as a "consensus conclusion". The second is in the concluding sentence that refers to another report where Dr. Platnick had changed another doctor's recommendation. I find that there is credible and compelling evidence that both statements were fair and substantially true descriptions of the facts.

"consensus opinion"

[103] The second paragraph of the email took issue with Dr. Platnick having submitted a report that purported to be a consensus report when Dr. King never participated in a consensus meeting, was never shown the Executive Summary report of Dr. Platnick and indeed never even spoke to Dr. Platnick. This statement is also objectively true. Dr. Platnick's report suggests that the opinion being conveyed was a consensus opinion. It plainly was not.

[104] Dr. Platnick has an explanation. It is not an explanation that appears on the face of the report nor even one that would be a fair inference to be drawn from his report. Dr. Platnick claims that he completed his report first and handed it over to his immediate client, Sibley. Sibley, he explained, was supposed to have taken in hand the task of collecting the signatures of the other assessing physicians – the ones who actually saw and spoke to Dr. Carpenter. He says that the bulk of the report is written in the first person and records his conclusions and opinions without attributing these to the other assessing physicians.

[105] Dr. Platnick's explanation is nonsensical and amounts to saying that he hoped the report would be true by the time it was used even though he knew it was not true when he delivered it. He knew that *none* of the assessing physicians had signed off on his conclusions when he submitted his own conclusions as consensus conclusions and admitted as much on cross-examination.

[106] The fact that the report was written in the first person does not alter the fact that it impliedly sought to enhance the credibility of Dr. Platnick's personal opinion by portraying it as reflecting the consensus view of those who had the first-hand experience and specialized expertise that he did not. Dr. Platnick admitted the obvious fact that a "consensus report" would bear greater weight than one that was not.

[107] In fact, Dr. Platnick's report was not shown to Dr. King at all, a fact he testified to at the arbitration. Dr. Platnick's "consensus" report failed to include material aspects of Dr. King's report that were favourable to Dr. Carpenter's claim. Indeed, one of the other assessing experts pointedly refused to endorse the report as a consensus report when asked to do so by Sibley and characterized Sibley's communications with him as "profoundly offensive and insulting".

[108] Dr. Platnick's report was on its face misleading.. It reasonably likely that Ms. Bent would succeed at a trial in demonstrating that the report sought to attribute to itself the weight of a consensus opinion that it did not have and was thus fairly described by Ms. Bent in her email communication to the OTLA Listserve membership.

[109] Dr. Platnick suggested that, had he testified at the arbitration, any confusion as to whether his report was a consensus report or his own personal opinion alone would easily have been cleared up and explained. That may be so but entirely misses the point. Dr. Platnick delivered his report to be used by the insurance company for whom he prepared it in determining Dr. Carpenter's compensation claim. To suggest that the "confusion" would have been cleared up at a hearing presupposes that a hearing would have ensured. Dr. Carpenter might have been disheartened and accepted the outcome; her lawyer might have neglected to request the full file. Ms. Bent's email contained an object lesson in the perils of that course.

[110] Ms. Bent submitted that even if email were determined to carry the pleaded implication that Dr. Platnick had engaged in professional misconduct, the implication would be found to be fully justified. Signing or issuing in his professional capacity a document that he knew or ought to have known is false or misleading is defined as professional misconduct under paragraph 1(1)(18) of the regulations made under the *Medicine Act, 1991*, S.O. 1991, c. 30. There is credible and compelling information before me that leads me to believe that Ms. Bent has a reasonable

likelihood of establishing such misconduct. Dr. Platnick has provided admissions that would readily lead to the implication that his report was provided in his professional capacity and was misleading for the reasons indicated. The explanations offered, even making all possible allowances for the summary nature of the procedure, have done nothing to diminish that reasonable conclusion.

"Dr. Platnick changed the doctor's decision"

[111] I have reviewed the circumstances surrounding "Frank" and Dr. Dua's two "final reports" in some detail above. Firstly, the description of Ms. Bent is quite accurate at least in the narrow sense. Dr. Dua did change her recommendation after the intervention of Dr. Platnick. She may well have had good and honourable reasons for doing so. Ms. Bent's warning to her colleagues would nevertheless be valuable and useful since a review of the file history would reveal the undisclosed (by Dr. Platnick) fact of the changed recommendation, a useful fact in and of itself for any counsel representing a claimant. That may be a nuanced description to a member of the general public but would not be so to a lawyer representing accident victims reading it. Secondly, Ms. Bent had no reason to know about the existence of a second version of the "final" report when she composed her email on November 14, 2014. Dr. Platnick on the other hand was in a position to have known of the confusion two competing "final" versions would create. He chose to omit any reference to it. The choice was not without implications. His summary report gave a claimant's lawyer no reasonable to suspect the existence of an earlier and very helpful version of the final report of Dr. Dua.

[112] There is compelling and credible evidence for me to form the belief that Ms. Bent reported fairly and accurately on the facts reasonably known to her. If her report in the email omitted Dr. Platnick's involved explanation it was because Dr. Platnick's report omitted any references that would have suggested a need to obtain one.

[113] There is therefore credible and compelling evidence before me (and considering Dr. Platnick's explanations) to justify my conclusion that it is reasonably likely that Ms. Bent would succeed in establishing the truth of the two references to Dr. Platnick in the email.

[114] I am not required by s. 137.1(4(a)(ii) of the *CJA* to make conclusive findings of fact or law in relation to the pleaded defence of substantial justification and do not do so. I do find without hesitation that there is no credible and compelling evidence to lead me to believe that the moving party's reasonable justification defence is not valid.

Qualified Privilege

[115] The moving party submits that Ms. Bent is also entitled to claim the benefit of the defence of qualified privilege. She submits that her publication of the email to the Listserve was made by her in her capacity as President-elect of the OTLA and it is in the public interest that members of the OTLA receive her frank and uninhibited advice in relation to the importance of obtaining full disclosure of expert files on catastrophic injury claims in order to protect the interest of claimants fully. Her evidence that it was not reasonably foreseeable that the communication would be leaked to a broader audience beyond the Listserve has not been challenged and her communication was reasonably appropriate to the occasion. She also denies having been motivated by malice in this case.

[116] I find that each of the claims made by Ms. Bent as summarized in the preceding paragraph is supported by credible and compelling evidence that can withstand a "hard look" and has more than an "air of reality" to them. The public interest in educating OTLA members about the risk of relying upon selective "executive summary" reports that omit evidence favourable to claimants and potentially make misleading and false claims of being consensus reports is manifest. The didactic intent of the email sent by the President-elect of the OTAL is equally manifest There is no evidence to suggest that Ms. Bent bears any responsibility for the subsequent and unanticipated republication of the email to a broader audience nor can malice reasonably be inferred from any of the evidence before me.

[117] The plaintiff suggests that he has not had an adequate opportunity fully to explore all of the evidence to see whether evidence to substantiate a finding of malice exists. While I fully appreciate that this is a summary procedure potentially undertaken at an early stage in proceedings, that does not mean that mere speculation is sufficient to meet the plaintiff's burden. "Credible and compelling information" is quite the opposite of "mere suspicion" and "mere speculation". If the

burden imposed by the Legislature upon the plaintiff in s. 137.1(4) means anything at all, it means that the evidence offered by the plaintiff to discharge that burden must go beyond mere suspicion and at least support scrutiny on the basis of credible and compelling evidence. The plaintiff has failed to do so in this case more than 18 months after the impugned email and considerably more than a year after the statement of claim and statement of defence were filed.

[118] The record suggests that it is quite likely that Ms. Bent would be able to establish each of the elements of the defence of qualified privilege. There are therefore no grounds for me to believe that the moving party's qualified defence privilege is not valid.

(v) Does the public interest in allowing the proceeding to continue outweigh the public interest in the communication?

[119] Having found that the plaintiff has not discharged the onus required of him pursuant to s. 137.1(4)(a) of the *CJA*, I now move on to consider the second branch of the test. Section 137.1(4)(b) provides that

> A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that...
>
> (b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[120] There is very little guidance in s. 137.1(4)(b) of the *CJA* as to how the weighing of the harm likely to have been suffered by the plaintiff is to be conducted relative to the public interest in allowing the claim to proceed and the public interest in protecting the expression. In my view, each should be examined separately.

[121] The evidence before me as to the "harm likely to be or have been suffered by the [plaintiff] as a result the [defendant's] expression" is quite general and imprecise. While Dr. Platnick claims that his lucrative insurance practice was very severely impacted, he has provided little in the way of concrete examples of how and through what means or the evidentiary foundation to attribute such harm to the plaintiff.

[122] The IME practice that Dr. Platnick claims was lost was that of representing insurance companies (directly or indirectly through assessment firms). There is a relatively small number of insurance companies and assessment firms operating in Ontario. Dr. Platnick has every reason to know in detail who his clients were by name and what volume of business he had done with them, which clients had left him and why. His affidavit provides no particulars of how and by what means the email caused any of these clients to desert him, whether they were impacted by other "broken telephone" gossip communications or even why he was unable to provide the explanations provided to this court to them.

[123] Dr. Platnick's affidavit also discussed the damaging effect of gossip and rumour that he claims was circulating about Ms. Bent's email. However, the gossip and rumour he purported to quote was manifestly not contained in Ms. Bent's email and is something for which she cannot reasonably be expected to be held responsible (at least not based on the pleadings and evidence presented).

[124] Dr. Platnick has laid no credible foundation for attributing the leak of the email to Ms. Bent. I cannot, for example, conclude on any credible or compelling evidence that Ms. Bent knew or ought to have known that the email would be leaked to non-members contrary to the confidentiality obligations of the Listserve members. The audience to whom the email was sent was subject to confidentiality obligations and none of the members of that audience are alleged to have been material clients of Dr. Platnick.

[125] The harm to Dr. Platnick's practice appears to have largely already been suffered *before* the *Insurance Business* magazine article appeared in late December 2014. Whether or not Ms. Bent might have succeeded in persuading the magazine not to run the story it decided to run, I can see little evidence of damages tied to that story in particular nor any credible and compelling information that Ms. Bent can be held responsible for the story or its consequences.

[126] For the foregoing reasons, I have grave doubts that the plaintiff would be able to demonstrate material *pecuniary* damages as against the moving party. I do not exclude the prospect of non-pecuniary or general damages. However such damages would also be subject to the same causation issues: were they the result of the gossip and rumour arising from unexpected

leak or the result of a private email to a group composed largely of non-clients with whom Dr. Platnick is normally in an adversarial relationship?

[127] I conclude that the harm suffered or likely yet to be suffered by the plaintiff that might reasonably be expected to be laid at the feet of the moving party defendant is fairly low.

[128] If the plaintiff's harm is slight, might there nonetheless be a public interest in allowing the plaintiff whose reputation has been harmed an opportunity to clear his name, if only for nominal damages? It seems hard to imagine how this might be so given that general damages might normally be expected to be assessed for a serious and unfounded assault on reputation. However, I need not decide the point here.

[129] What is the public interest in permitting Dr. Platnick to continue with his suit? There is certainly a general public interest in permitting people to protect their reputation through the civil justice system. That public interest remains a reasonably strong one even if it has evolved significantly since the 18th and 19th Centuries when duels might have been the preferred alternative dispute resolution mechanism where matters of reputation and honour were concerned.

[130] What then of the public interest in protecting the expression?

[131] Freedom of expression and in particular the freedom to engage in robust discussion of matters of public interest both represent strong values in our system. This latter value has been recognized by the evolving common law of defamation in cases such as *Grant v. Torstar*. It is also a value that has found expression – both for and against - in the public consultation process leading to the enactment of the *PPPA*.

[132] There is also a strong public interest in the administration of justice. There is a strong public interest in lawyers sharing information intended to improve the administration of justice with each other. There is a strong public interest in finding the correct balance between victims' rights and the public (through its insurers) in the accident compensation system. The role of experts in that system is also a matter of strong public interest. All of these public interests are strongly engaged by the email of Ms. Bent.

[133] There is evidence that the law suits that followed this email had the effect of chilling to a material degree the ability of the president-elect of the OTLA to participate freely in debates on the subject-matter of the email.

[134] Finally, there has been no credible basis to support the allegation of malice advanced by the plaintiff in this case. Suspicion and speculation does not arise to the level of credible and compelling information. It seems clear to me that the public interest in protecting expression born of malice would be quite slight.

[135] The foregoing considerations lead me to find that the plaintiff has failed to satisfy me that the harm suffered or likely to be suffered by him arising from the expression of Ms. Bent is sufficiently serious that the public interest in permitting him to continue to continue the proceeding outweighs the public interest in protecting Ms. Bent's expression.

(vi) Summary re: s. 137.1

[136] I therefore conclude that the plaintiff has failed to satisfy his onus under s. 137.1(4) of the *CJA*. Since I have also found that the plaintiff's claim against Ms. Bent arises from an expression made by her that relates to a matter of public interest, I am required by s. 137.1(3) of the *CJA* to dismiss the plaintiff's claim and I do so.

(vii) What is the relevance of "Charter principles" to the construction of s. 137.1 of the CJA?

[137] The plaintiff submits that the proper construction of the s. 137.1 of the *CJA* must be informed by "*Charter* principles" at each stage of the interpretation process. He submits that the techniques of "reading down" may be employed both as an interpretative tool to "show respect for constitutional values" and as a constitutional remedy. Furthermore, he submits that vagueness or over breadth in and denial of due process in and of themselves violate *Charter* values and principles and call for a narrow and targeted interpretation of the statute to avoid these outcomes.

[138] The plaintiff's argument is premised on an approach to statutory construction in general and the *Charter* in particular that is at odds with the clear directions of the Supreme Court of Canada regarding statutory interpretation in relation to the *Charter*.

[139] The Supreme Court of Canada has repeatedly endorsed a single approach to the task of statutory construction, adopting the formulation of Driedger in his *Construction of Statutes* (2nd ed. 1983):

> "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 SCR 559, 2002 SCC 42 (CanLII) (at para. 26).

[140] When the "entire context" of an enactment is required to be considered, clearly this must entail examining not only the surrounding words but the legislative and legal framework in which they have been placed. However, the primary task remains that of discerning the intention of Parliament and not designing the filter or filters to be applied beforehand.

[141] While it is trite to suggest that where a statute is ambiguous the interpretation that does not result in an infringement of the *Charter* is to be preferred to one that does, the *Charter* may not be used to create an ambiguity where none otherwise exists: *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, [2015] 3 S.C.R. 300 (at para. 25). An ambiguity only exists where there are two or more plausible readings, each equally in accordance with the discerned intentions of the statute. It is only then that the *Charter* may be resorted to decide upon the preferred reading – assuming that the rejected reading would infringe upon *Charter* rights.

[142] The problems with the plaintiff's suggested approach are compounded where, as here, the enactment under consideration brings into play other fundamental *Charter* values, not least of which is the proper balance to be struck between the *Charter* value of reputation and the *Charter*-protected right of freedom of expression.

[143] In my view, inserting the concept of "*Charter* principles" into the process of statutory construction before determining the intentions of Parliament in the first place (having regard to the oft-endorsed formulation of Mr. Driedger) places the remedial cart before the interpretation horse. The *Charter* represents the borders of the canvass upon which Parliament is constitutionally

authorized to paint its laws. Those borders have not been placed there to deflect Parliament's brush *before* it has gone past them. The plaintiff would have the court steer Parliament's hand clear of approaching the line instead of deciding when it has actually done so. The latter is my proper role; the former is not. *Charter*-values do not govern the task of interpreting legislation when no breach of the *Charter* exists.

(viii) Does the application of s. 137.1 of the CJA violate the plaintiff's rights under s. 7 of the Charter?

[144] Section 7 of the *Charter* provides:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

[145] The plaintiff alleges that the effect of the procedures governing motions under s. 137.1 of the *CJA* is a denial of procedural fairness that amounts to a deprivation of fundamental justice. "Informed by s. 7 of the *Charter*" he submits this court ought to dismiss or stay the defendant's motion to dismiss his claim.

[146] The plaintiff's position represents a misreading of s. 7 of the *Charter*. The test in s. 7 is a two-part test. The principles of fundamental justice do not represent a stand-alone *Charter* right. Rather, it is against the principles of fundamental justice that restrictions on the right to life, liberty and security of the person are to be considered. One does not start with the second part of the two-part test before applying the first. There is no stand-alone *Charter* protection of procedural fairness and natural justice as contended for by the plaintiff. As articulated by the Supreme Court in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 at para. 47, "if no interest in...life, liberty or security of the person is implicated, the analysis stops there".

[147] The plaintiff submits that his right to protect his reputation must be considered a *Charter*-protected *right* (in addition to being a "*Charter* value" more generally) under s. 7 as being a right implied by either the right to "liberty" or "security of the person".

[148] Is "reputation" a right protected under s. 7 of the *Charter* as the plaintiff claims?

Liberty

[149] The plaintiff submits that the concept of liberty incorporates the fundamental notions of personal dignity and personal autonomy and that "nothing can be more important to personal dignity and autonomy than one's reputation". In support of this proposition he cites *Blencoe* (at paras. 49-54).

[150] Writing for the majority in *Blencoe*, Bastarache J. found that while "the liberty interest protected by s. 7 of the *Charter* is no longer restricted to freedom from physical restraint", and found that claimed right to be free from the stigma of a pending human rights complaint investigation of sexual harassment charges that were very damaging to Mr. Blencoe's reputation did not come within the liberty interest protected by s. 7 of the *Charter* (at para. 54). I cannot conclude the reputation can be equated to the liberty interest in s. 7.

Security of the Person

[151] In *Blencoe,* Bastarache J. also examined the claimed nexus between security of the person and reputation in detail. It was claimed that damage to Mr. Blencoe's reputation was the source of considerable stress upon him. While noting that the infliction of psychological stress in some circumstances may rise to the level of infringing with "security of the person", to so qualify, the stress must be both "state-imposed" and "serious": *Blencoe* at para. 57.

[152] The requirement for the harm to be "state-imposed" arises because "it would be inappropriate to hold government accountable for harms that are brought about by third parties who are not in any sense acting as agents of the state" (at para. 59). Rather, "it is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest": *Blencoe* at para. 83.

[153] There is simply no evidence before me from which I could conclude that any of the psychological harm alleged in this case to have been suffered by Dr. Platnick in this case can be attributed to "state action". Most of the non-pecuniary harm referred to in his evidence occurred

before the action was commenced. The plaintiff commenced this action ten months before s. 137.1 of the *CJA* received final approval (even if, by its terms, it applied to actions commenced after December 1, 2014). His affidavit details no stress or strain said to be attributed to s. 137.1 of the *CJA*. Indeed, a significant element of the plaintiff's argument that he has been deprived of natural justice arises from the allegedly draconian nature of the mandatory 60 day time frame for hearing the motion, an argument that would have lacked any punch if the plaintiff claimed to have suffered stress by reason of the prospect of having to respond to this motion a year or more before the defendant alerted him to the likelihood of it being brought. Even if I were to make the liberal assumption of *some* exacerbation of the plaintiff's stress or strain arising from the prospect of facing or losing a motion under s. 137.1 of the *CJA*, such stress does not rise to the level of the "extraordinary" circumstances necessary to ground a s. 7 claim upon the infliction of mental stress.

[154] In *Blencoe*, Bastarache J. rejected the proposition that "dignity" or "reputation" could be elevated to the level of a free-standing *Charter* right:

> "The framers of the *Charter* chose to employ the words "life, liberty and security of the person", thus limiting s. 7 rights to these three interests. While notions of dignity and reputation may underlie many *Charter* rights, they are not stand-alone rights that trigger s. 7 in and of themselves. Freedom from the type of anxiety, stress and stigma suffered by the respondent in this case should not be elevated to the stature of a constitutionally protected s. 7 right" (at para. 97).

[155] Mr. Danson sought to argue that the use of the qualifier "in and of themselves" by Bastarache J. in the quotation above suggests that reputation might nevertheless be considered as a *Charter*-protected right if it were connected to "something else". In such a case, it would not be "in and of itself" any longer.

[156] Without following Mr. Danson through the looking glass to examine the flawed logic of that submission, it is clear that the "something else" cannot simply be an alleged violation of the principles of fundamental justice since that would make the task of interpreting s, 7 an entirely circular exercise: everyone has the right not to be deprived of the benefits of the principles of fundamental justice except in accordance with the principles of fundamental justice. The two-part

test in s. 7 cannot be conflated into one by the device of wishful thinking. Mr. Danson's reading of s. 7 would inexorably result in the minimization of "life, liberty and security of the person" and their collapse into a single all-embracing super-concept of "principles of fundamental justice". Apart from any other objection, such a reading would run the risk of turning s. 7 into a *Charter* black hole into whose irresistible gravitational pull would be drawn all of the other rights enshrined in it. This is precisely the interpretation trap that Lebel J. warned against in *Blencoe* (at para. 188-189).

[157] I conclude that reputation is not a free-standing right under s. 7, even if it may be considered, along with dignity, to be an underlying *Charter* value. I cannot therefore find that the operations of s. 137.1 of the *CJA* has deprived the plaintiff of liberty or security of the person under s. 7 of the *Charter*.

Principles of fundamental justice

[158] The plaintiff submitted that the procedures applicable to a motion under s. 137.1 of the *CJA* violate principles of fundamental justice by effectively denying him access to justice. He points to the short time frames, the costs sanctions and the onus placed upon him by s. 137.1(4) of the *CJA* as being features of the legislation that have operated cumulatively to deny him a fair hearing on the merits of his claim in a manner that violates the principles of fundamental justice.

[159] The plaintiff's position starts from an erroneous view of what the principles of fundamental justice demand. A "fair hearing on the merits" of every civil claim is not a constitutional requirement. To name but one obvious example, limitation periods operate to deprive claimants of a hearing of their claim on the merits.

[160] In *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, 1985 CarswellBC 398, Lamer J. made clear that the principles of fundamental justice are tied to the "basic tenets of our legal system" (at para. 37). Subsequent Supreme Court decisions have defined them as principles "vital or fundamental to our societal notion of justice..."(See: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, 1993 CarswellBC 22 at p. 590: *R v. Malmo-Levine; R v Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 112). The

suggestion that the imposition of a 60 day time limit for hearing motions under s. 137.1 of the *CJA* can be characterized as a breach of natural justice is simply absurd. The principles of fundamental justice are not to be trivialized to such an extent and a "full hearing on the merits" following the "full trial" model of the *Rules of Civil Procedure* is by no means the only means of securing justice.

[161] The *Rules of Civil Procedure* govern the resolution of only a portion of civil disputes in society and their sometimes leisurely and often overly-expensive administration has been identified as an *obstacle* to obtaining justice in many cases that needs reforming and refining rather than as a bedrock guarantee of minimum standards. Arbitration agreements frequently impose time limits for a full hearing on the merits of much shorter duration. Injunction applications, often deciding weighty and important matters, are routinely prepared, heard and resolved on shorter time lines. Commercial cases under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, C-36 are conducted on a "real time litigation" time-line with hundreds and sometimes thousands of claims and disputes routinely heard and dealt with on far shorter time lines.

[162] The time line imposed in this case may have been inconvenient and annoying to one counsel. That alone does not amount to a breach of any principles of fundamental justice.

[163] I have the plaintiff's burden under s. 137.1 of the *CJA* as lying somewhere between the low hurdle of "not frivolous" and the higher hurdle of "proved on the balance of probabilities". The plaintiff launched his case and received the defendant's statement of defence more than a year before the idea of this motion was first bruited. He launched separate claims against other parties who are alleged to have participated in causing the damage he claims was inflicted upon his reputation. He was alerted to the likelihood of an imminent summary judgment motion – motions that are routinely scheduled and heard on time lines of 60 days or less – almost six months before this motion was heard and was thus on notice (if the passage of nine months from the close of pleadings had not already done so) that it was high time to move past investigating the claim and into the mode of putting his "best foot forward". He was notified of the grounds for this actual motion almost 90 days before it was heard. The plaintiff and his counsel had more than adequate notice of the issues to be addressed and the time within which they needed to be addressed to have

been able to marshal their evidence and to work around a planned trip abroad in counsel's schedule. Equating mere inconvenience with a deprivation of fundamental justice demeans the concept.

[164] Similar objections could be made to the suggestion that the costs sanctions or the "reverse onus" of s. 137.1(4) of the *CJA* can be construed as infringing principles of fundamental justice. The costs sanction is subject to overriding judicial discretion – discretion that is always exercised having regard to principles of justice. I cannot agree that the placing or displacing of the onus of proof in matters of civil proof engages the principles of fundamental justice in the first place. It might equally well be asserted that the onus placed on defendants to demonstrate affirmative defences such as justification is unfair to them. Dr. Platnick stands charged of no offence and s. 11(d) of the *Charter* is not at issue.

[165] The principles of fundamental justice lie deep and represent the core of our value system. They are not to be found in the changing manifestations of rules and procedures at the surface. Suggesting that variations to "traditional" rules and procedures challenge those core values too lightly runs the risk of stifling procedural innovation and experimentation – the very process by which progress in achieving those core values is best made.

(ix) Does the application of s. 137.1 of the CJA violate the plaintiff's rights under s. 15(1) of the Charter?

[166] Section 15(1) of the *Charter* provides:

> "15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[167] Not every distinction made in legislation constitutes discrimination under s. 15(1) of the *Charter*. The focus the s. 15 analysis is on whether the law draws distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual's membership in an enumerated or analogous group: *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 SCR 548, 2015 SCC 30 (CanLII) at para. 18.

[168] There is no suggestion in the present case that the s. 137.1 of the *CJA* discriminates against the plaintiff on any of the listed grounds (race, national or ethnic origin, colour, religion, sex, age or mental or physical disability). The plaintiff claims to be subject to discrimination based on an analogous ground. In determining the parameters of an "analogous ground", section 15(1) "recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages": *Taypotat* at para. 18. The test for "analogous grounds" as formulated in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 1999 CanLII 687 (SCC) continues to be applied (per McLachlan J. and Bastarache J. at para. 13):

> "It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law."

[169] The plaintiff's factum described the analogous group that he claimed to be the object of discrimination under s. 15(1) of the *Charter* as comprising "those individuals who wish to protect their reputations". It cannot be claimed that potential plaintiffs in defamation suits have been the object of "persistent systemic disadvantages" whether of historic or recent vintage. It cannot be claimed that a desire to protect one's reputation represents an immutable characteristic of the individual or one that is "changeable only at unacceptable cost to personal identity". The process of identifying a group suffering from discrimination on an analogous ground does not work backwards from the desired result to create as artificial a proposed group as the plaintiff has done.

[170] The only characteristic the members of the plaintiff's proposed enumerated group have in common with each other is the very fact that they are affected by the law in question. Such a definition of what constitutes a group subject to discrimination on an analogous ground test is

simply circular and devoid of any internal logic. Membership in an analogous group requires a search for the "constant markers" of suspect decision making or so as to "keep the focus on equality for groups that are disadvantaged in the larger social and economic context": *Taypotat* at para. 18.

[171] There is ample authority for the proposition that the mere fact of being denied access to the ability to sue in civil courts does not create an analogous group. The law denies workers with workplace injuries from advancing compensation claims in the civil courts without breaching s. 15(1) of the *Charter*: *Reference re Workers' Compensation Act*, [1989] 1 S.C.R. 922. The no-fault regime in Ontario and other provinces denies accident victims with damages claims from advancing certain types of claims altogether and subjects others to a minimum threshold.

[172] I cannot find that the plaintiff's membership in the group of potential defamation suit plaintiffs constitutes membership in a group subject to discrimination on a ground analogous to those listed in s. 15(1) of the *Charter*.

(x) Is s. 137.1 of the CJA a reasonable limit prescribed by law such as can be demonstrably justified in a free and democratic society?

[173] In light of my conclusion that there have in fact been no violations of the plaintiff's rights under s. 7 and s. 15(1) of the *Charter*, there is no need to address s. 1 of the *Charter*.

Disposition

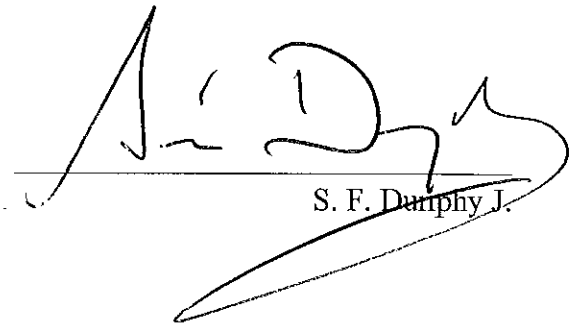
[174] In the result, I have concluded that this action must be dismissed. Ms. Bent's firm, Lerners LLP was separately represented in this action and adopted submissions made on her behalf on this motion. There can be no basis to maintain the action as against Lerners LLP if it is dismissed as against Ms. Bent since the liability of Lerners LLP is entirely derivative of the alleged liability of Ms. Bent. The action is therefore dismissed as against both defendants.

[175] Section 137.1(7) of the *CJA* entitles Ms. Bent to substantial indemnity costs both for the (successful) motion and for the proceeding itself now that the action has been dismissed unless I order otherwise. Dr. Platnick pleads that newness of the legislation and the harshness of the result – depriving him of a suit in light of what he claims has been a drastic impact on his professional career – ought to move the court to lessen the harshness of the costs sanction the statute

presumptively imposes. I disagree. The harm he claims to have suffered is objectively due in whole or in very substantial part to the leaking and republishing of the email by persons other than Ms Bent. Ms. Bent's defences are objectively very strong ones and that fact ought to have been well-known to Dr. Platnick who knew or ought to have known of all of the details of her justification defence as it related to his two criticized reports. I can see no convincing reason to exercise my discretion in his favour. Ms. Bent shall be entitled to an award of substantial indemnity costs for both the motion and the proceeding.

[176] The same cannot necessarily be said for Lerners LLP. Lerners LLP has contented itself largely with a "me too" position. The action having been dismissed, I find that Lerners LLP ought to be entitled to its costs, but such costs shall be on a partial indemnity basis only.

[177] The defendants shall deliver their outlines of costs calculated on a full indemnity basis in the case of Ms. Bent and a partial indemnity basis in the case of Lerners LLP within fifteen days of the day of release of these reasons. Written submissions if needed to explain claimed amounts (the scale of costs having already been determined) shall be limited to three pages each. The plaintiff shall have ten business days to respond with a similar length limitation. Cited cases need not be appended if readily available electronically. I would ask counsel for Ms. Bent to take on the task of collecting all submissions and delivering them to me electronically or in hard copy at Judges' Administration, Room 107, 361 University Ave, Toronto.



S. F. Dunphy J.

Date: December 1, 2016