CITATION: Katznelson v. Canadian Undersea and Hyperbaric, 2024 ONSC 1003
COURT FILE NO.: CV-23-00695418-000
DATE: 20240215

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: RITA KATZNELSON, Plaintiff

AND:

CANADIAN UNDERSEA AND HYPERBARIC MEDICAL ASSOCIATION, KENNETH LEDEZ, RON LINDEN, JAY MACDONALD, GEOFF ZBITNEW, SHERRI FERGUSON, JULIE MALONE, CAROLINE BAIN and GEORGE HARPUR, Defendants

BEFORE: AKAZAKI J.

COUNSEL: Young Park and Alexander Evangelista, for the Plaintiff

Neil M. Abramson, Marco P. Falco, and Anne Lewis, for the Defendants Kenneth LeDez and Ron Linden

Sean McGarry, for the Defendants Canadian Undersea and Hyperbaric Medical Association, Jay Macdonald, Geoff Zbitnew, Sherri Ferguson, Julie Malone, Caroline Bain and George Harpur

HEARD: January 25, 2024

ENDORSEMENT

INTRODUCTION AND SUMMARY

[1] The defendants Kenneth LeDez and Ron Linden brought a motion pursuant to s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (CJA), to dismiss the action against them on the basis that it is a strategic lawsuit against public participation (SLAPP). In the alternative, the motion requires certain pleadings derivative of the libel claim to be struck under rule 21.01(1)(b) as disclosing no reasonable cause of action.

[2] The plaintiff Rita Katznelson is a leading anesthesiologist in the subspecialty of hyperbaric medicine and an associate professor the University of Toronto Faculty of Medicine. Her practice is not limited to traditional methods. She and various colleagues have made no secret of their "off-label" use of hyperbaric procedures to treat difficult neurological conditions beyond those Health Canada has specifically approved for hyperbaric equipment. They have published their clinical results in medical journals.

[3] Katznelson brought this lawsuit after her colleague LeDez accused her of unethical conduct in communications to professional colleagues, orchestrated her ouster as president of the

defendant professional association, and sought suspension of the operations of the clinical Area of Focused Competency (AFC) program at the university of which she serves as program director.

[4] The plaintiff also alleges the defendants LeDez, Linden and Zbitnew blocked her AFC Diploma application to the Royal College of Physicians and Surgeons of Canada (Royal College). Incidental to these events, LeDez brought about a formal complaint by the association to the College of Physicians and Surgeons of Ontario (CPSO), an act that potentially jeopardizes the plaintiff's licence to practice medicine. (She concedes the complaint itself is not actionable.)

[5] What animated LeDez was his belief that the plaintiff was engaged in unethical conduct by offering the off-label hyperbaric medical treatments and billing the provincial health insurer, OHIP, for patient consultations in respect of the uninsured services. Since LeDez's plan and execution included communication of defamatory statements, he takes the position that the suit is an attempt to stifle his legitimate and duty-bound right to communicate his concerns to everyone with a need and right to know. He did not deny having made the statements. In his affidavit evidence, he repeated his allegations of Katznelson's misconduct.

[6] As I will explain below, the anti-SLAPP motion must be dismissed. LeDez and others involved in raising concerns about the plaintiff were within their rights to report her in accordance with established procedures of regulatory and accreditation bodies. However, the official channels were not enough for him. He extended his campaign to the plaintiff's colleagues at the university and within the association. His stated purpose for extending the scope of his audience was not to shine a light on the plaintiff's practices to invite public scrutiny. Rather, he wanted the peer group to shut the plaintiff down before her practices started to attract such scrutiny.

[7] In this motion, the moving parties sought to employ legislation intended to promote public awareness and discourse to protect their use of defamation to suppress the plaintiff's use and promotion of medical practices with which they disagreed. They have, in effect, turned the legislation on its head.

[8] Perhaps in anticipation of the anti-SLAPP motion, the plaintiff pleaded some causes of action that did not directly sound in defamation. All but one of these is derivative of defamation and does not meet the legal tests for pleading the required elements. The alternative footing of the motion is therefore successful, except for the oppression remedy. The oppression remedy is not founded in expressions or words but on specific acts within the corporation's constitution and procedures. The allegations of the plaintiff's removal from her prestigious role without procedural fairness must be adjudicated on the merits. That pleading will stand.

SUMMARY OF EVENTS

[9] The plaintiff's medical practice includes hyperbaric oxygen therapy (HBOT). HBOT is a recognized procedure in which a patient is subjected to high-pressure oxygen. It originates from the use of pressurized chambers to acclimate divers and submariners to sea-level and to treat a condition known as "the bends," a painful and life-threatening condition involving gas embolisms forming in the bloodstream. The history of such chambers dates back to the 1600's.

[10] The plaintiff runs a program in the University of Toronto operating hyperbaric units for the treatment of terrestrial ailments. Health Canada has licenced the importation and use of these units because the treatment has recognized therapeutic uses in treating fourteen medical conditions, including those unrelated to diving. The subspecialty is logically affiliated with anaesthesiology because HBOT is used to treat neuropathy. Forcing oxygen into bodily tissues reduces cell death and pain and promotes nerve regeneration.

[11] The debate between the plaintiff and the physicians in the "approved-use" group, LeDez in particular, is the "off-label" use of the chambers by the plaintiff and other physicians in her program. Off-label is a medical slang originating from physician's prescription of drugs for conditions outside the regulatory approval. It is not a type of quackery. It is not forbidden, provided the doctor applies accepted training and skill in the use of a drug or procedure to treat a condition other than the one for which it was originally formulated, and provided the approved conditions for patient safety are sedulously observed. Health Canada licenses therapeutic products and pharmaceuticals. It does not regulate doctors' use of them.

[12] Here, the plaintiff's off-label practices entail the use of HBOT to treat conditions such as "long Covid," a virus-caused neurological condition for which there is no currently recognized cure. The plaintiff believes some of the symptoms of long Covid, such as hyposmia and parosmia, respond to HBOT. Other conditions include chronic pain and fibromyalgia. LeDez and others who oppose her work claim that she is profiteering from patients who are desperate for a cure.

[13] The plaintiff has never hidden the fact that she has offered off-label HBOT treatments. In fact, she has co-authored several medical journal articles based partly on her clinical experience. She engaged LeDez and others in discussion about off-label HBOT in the development of practice standards. For reasons that still escape historians of medical science, pioneers since Ignaz Semmelweis have suffered political exclusion and defamation for having tried something different to help their patients and for having tried to gain peer acceptance of their innovations. The plaintiff ran into such a force here after she engaged the defendants in dialogue over off-label HBOT.

[14] In mid-2021, Katznelson tried to persuade her colleagues within the defendant Canadian Undersea and Hyperbaric Medical Association (CUHMA), of which the plaintiff was the president, to re-evaluate its position against off-label HBOT. She negotiated a change in position and proposed it at the November 2021 CUHMA virtual conference.

[15] The first five presentations at the conference dealt with the use of HBOT to treat off-label conditions. The plaintiff stated in her affidavit that, during a break between presenters on November 13, LeDez confronted Katznelson. He questioned her expertise to speak on the subject and stated he would have her practice investigated. LeDez filed a reply affidavit denying that this encounter occurred.

[16] For the purposes of the motion, I need not find whether the encounter occurred. Nevertheless, consistent with the plaintiff's version of what happened, it did not take long for LeDez to launch a campaign to discredit the plaintiff and her medical practices as "misconduct" – the word he used in paragraph 24 of his reply affidavit to describe his allegations of her conflict of interest, failure to abide by standards of practice, OHIP billing fraud, lack of ethical review, and lying on her AFC Diploma application.

[17] LeDez cast himself as a concerned peer of the plaintiff prosecuting his case against Katznelson in the forums available to him. The plaintiff expressed disbelief over the ferocity and pettiness of the attack on her professional integrity and did not understand the source of LeDez's malice. The facts of what *happened* were not really in dispute because they exist in emails and other written correspondence. In fact, after this motion, one would not be surprised if the plaintiff were to seek summary judgment based on the same evidence filed in this motion.

[18] In December 2021, the CUHMA Executive Committee authorized LeDez to investigate the concerns of Jay MacDonald and others that the plaintiff was providing off-label HBOT as an uninsured service. Given that she had already been forthcoming and transparent about such use, one must question the *bona fides* of the mandated investigation.

[19] Based on some surreptitious calls with the plaintiff's office staff and with a patient, LeDez not only confirmed the plaintiff's off-label use but determined that she was risking patient safety. He also concluded that her office was engaged in unethical and potentially fraudulent OHIP billing, by billing the public insurer the initial consultations prior to the treatments.

[20] LeDez could not have concluded the risk to patient safety based on this amateur sleuthing, because he gathered no medical data. Indeed, as his counsel pointed out, HBOT carries with it obvious risks associated with exposure to high-pressure conditions. There was no evidence, however, contradicting the plaintiff's evidence that her office fully informs patients of such risks, as in the case of any medical procedure. LeDez contended that the off-label use requires approval by an institutional ethics committee. She responded that such approval is not required unless procedures are offered in a clinical trial.

[21] On December 13, 2021, LeDez then wrote to Linda Rumleski, AFC Manager at the Royal College, to make "an urgent request for advice and action." He told her that Katznelson and other faculty at the University of Toronto "are involved in inappropriate hyperbaric oxygen treatments and are charging patients for these treatments" and urged the suspension of the Toronto program. Rumleski responded that the issues he raised were outside the College's accreditation mandate.

[22] LeDez did not give up on his pursuit and continued to make his pitch to the Royal College. On December 14, he requested an emergency Specialty Committee meeting, in the absence of the plaintiff, to talk about his concerns.

[23] Also on December 14, LeDez forwarded his emails with Rumleski to Beverly Orser, Chair of the University of Toronto's Department of Anesthesiology. LeDez stated that there were "strong grounds to believe" that consultations were being charged to OHIP for unapproved HBOT, and if a CPSO investigation determines that his concerns are justified, "this could be very damaging to the Discipline of Anesthesia and to the University."

[24] I pause to observe that Orser, as the plainitff's faculty chair, did not have regulatory authority over the plaintiff and was not involved in her accreditation. From an organizational perspective, LeDez's communications with her were analogous to addressing the subject's manager in a corporation or a senior functionary in a government department. The statements, presumed to be untrue, were defamatory and unprotected. In fact, by targeting someone with institutional influence over the plaintiff's academic career, the defamer struck where he ought to have known the plaintiff was vulnerable to damage.

[25] On January 3, 2022, LeDez wrote to the plaintiff and her colleague, Anton Marinov, a letter entitled "Notice of concerns to RK 2022" on CUHMA letterhead, stating:

> Dear Dr. Katznelson (and Dr. Marinov):
>
> I am writing to you on behalf of the Executive Committee of CUHMA due to concerns raised with me about your conduct and the conduct of a number of CUHMA members at the University of Toronto that work at two facilities in the community. There are in addition concerns related to the potential negative effects on the hyperbaric medicine training program at the University of Toronto. The concerns are as follows:
>
> > 1. You, as the President of CUHMA have delayed correspondence with provincial licensing Colleges but without declaring a significant conflict of interest related to the content of the draft letter.
> >
> > 2. You as President of CUHMA are in violation of CUHMA policy related to unapproved ("off-label") HBOT as set forth in Appendix #2 of the CHUMA Guidelines (see below for a copy).
> >
> > 3. Specifically that you are involved in charging fees for off-label HBOT at Rouge Valley Hyperbaric Medicine Centre and without ethical review or approval.
> >
> > 4. That you were involved in giving discounts for off-label HBOT to encourage continuation of treatment, which would violate TCPS2 terms that prohibit financial incentives for participation in investigational treatments.

5. That you have approved or will accept a physician into the training program that is providing and charging private fees for off-label and unapproved HBOT at Restore Hyperbarics.

6. That you did not intervene to support or ensure compliance with CUHMA policies and Guidelines when you were aware of CUHMA members among University of Toronto anesthesia faculty that are providing unapproved HBOT for private fees at Rouge Valley Hyperbaric Medicine Centre and Restore Hyperbarics. In addition, you did not disclose these practices to the CUHMA Board of Directors.

7. That you have failed to take action related to anesthesia and hyperbaric staff at Restore Hyperbarics that are CUHMA members and that are falsely claiming on their website to have sub-specialty certification in hyperbaric medicine as part of their efforts to encourage patients to undergo approved and unapproved HBOT, actions that are misleading the public. Such false claims undermine the Diploma in Hyperbaric Medicine.

8. That you have intentionally concealed or failed to disclose your participation in off-label private pay HBOT and your links to off-label hyperbaric facilities.

9. That your failure to disclose material conflicts of interest and your failure to recuse yourself from CUHMA discussions on important matters related to inappropriate unapproved off-label HBOT contravenes the requirements of the Canada Not-For-Profit Act.

10. That you failed to disclose your off-label HBOT involvement to the RCPSC Hyperbaric Medicine Specialty Committee.

11. That your actions have the potential to compromise the integrity of the hyperbaric medicine training program at the University of Toronto.

12. That with your knowledge, patients at both Rouge Valley Hyperbaric Medicine Centre and Restore Hyperbarics are informed that consultations or assessments are covered by OHIP even when it is clearly known that subsequent HBOT is unapproved. This would be expected to be a significant concern to both the CPSO and OHIP and could be considered possible fraudulent billing that compromised the integrity of the individual physicians. This has potential implications for the training program and CUHMA.

> 13. That overall your actions have the potential to compromise the integrity and reputation of CUHMA.
>
> 14. That overall your actions are contrary to the objectives of the Articles and By-laws of CUHMA.
>
> The above issues are of concern to CUHMA, the University of Toronto, the RCPSC and likely also the CPSO and OHIP. After discussions with the University of Toronto and the Royal College of Physicians and Surgeons of Canada it has been determined that it is necessary to refer these issues to the CPSO for possible investigation and advice.
>
> It is essential that all Board of Directors members adhere to CUHMA objectives, bylaws, policies, applicable standards and guidelines. There is considerable disappointment that CUHMA finds itself in this position but at this time independent consideration is important to ensure fairness to all parties and to ensure integrity of the process. Additional independent advice or mediation may be warranted to resolve all these concerns. Due to provisions of CUHMA policies and By-laws and of the Canada Not-For-Profit Act, those with an actual or potential conflict of interest cannot participate in the decisions on these matters. A copy of this letter willHowever [*sic*], a written response to the Executive Committee and Board of Directors is requested and will be given due consideration.
>
> Yours sincerely
>
> Dr. Kenneth M. LeDez
> Vice-President, CUHMA, on behalf of the Executive Committee

[26] I pause to observe that this letter, as addressed to the plaintiff and another off-label HBOT provider, could not have defamed the plaintiff or otherwise have been actionable per se. It therefore fell outside the purview of the anti-SLAPP legislation. Nevertheless, I have recited it in full, because it contains all the accusations levelled against the plaintiff in the various communications which do form the libel suit. The letter also made its way to persons other than the plaintiff.

[27] On January 4, 2022, CUHMA and Dr. LeDez lodged a complaint against Dr. Katznelson, and Drs. Marinov and Hance Clarke, with the CPSO. He also sent a copy of it and the "Notice of concerns to RK 2022" to Orser and Robert Byrick. Dr. Byrick was a *past*-president of the CPSO and was a colleague of the plaintiff at the university. He held no official role in accepting a regulatory complaint to the CPSO and, at the time he received the defamatory notice, nothing other than a senior member of the university medical establishment. (Since libel communicated to a single person outside any zone of privilege is actionable, the communications to Orser and Byrick will factor in the s. 137.1 analysis of the availability of a defence to the claim.)

[28] On February 17, 2022, the plaintiff notified CUHMA of her intent to start a lawsuit. Two days later, the CUHMA Board held an "emergency" meeting to remove the plaintiff as the president. The meeting, held on February 19, 2022, on twelve hours' notice breached the organization's by-laws. Thereafter, CUHMA removed the plaintiff from its committees.

[29] The plaintiff, who had submitted her AFC Diploma application to the Royal College in October 2021, now also found that her application had been suspended.

NO MOTION FROM THE OTHER DEFENDANTS

[30] The remaining defendants have not brought a motion. Their counsel argued that if the proceeding is dismissed under s. 137.1, it should be dismissed outright. He also contended that case conference judges may have opined that a separate notice of motion by his clients was unnecessary. I could not be directed to any endorsement dispensing with the requirement. I am obliged first to consider the effect of this procedural asymmetry on the positions of the parties.

[31] Under s. 137.1(3), the legislature has made it clear that a person must bring a motion in order to obtain an order dismissing the proceeding against the person:

> **Order to dismiss**
> (3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. 2015, c. 23, s. 3.

[32] Counsel for the non-moving defendants argued formalistically that the word "proceeding" should be construed liberally as meaning the whole proceeding. To rule in this manner would imply that an action in which the defamation or other expression-based cause of action is only a part could, like the tail wagging the dog, result in non-expression-based rights of action being stifled. In any event, the qualifying words "against the person" clearly mean that the order can only affect the proceeding against the defendants who brought the motion.

[33] In *The Catalyst Capital Group Inc. v. West Face Capital Inc*., 2023 ONCA 381, at paras. 145-46, the Court of Appeal declined to rule that an anti-SLAPP motion could not be used to excise a cause of action arising from an expression, while leaving other causes of action to proceed to trial. However, in stating that the motion should dispose of a whole cause of action, the court meant to say that an anti-SLAPP motion that fails to dispose of the whole cause of action ought to be dismissed because it cannot achieve the aim of stopping the litigation at an early stage:

> [145] It is unnecessary to decide, on the facts of this appeal, the broad question of whether s. 137.1 contemplates partial anti-SLAPP motions. This jurisprudential question is better left to another appeal in which the issue

> would be dispositive. In this case, not only would the motion not be dispositive of the counterclaim as a whole, it is not even dispositive of the particular cause of action. …
>
> [146] An anti-SLAPP motion is meant to be summary, efficient, and final. It is intended to save resources. This court has expressed concern that it is too often simply an occasion for the waste of additional time and expense, at no risk to the moving party: *Park Lawn*, at paras. 34-40. I share the motion judge's concern that allowing a partial anti-SLAPP motion of this sort would have the effect of delaying the entire proceeding for little purpose and with great expense and delay. The motion judge did not err in dismissing the motion on the basis that s. 137.1 does not contemplate a motion that would not dispose of an entire cause of action against a defendant.

[34] In the absence of a clear appellate statement that partial anti-SLAPP motions are defective, the wording of subsection (3) must be construed as allowing one of several defendants to seek to have the expression-based claim dismissed early as against that defendant.

[35] Other parts of the anti-SLAPP law also focus on the importance of a party bringing a motion to be entitled to the dismissal order. Subsections 137.2(1) and (2) state that the motion must be made in accordance with the rules of court, and that the hearing take place no later than 60 days after the notice of motion is *filed*. This court has held that filing the motion is not synonymous with bringing or making the motion for the purpose of the stay under s. 137.1(5): *Canadian Thermo Windows Inc. v. Seangio*, 2021 ONSC 6555, at para. 81. That issue turned on the steps, including the scheduling of a hearing date under subrule 137.2(3), to be taken before the notice of motion can be served. By referring to the service of a notice of motion, however, that subsection clearly contemplates that a notice of motion is required to be served before the hearing.

[36] Subrule 37.07(1), requiring service on a party who will be affected by the order sought. The non-moving defendants could have served a notice of motion up to a week before the hearing, under subrule 37.07(6). If for no reason other than the costs jeopardy of participation, the respondent needs to know in advance of the hearing precisely which parties are seeking the relief.

[37] There may be instances where a s. 137.1 motion could dispose of an action against the privy of a defendant, either on consent or because of vicarious liability of the non-moving defendant: *Bent v. Platnick*, 2020 SCC 23, [2020] 2 SCR 645, at para. 33; 2018 ONCA 687, at para. 28. In *Platnick*, the law partnership and the lawyer who communicated the libel were joint and several defendants in this manner. That is not the situation here, where CUHMA and others are not privies of LeDez or vicarious tortfeasors.

[38] I therefore rule that the motion can only result in an order for dismissal of the proceeding as against LeDez and Linden. Moreover, unless the pleadings are struck out by the motion under rule 21, only the aspects of the proceeding arising from their expressions can be dismissed under the anti-SLAPP law.

[39] The procedural conundrum created by the motion being brought by only two of the defendants has some definite consequences. The first and most obvious one is that the corporate oppression remedy must stand, if for no other reason that the corporate defendant is the natural primary defendant to that claim and the moving parties but secondary or necessary parties. The second is that any potential liability of the corporate defendant under the direction of the moving parties will not be barred by a dismissal of the claim against the moving parties as personal defendants.

[40] This leads to the third anomaly of the defamation claim being continued against the corporate defendant even if it is dismissed against the moving parties, in particular Dr. LeDez as the author of the allegedly defamatory publication. It is not for me to decide whether the other defendants, by missing this window of opportunity to bring their own anti-SLAPP motion, have waived their right to do so or are otherwise estopped. Having regard to the outcome of the actual motion that was filed, the decision of the remaining defendants not to bring a motion will turn out not to have adverse consequences.

ISSUES IN THE ANTI-SLAPP MOTION

Legislative Purpose

[41] The modern principle of statutory construction underlying all Canadian jurisprudence requires courts to examine the underlying aims of legislation, to prevent them from being undermined by inappropriate or incongruous use: *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 SCR 795, at para. 50.

[42] The purpose of the anti-SLAPP law in Ontario are set out in this preamble:

Dismissal of proceeding that limits debate

Purposes

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. 2015, c. 23, s. 3.
>
> Definition, “expression”

> (2) In this section,
>
> "expression" means any communication, regardless of whether it is made verbally or nonverbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 2015, c. 23, s. 3.

[43] The Ontario legislature enacted the anti-SLAPP provisions in the CJA to protect public participation and freedom of expression in both public and private spheres. It was part of a national movement responding to the abuse of defamation suits by the rich or powerful. Provincial legislatures enacted similar laws, after the Uniform Law Conference of Canada (ULCC) studied and recommended this type of legislation. The ULCC's 2008 SLAPP Working Group Report stated, at para. 5:

> [5] The SLAPP phenomenon, already familiar in the United States, first appeared in Canada as a type of abuse of process … in the 1990s. A number of companies initiated legal proceedings that fit the definition of SLAPP in order to silence groups or citizens who were speaking out on public issues, especially on environmental, but also municipal or consumer, issues.

[44] The Working Group Report canvassed various provincial court rules, including Ontario's rules 20 and 21. It concluded, at para. 106, that Anti-SLAPP legislation was required because of courts' reluctance to apply the rules at a preliminary stage in the proceedings. The Ontario anti-SLAPP legislation did not follow the ULCC Model Act, presented at its 2009 conference. Nevertheless, its drafters recognized the need for a summary method for courts to stop SLAPPs outside the established rules for early dismissal of actions. Ontario's legislation addresses a specific type of abusive litigation and is not intended as a triage tool for courts to weed out unmeritorious or otherwise irregular suits. In other words, the purpose of the law is to remove lawsuits as cudgels with which the powerful might beat down exponents of inconvenient messages.

[45] Although it would be wrong to construe the law as applying only to David defendants sued in defamation by Goliath plaintiffs, the word "individuals" in para. (a) instead of "persons" does imply the legislative intent to protect Davids and not Goliaths. Neither side of this action fall into the Goliath category. However, the plaintiff is the putative anti-establishment figure in the piece. She is the one who published the journal articles and who actively exposed her work to peer review and criticism in aid of expanding the knowledge base of the medical academy. Most importantly, in the context of the legislative purpose of s. 137.1, she has been respectful, and at worst indifferent, of the body of medical opinion that LeDez and his cohort represent.

[46] The resort to the statute by LeDez, an individual who has apparently marshalled a professional faction against the plaintiff, therefore appears to be out of step with the spirit, if not the letter, of the law. LeDez and his followers were the ones trying to shut down the plaintiff's pursuit of a medical procedure, both in private practice and in her leadership of a group within the medical academy. His reference to fraudulent billing practices, without having properly audited the billing and clinical setting, bore serious legal risk wholly out of proportion to any scientific concern.

[47] The modern purposive rule of construction does not give cause to refuse the application of the law or to change the liberal construction. It does, however, set the context of the public interest analysis that is the backbone of the statute. The question, *who* is trying to silence *whom*, is very relevant.

Threshold Questions – Subsection (3)

[48] As stated in the above-quoted subsection (3), the judge hearing the motion must dismiss the proceeding if it "arises from an expression made by the person that relates to a matter of public interest." This has been described as the threshold test, after which it falls on the responding plaintiff to show cause why it should not be dismissed, under subsection (4).

[49] The plaintiff conceded in her counsel's factum that the threshold under ss. 137.1(3) is met, with respect to the defamation claim. Although that concession is not binding on me, I agree that the defamation claim falls into the category of a suit that arises from an expression.

[50] I also agree with the parties that the subject matter of LeDez's information, that the plaintiff was engaged in a practice that posed unwarranted risk to her patients and that she could have been defrauding OHIP, were expressions that some members of the community would genuinely be interested in knowing. It must be observed that the public-interest test under subsection (3), as a threshold question, is different from the weighing provision under subsection (4). Subsection (3) must be accorded a broad and liberal interpretation: *Platnick*, at para. 81. As long as some segment of the community would have a genuine interest in receiving the information, the defendant has met the burden: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, [2020] 2 SCR 587, at para. 27.

[51] Thus, even if LeDez's information, presumed to be false, turns out to have been false, there are some members of the recipient group who might be interested in receiving it. The fact that some of the plaintiff's colleagues within the CUHMA leadership acted on LeDez's "investigative" conclusions likely satisfies the threshold test. The moving party argued that patients would be interested ostensibly made sense, except that I do caution that LeDez's intent was to keep his concerns out of the public eye. As far as subsection (3) is concerned, the moving party has met the test. The legal inquiry must then turn to the exceptions in subsection (4).

Exceptions from Dismissal – Subsection (4)

[52] The motion by LeDez depends on the application of subsection (4), which is worded as a cumulative test:

> **No dismissal**
>
> (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; and
>
> (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. 2015, c. 23, s. 3.

[53] The operative words, "grounds to believe" denote a basic recognition of available evidence based on a preliminary record: *Pointes*, at paras. 34-42; *Platnick*, para. 126. Because of the conjunction "and" used to connect the operative paragraphs and clauses of subsection (4), the plaintiff must satisfy every condition for the claim to avoid dismissal. This should not be construed as an insurmountable set of hurdles, because a truly meritorious defamation suit can satisfy subsection (4). The legislature did not intend to eliminate the cause of action. It intended to stop such suits from being used for an improper purpose.

[54] Although the moving parties' factum took the position that the plaintiff failed to meet the "substantial merit" onus under clause (i), they conceded that LeDez's utterances made out a *prima facie* libel case. This is enough to establish grounds to believe the proceeding has substantial merit.

[55] The moving parties maintained they had a valid defence to the claim in either justification, absolute privilege, or qualified privilege. Much of the argument on the motion focused on these defences. For the plaintiff to survive to paragraph (4)(b) of the analysis, the plaintiff had to show grounds to believe the moving parties had no valid defence.

[56] Justification is the defence to a libel or slander action on the basis that the defamatory publication was substantially true. To the lay person, truth should mean that the publication was not defamatory. In defamation law, however, the words are considered defamatory if they refer to the plaintiff and could reasonably harm the plaintiff's reputation. The law presumes the falsity of the statement and places the onus on the defendant to justify the statements on the basis that they were true.

[57] On the basis of the evidentiary record before me, the defence of justification was the weakest of the three because the plaintiff provided abundant grounds to believe LeDez distorted and sensationalized her well-known and ethical off-label use of HBOT as a danger to patients and her billing OHIP as fraudulent. The defence requires the accuracy of the information and absence of the sting of libel: *Pointes*, at paras. 107-08. The record provided ample grounds to believe that justification would not be accepted as a defence.

[58] Absolute privilege is a defence to libel or slander where the communication is made through official channels of a recognized legal process. A pleading filed in court or a statement made on the floor of Parliament are obvious examples. The complaint to the CPSO was covered by this privilege because the college's processes are quasi-judicial in nature. The moving parties did not argue absolute privilege beyond the filing of this complaint. College complaints are nevertheless costly, time-consuming and highly stressful, even if the complaints do not go beyond the Inquiries, Complaints and Reports Committee. Even in the event the CPSO were to investigate and direct a hearing, the plaintiff is justified to feel betrayed by LeDez and her association.

[59] Counsel for the plaintiff conceded that there would be no cause of action against the defendants for the regulatory complaint to the CPSO. To this I would, for the purposes of the motion, consider a properly made complaint to the Royal College, an accrediting body but not a regulator, to be subject to such a privilege. The defence protecting the statements made to these agencies, however, do not protect the defendants' defamatory speech if made beyond communications made in those narrow settings, i.e. correct official channels. The pleadings and evidence showed that LeDez and other defendants communicated with persons outside the narrow purpose of lodging such complaints. Therefore, absolute privilege does not provide a defence to the claim when one considers the claim as a whole.

[60] Once a judicial or quasi-judicial proceeding has been commenced, out-of-court publication of the subject matter may be covered by qualified privilege: *Hill v. Church of Scientology of Toronto*, 1994 CanLII 10572 (ON CA). In *Sussman v. Eales*, 1986 CarswellOnt 529, [1986] O.J. No. 317, 25 C.P.C. (2d) 7, para. 2, the Court of Appeal held that a complaint to the dental regulator was covered by absolute privilege, whereas a copy of the complaint sent to the local dental association was covered only by qualified privilege. See also *McDonald v. Freedman*, 2013 ONSC 6812 (CanLII), at paras. 21-22.

[61] Qualified privilege is a defence applying to defamatory statements made by a person who has "an interest or duty, legal, social, moral or personal, to publish the information in issue to the person to whom it is published" and the recipient has "a corresponding interest or duty to receive it": *Platnick*, at para. 121. Some of the recipients of LeDez's communications, not limited to the complaint to the CPSO, appear to have been made in an honest albeit misplaced belief that he had a moral duty to communicate with persons and agencies who needed to know about the plaintiff's allegedly unethical practices. Others such as Orser and Byrick, did not have official roles with the regulator or the accreditation body, at least in terms of a duty to receive the information. Although I need not decide the issue, there are grounds to believe that the communication of the defamatory allegations to this slightly wider audience was not protected speech under the law of defamation. In *Platnick*, paras. 130-32, Coté J. disagreed from the minority's view that a zone of confidentiality among professionals created an occasion of privilege.

[62] The defence of qualified privilege requires an element of necessity in carrying out the duty to communicate the defamatory speech. If it is possible to communicate it without referring to the plaintiff, the speech can fall outside the privilege or the occasion of the privilege: *Platnick*, paras. 129-30. Here, LeDez' communications identified the plaintiff as well as other doctors at the university program. While he may have felt justified in identifying her

because she was program director, the content referring to her went beyond her leadership of the program participants and attacked her personal integrity. The personal accusations, such as her fraudulent billing, went beyond the scope of necessary reporting of an unnamed group.

[63] The plaintiff also responded to the assertion of qualified privilege on the basis that the defence does not apply to statements uttered with malice. In the law of defamation, malice need not be an intent to injure. Malice can also describe defamatory statements made with reckless disregard for the truth: *Platnick*, paras. 136-37. Recklessness, in this regard, must be indifference to the truth or falsity of the utterance: *Weisleder v. OSSTF*, 2019 ONSC 5830, at para. 17. In the case of a medical or other professional, lack of fairness or the strength of innuendo are indices of malice: *Myers v. Canadian Broadcasting Corp*., 2001 CanLII 4874 (ON CA), at para. 11.

[64] The email to Beverley Orser on December 14, 2021, was unnecessarily mischievous. It related his "strong grounds to believe that consultations are being charged to OHIP for unapproved hyperbaric treatments provided at a fee of $280 for each session. I do not think this is an acceptable practice but it is not my primary concern." These words suggest strongly that he threw the OHIP billing issue into the mix only to stir the pot. It had nothing to do with his concerns about the safety or efficacy of the off-label HBOT.

[65] Later, on January 4, 2022, he wrote her again and told her: "We are aware of facilities that are misrepresenting patient diagnoses as approved conditions so that they can bill OHIP. We do not have the resources or authority to investigate such matters." It was not clear whether the facilities included the plaintiff's clinic. Even if it did not, the overall message in the email, which repeated the earlier "concerns" regarding the plaintiff's operations, was that the plaintiff was part of a scandal that threatened to undermine the reputation of the hyperbaric medicine program at the University:

> I would greatly welcome your advice. It is quite possible that the CPSO will not address our concerns, but I hope that they do consider the issues. I am sure that the CPSO has many issues to address and perhaps this will not be given priority. One of our concerns is that when OHIP starts to notice rapid growth in hyperbaric billing, some of it likely fraudulent, is that it will result in restrictions that will decrease access even further for patients that can benefit from approved treatments. All of these issues risks destroying the reputation of hyperbaric medicine and years of effort to be respected. It has taken a long time to get the AFC Diploma program from the RCPSC fully implemented and it would be a disaster for this to become undermined.

[66] The prediction that CPSO might not address the concerns betrays some consciousness that the concerns could be rejected at the intake level at the regulator. Given the seriousness of CPSO involvement, the bane of every medical professional's life, the statement came close to being an admission that the complaint itself was made without serious thought. While it is not defamatory to bring a complaint to CPSO in which one lacks faith that it will be taken seriously, the privileged umbrella that the regulatory process covers cannot be wide if the complainant himself lacks conviction about the complaint. When the defendants in

Hill v. Church of Scientology of Toronto, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130 defamed the plaintiff on the steps of Osgoode Hall in Toronto, the overhang of the roof did not protect the defendants when their lawyer read out the contents of a defamatory notice of motion.

[67] LeDez evidently believed that where there was smoke there was fire. However, his insistence in continuing to correspond with Orser and others in a parallel channel to the CPSO could only be sheltered by qualified privilege if he had properly weighed the potential harm to the plaintiff's professional standing against the evidence backing up his allegations. Statements that can harm professional reputation must be preceded by reasonable investigation: *Platnick*, at paras. 97, 132-33. LeDez's cursory investigation of the plaintiff's operations could not have justified the zealous and disproportionate attack. Indeed, despite his numerous allegations of billing impropriety, he never directed it to the party that might have a genuine interest in receiving it: OHIP. His concern appears to have been that OHIP could audit the plaintiff and other practitioners and bring the program into disrepute. This communication was less intended to raise public awareness of his concerns but, rather, to prevent it from becoming a matter of public concern of a public agency within the Ministry of Health.

[68] I therefore find that there are grounds to believe that LeDez exceeded the bounds of qualified privilege by making statements damaging the plaintiff's professional reputation to those who did not need to receive the information, without adequate investigation and without sufficient regard to the consequences. Moreover, there are grounds to believe that malice may defeat the privilege.

[69] For the purposes of this motion, the plaintiff has satisfied me on the face of the record that there are grounds to believe the moving parties do not have a valid defence to the proceeding. Indeed, I doubt there can be any defence to the libel claim for the communications made to Orser and Byrick. This does not end the inquiry.

[70] Paragraph (4)(b) requires a weighing of public interest in permitting the proceeding to redress the harm outweighs the public interest in protecting the expression. The actual and potential harm to the plaintiff was not seriously in dispute. Tarnishing a professional reputation is one of the categories of prejudice that the law of defamation recognizes as damage at large, i.e., without the need for specific proof: *Hill*, at para. 177.

[71] I therefore return to the legislative aims of s. 137.1. Katznelson never meant to prevent LeDez from opposing her medical techniques or that of her colleagues at the university. Indeed, she actively sought out their engagement in the medical debate. She only hired lawyers and started this proceeding after LeDez targeted her with personal attacks. The court can and should consider whether the plaintiff's motives are to silence the moving party or to recover for harm from a defamatory statement: *The Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2023 ONCA 381, at para. 112.

[72] A more panoramic view of the statement of claim and the evidence of the parties reveals no vindictive or strategic motive on the plaintiff's part. She should have expected some blowback when she published or co-authored her papers and tried to move the association's

policies toward an acceptance of off-label use. There could not have been a significant commercial impact on the plaintiff's private clinic because the publications were not made to the public, such as in an online review of website. Her concerns appeared to be genuine fear of the actual and potential stain on her professional career.

[73] Nor can it be said that the moving parties, LeDez in particular, lacked conviction that he was trying to protect his vision of the hyperbaric subdiscipline within anaesthesiology and that his interpretation of the plaintiff's billing practices could attract scrutiny from OHIP. Despite his zeal in pursuing these issues, his moral compass seems to have pointed in directions other than the right ones. He could very well have left his complaints with CPSO and to OHIP and let those authorities perform the real investigative work. In the case of OHIP, as I have stated, he sought to prevent that agency's scrutiny of the plaintiff and other practitioners engaged in private HBOT services. That, in my view, is not public expression but a type of cover-up. Indeed, removing the plaintiff from her position in the association was an act in furtherance of a cover-up and attempt to smear the plaintiff.

[74] While it might be premature to circumscribe his actual motives, the picture that appears on the face of the record is that LeDez sought to shut down the private clinics, including the plaintiff's, before OHIP started investigating the entire subdiscipline. By encouraging others to circle the wagons against the plaintiff and other operators of private HBOT clinics, he was organizing a private interest group of like-minded doctors. While these doctors could be considered members of the community who would be interested in receiving the information, the public interest could have been served in a more focused and effective manner by limiting his communications to CPSO, OHIP, and perhaps the Royal College. The moving parties did not need to broadcast their message to serve the public interest. They were only looking out for their own interests, even if the interests were motivated by ego or professional standing.

[75] I conclude that the public interest in allowing the plaintiff to continue her suit to recover damages for harm caused by the defamatory statement outweighs the moving parties' right to utter those statements in non-privileged occasions, when privileged occasions were available. The public interest in protecting free speech does not extend to the use of libel to silence a competitor's opinion.

[76] I have thus concluded the s. 137.1 analysis and dismiss the anti-SLAPP motion.

RULE 21 PLEADINGS MOTION

[77] In the alternative to their motion to dismiss the proceeding against them, the moving parties have also sought to strike out pleadings of various causes of action, namely those pleading oppression remedy, unlawful interference with economic relations, conspiracy, bad faith, and breach of fiduciary duty. In fact, had I not dismissed the anti-SLAPP motion, it is possible that other causes of action survived. The claim for an oppression remedy, in particular, is not based on an expression but specific corporate acts.

[78] Rule 21.01(1)(b) states:

> **21.01** (1) A party may move before a judge,
>
> …
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

[79] The test for such a motion was described in *Trillium Power Wind Corporation v. Ontario (Natural Resources)*, 2013 ONCA 683, at paras. 30-31. The pleadings must be construed as true or capable of being proven and construed generously. To succeed, the moving party must show the pleadings have no reasonable chance of success or are patently ridiculous. It is a high bar. Nevertheless, it is evident that some of the pleadings were inserted to allow the case to survive a s. 137.1 attack. In those pleadings, the plaintiff has not really disclosed cause of action beyond repackaging libel with textbook labels for other torts.

[80] For the reasons below, the pleadings of the causes of action other than defamation and oppression should be struck. The motion should be considered an opportunity to focus on the real causes of action, and to weed out the pleadings that will only lade the litigation with dead weight.

Corporate Oppression

[81] At the hearing, the moving parties' complaint about the pleading of oppression under s. 253 of the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23, is that it is a "dressed-up" claim for defamation. Their factum stated:

> In this case, the pleading of oppression by Dr. Katznelson is simply a dressed-up claim for being terminated by the Board as CUHMA president. If accepted as pleaded, any time a member of a not-for-profit corporation were removed as President because of concerns of misconduct, such would create liability for oppression.

[82] The statement of claim pleads specific measures taken by the corporation and its directors, some of which are described as breaches of its own by-laws. These pleadings are separate and distinct from the claim in defamation and cannot be characterized as derivative of the defamation claim. They related to issues such as notice and the scheduling of a meeting with the intent to exclude the plaintiff. These are not based on defamation. Rather, the foundation is rooted in corporate process and fairness to the officeholder.

[83] The oppression claim is not a "dressed-up" cause of action for the plaintiff's ouster as president of the association. Without having to mine the jurisprudence on the issue, it is

clear that an unfair process leading to such ouster is included in Parliament's categories of wrongful corporate conduct (underline added):

> **253 (1)** On the application of a complainant, a court may make an order if it is satisfied that, in respect of a corporation or any of its affiliates, any of the following is oppressive or unfairly prejudicial to or unfairly disregards the interests of any shareholder, creditor, director, officer or member, or causes such a result:
>
> **(a)** any act or omission of the corporation or any of its affiliates;
>
> **(b)** the conduct of the activities or affairs of the corporation or any of its affiliates; or
>
> **(c)** the exercise of the powers of the directors or officers of the corporation or any of its affiliates.

[84] I would also include in the oppressive corporate act the directors' resolution to bring a complaint to the CPSO against the plaintiff. Although the complaint itself is privileged, any one of the proponents of the complaint could have made the complaint as an individual member of the public or as a licensee of the College. The mobilization of the corporation against the plaintiff was clearly intended to lend credibility and political strength to the complaint. However, before the individuals' concerns could be converted into a corporate act against its own president, the corporation and the participants in the corporate act owed a duty of fairness to the plaintiff. On the face of the pleadings, there is no basis to strike out the oppression remedy claim or the facts alleged in support of it.

Unlawful Interference with Economic Relations

[85] At paragraphs 55 and 56 of the statement of claim, the pleading of the tort of unlawful interference with economic relations cites the defamatory communications and the intent to injure her economic interests and to alienate her from her professional and academic communities. Unlike the oppression claim, this pleading seems very much to be a re-casting of the defamation claim.

[86] The tort requires the defendant to have committed an actionable wrong against a third party with the intention of causing the plaintiff economic harm: *Gaur v. Datta*, 2015 ONCA 151, at para. 25. It is one of the hardest causes of action to plead and prove, because it relies on indirect harm to the plaintiff in circumstances where the direct victim usually has not sued the defendant. Neither the plaintiff's pleadings nor the factual matrix of the case support the tort, since nothing harmful was done to others to the prejudice of the plaintiff.

[87] Paragraphs 55 and 56 should therefore be struck out as failing to plead the described cause of action.

Conspiracy

[88] Paragraphs 57, 58, and 59 of the statement of claim contain the pleadings of conspiracy. There are general allegations of the defendants' agreement to injure the plaintiff or to bring about such harm through unlawful means.

[89] The moving parties objection was founded on the failure to plead the particulars of conspiracy as required by the courts. The settled law of pleading conspiracy requires, at a minimum, the following particulars:

a. the relationship of the defendants within the conspiracy;

b. the agreement between the defendants to conspire;

c. precisely what the purpose or what were the objects of the alleged conspiracy;

d. the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and

e. the injury and damage occasioned to the plaintiff thereby.

Normart Management Ltd. v. West Hill redevelopment Co. Ltd., 1998 CanLII 2447 (ON CA)

[90] Although some parts of some of these elements have been pleaded, what is missing from the statement of claim is the collusion of the defendants in each of them. The statement of claim describes one or more defendants initiating the concerns taken up by LeDez, after which LeDez orchestrates a campaign of misinformation and corporate exclusion. There are those who prompted LeDez and those who acted in response to him. There is no pleading, and certainly no particulars, of anyone other than LeDez being aware of or being behind all the steps taken against the plaintiff. A conspiracy requires a minimum quorum of two conspirators. None of the pleadings against the other defendants rise to that level.

[91] As pleaded, the conspiracy claim also merges with the defamation claim. Defamation is a particularly unsound basis for a conspiracy pleading because the actual act of publication of the defamatory statement causes any conspiracy to merge with the defamation: *Hall v. MacPherson Leslie and Tyerman LLP Barristers and Solicitors*, 2007 SKCA 1, at para. 29.

[92] Thus, on the face of the statement of claim, the tort of conspiracy has not been properly pleaded, and it cannot be saved by granting leave to amend. Paragraphs 57, 58, and 59 of the statement of claim are therefore struck out on this basis.

Bad Faith

[93] Paragraph 60 of the statement of claim is a pleading that the defendants acted in bad faith to cause injury to the plaintiff's economic interests and reputation. Apart from being an

unnecessary restatement of two other causes of action, the pleading of bad faith itself adds nothing to the claim. Bad faith is not a stand-alone cause of action: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 (CanLII), [2011] 2 SCR 261, at para. 78.

[94] Paragraph 60 must therefore be struck out.

Breach of Fiduciary Duty

[95] Paragraphs 61, 62, and 63 of the statement of claim allege breach of fiduciary duty by the defendants. The factual basis of the claim is a restatement of the oppression remedy.

[96] The allegation of fiduciary duty does not fall into the traditionally defined categories of fiduciaries, such as trustees: *Elder Advocates*, at para. 33. The plaintiff must therefore bring the defendants into the class of fiduciaries known as "ad hoc" fiduciaries. The Supreme Court, in para. 36 of *Elder Advocates*, described these as follows;

> [36] In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[97] The principal quality of an *ad hoc* fiduciary that makes the relation analogous to the traditional fiduciary is the duty to act in the beneficiary's best interests, or at least to put the beneficiary's interest ahead of the fiduciary's. Although there are some bald statements in the statement of claim to this effect, the narrative of parties and their conduct do not reveal any basis for holding that the defendants owed such duties to the plaintiff. The directors of the association owed fiduciary duties to the association but not to the plaintiff as president. The fact that the plaintiff was vulnerable to corporate misfeasance did not, of itself, create a fiduciary relationship. Rather, the appropriate cause of action for pursuing her claim for wrongful ouster from the office of president is the oppression remedy.

[98] Paragraphs 61, 62, and 63 of the statement of claim should therefore be struck out.

CONCLUSION

[99] The anti-SLAPP motion under s. 137.1 to dismiss the action against Kenneth LeDez and Ron Linden is dismissed.

[100] The motion to strike certain pleadings be struck under rule 21.01(b) is granted in part. The pleadings of unlawful interference with economic relations (paras. 55 and 56), conspiracy

(paras. 57, 58, and 59), bad faith (para. 60), and breach of fiduciary duty (paras. 61, 62, and 63), shall be struck out from the statement of claim. Since these pleadings were derivative of the causes of action in defamation and corporate oppression, the plaintiff has not lost anything in the litigation beyond the burden of having to lead evidence to support untenable claims. The plaintiff shall amend the statement of claim to reflect these changes, either by crossing them out with lines or by deleting them.

[101] The anti-SLAPP legislation and the *Rules of Civil Procedure* provide potentially different costs consequences arising from the disposition of the motion. I encourage the parties to the motion to try to settle the costs, and not to give up until there is a true impasse. If there is such an impasse, counsel may serve and file costs outlines, any truly relevant rule 49 offers, and submissions of no longer than two pages, double-spaced, within 30 days hereof. Any such documents shall also be copied to my judicial assistant at her email address at Sarah.Humphreys@ontario.ca.

Akazaki J.

Date: February 15, 2024