SCC File No. 38374

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

MAIA BENT

Appellant
(Respondent)

-and-

HOWARD PLATNICK

Respondent
(Appellant)

FACTUM OF THE APPELLANT,
MAIA BENT
(Pursuant to Rule 35(1) of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal concerns the proper interpretation of new legislation in Ontario[1] designed to protect and promote expression that relates to a matter of public interest. In this case, the defendant, Maia Bent, raised concerns about the integrity of Ontario's mandatory automobile insurance dispute system. Her expression highlights the struggle of catastrophically impaired victims of motor vehicle accidents ("MVAs") to obtain access to vital medical benefits, the insurance assessment system that is set up to deny them coverage, and the lawyers, like Ms. Bent, who advocate for a fair dispute system.

2. Ms. Bent is a plaintiff-side personal injury lawyer and volunteer advocate for the seriously injured. She warned her colleagues on a restricted and confidential Ontario Trial Lawyers Association ("OTLA") listserv about specific instances of unfair and biased practices in the automobile insurance dispute system shortly after the abrupt settlement of a Financial Service Commission of Ontario ("FSCO") arbitration, which resulted in the insurer designating her client catastrophically impaired. In her post to the listserv, Ms. Bent identified both Sibley, the insurance assessment firm involved, and the plaintiff, Dr. Howard Platnick.

3. Dr. Platnick sued Ms. Bent for the intimidating amount of **$16,300,000** after her warning, through no fault of her own, was leaked and then published in Insurance Business Magazine (IBM), an insurance trade magazine. Sibley did not sue Ms. Bent or dispute the content of her post.

4. Dr. Platnick is a general practitioner ("GP") who has devoted his medical practice to working for insurance assessment firms. He made about **$1,000,000** a year for ten years writing paper-review reports of specialist insurer assessors, which insurers rely on to deny victims of MVAs access to enhanced benefits. He is a cog in the billion-dollar automobile insurance machine.

5. Like Ms. Bent, many judges have recognized the serious and systemic nature of the issue of unfair and biased insurer assessor reports and have criticized insurance assessment firms who direct specialist assessors to make substantive changes to their reports; and the hired guns, like Dr.

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[1] *Protection of Public Participation Act*, 2015, S.O. 2015, c. 23 [*PPPA*]. British Columbia has also enacted almost identical legislation: *Protection of Public Participation Act*, SBC 2019, c 3.

Platnick, who work for them and whose reports are partisan, who act as judge and jury, and who advocate for the insurer rather than being impartial.[2]

6. The Legislature of Ontario has determined that expression like Ms. Bent's merits special protection. It enacted the *Protection of Public Participation Act* ("*PPPA*"),[3] which amended the *Courts of Justice Act* ("*CJA*")[4] to include a fast-track mechanism for the summary dismissal of lawsuits that **have the effect of limiting expression**[5] on matters of public interest (ss. 137.1 to 137.5) and amended the *Libel and Slander Act* ("*LSA*")[6] to add s. 25, which provides that a qualified privilege applies in "respect of an oral or written communication on a matter of public interest" **even where the communication is reported on by media or other people.**

7. Subs. 137.1(1) sets out the clear and unambiguous purposes of the legislation:

> (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.

8. Subs. 137.1(3) provides that the motion judge shall dismiss the proceeding if the defendant satisfies the judge that the proceeding arises from an expression made by the defendant that relates to a matter of public interest.

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[2] See *Daggitt v Campbell*, 2016 ONSC 2742 (CanLII) at paras. 27, 30 [*Daggitt*]; *Macdonald v. Sun Life Assurance Company of Canada*, 2006 CanLII 41669 (ON SC) at paras. 100-103 [*Sun Life*]; *Burwash v. Williams*, 2014 ONSC 6828 (CanLII) at paras. 25-29 [*Burwash*]; Ontario, Ministry of Finance, *Ontario Automobile Insurance Dispute Resolution System Review, Final Report* by The Honourable Justice Douglas Cunningham (Online: Ministry of Finance, 2014) [Cunningham Report] at 22-23.

[3] *PPPA*, *supra* note 1.

[4] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137 [*CJA*].

[5] The "key evaluation" under the dismissal test is the adverse effect of the lawsuit on expression and not the motives of the plaintiff in bringing the lawsuit: See Anti-SLAPP Advisory Panel Report to the Attorney General (October 28, 2010), at Intro., paras. 22, 35 [Advisory Panel Report].

[6] *Libel and Slander Act*, R.S.O. 1990, c. L.12, s. 25 [*LSA*].

9. Subs. 137.1(3) is qualified by subs. 137.1(4), which provides that the motion judge shall not dismiss the proceeding if the plaintiff 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 ("the merits test"); 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 (the "balancing test").

10. The three-part conjunctive test in s. 137.1(4) is specifically designed so that a lawsuit must be dismissed if the plaintiff fails any one part. The language of the provision does not prioritize any one part of the test over another.

11. To determine whether the motion judge was justified in dismissing the action, this appeal requires resolution of two issues.

a) First, what is the proper scope of the motion judge's inquiry into the merits of the defences? With respect to the merits test, the Court of Appeal erred in its interpretation of "grounds to believe" and its formulation of the test by recasting the specific words of the provision, ignoring the well-known meaning of the term, prohibiting the judge from considering whether the plaintiff's evidence is credible and compelling, and creating a test with such a low threshold that it gives little to no practical effect to the purposes of the PPPA.

b) Second, how is the motion judge to weigh the seriousness of the harm and the strength of the public interest expression at stake? With respect to the balancing test, the Court of Appeal erred by creating a mechanical test that restricts the relevant factors that a motion judge may consider in assessing the seriousness of the harm to reputation. It erred in finding that the motion judge was not permitted to consider Dr. Platnick's own evidence that the "serious harm" arises solely from the republication of the words complained of (a separate and distinct libel) and credible, uncontradicted and unchallenged evidence that Ms. Bent is not liable for the republication of her words. The Court of Appeal was unjustified in interfering with the motion's judge's proper exercise of discretion.

12. Resolution of these issues is necessary to ensure that the PPPA is effective in protecting and promoting expression that relates to a matter of public interest, as intended. A failure to show proper deference to the decisions of motion judges will also result in a flood of appeals from s. 137.1 decisions, inconsistent with the legislation's intent of protecting the public from expensive and drawn out lawsuits that have the effect of limiting expression that relates to a matter of public interest.

13. In dismissing the action, the motion judge appreciated the high value of Ms. Bent's expression, the critical importance of fostering full and frank discussions on the OTLA lawyer listserv about specific instances involving the integrity of the automobile insurance dispute system, and the intent of the Legislature to protect such expression from liability. He applied the correct legal principles, had a sufficient basis in the record for his factual determinations and gave sufficient weight to all relevant factors in exercising his discretion to dismiss the action under both the merits test and the balancing test. The Court of Appeal wrongly intervened.

B. Facts

1. The Parties

a. Ms. Bent, Advocate for the Seriously Injured

14. Ms. Bent is a personal injury lawyer and acts as a volunteer advocate for the seriously injured, promoting their interests in Ontario's automobile insurance dispute system.[7] She has held the titles of President-Elect and President of OTLA.[8]

15. OTLA is an association of lawyers, law clerks, and law students who practice plaintiff side litigation.[9] It has a public service mandate to advocate for a fair and accessible automobile insurance system in Ontario.[10] Ms. Bent and OTLA members try to promote legislation that assists people who are injured in accidents and to increase the benefits that are available to them.[11]

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[7] Affidavit of Maia Bent, sworn April 25, 2016 [Bent Aff.], AR, Vol. III, Tab 18, p. 2 (para. 3).
[8] Bent Aff., AR, Vol. III, Tab 18, p. 2 (para. 3).
[9] Bent Aff., AR, Vol. III, Tab 18, p. 6 (para. 13).
[10] Bent Aff., AR, Vol. III, Tab 18, p. 6 (para. 14).
[11] Transcript of the Cross-Examination of Maia Bent, AR, Vol. XII, Tab 26, p. 49 (q. 196) [Bent Transcript].

b. Dr. Platnick, Doctor for Insurance Assessment Firms

16. Dr. Platnick is a GP.[12] He has devoted his medical practice to drafting summary assessment reports, called Executive Summary Reports (ESRs), which are used by insurers to deny motor vehicle accident victims access to enhanced benefits.[13] His reports may also be relied on by the insurer in arbitrations.

17. He made **$1,000,000** a year for about 10 years doing this type of work.[14]

18. Dr. Platnick works for insurance assessment firms (known as "vendor companies")[15] that are hired by insurance companies to arrange catastrophic impairment assessments and provide insurers with impairment determinations.[16] In respect of his catastrophic impairment work, he engages in a paper-review of the reports of specialist assessors who examine and assess the accident victims.[17]

19. Dr. Platnick does not have the specialist qualifications of the various assessors whose reports he reviews, comments on and summarizes for use by insurers (ONSC, paras. 10-11). Yet he does not feel bound to follow their findings.[18] He has also admitted to counseling a psychiatrist assessor to remove material findings from her final report on behalf of an insurance assessment firm.[19]

20. Although insurers rely on ESRs to deny claimants insurance coverage, the governing accident benefits legislation (the "SABS")[20] contains no provision for the use of vendor companies, the catastrophic impairment assessments they coordinate, and the writing of ESRs by doctors like Dr. Platnick who are not involved in conducting any direct medical evaluations of the claimants. **All of this is a creation of the insurance industry**.

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[12] Affidavit of Howard Platnick, sworn May 20, 2016 [Platnick Aff.], AR, Vol. VI, Tab 19, p. 2 (paras. 3-4); Transcript of the Cross-Examination of Howard Platnick held June 8, 2016 [Platnick Transcript], AR, Vol. XIII, Tab 28, p. 58 (qq. 4-5).
[13] Platnick Aff., AR, Vol. VI, Tab 19, pp. 2-3 (para. 5), p. 4 (para. 8), pp. 13-14 (para. 26); Platnick Transcript, AR, Vol. XIII, Tab 28, pp. 95-98 (qq. 199-214).
[14] Platnick Transcript, AR, Vol. XIII, Tab 28, pp. 95-96 (qq. 199-205).
[15] Statement of Claim, AR, Vol. II, Tab 13, p. 4 (para. 5).
[16] Platnick Aff., AR, Vol. VI, Tab 19, p. 26 (para. 56).
[17] Platnick Aff., AR, Vol. VI, Tab 19, pp. 26-28 (paras. 57-61).
[18] Platnick Transcript, AR, Vol. XIII, Tab 28, p. 148 (q. 459).
[19] Platnick Aff., AR, Vol. VI, Tab 19, pp. 66-69 (paras. 99a-c, f).
[20] *Statutory Accident Benefit Schedule*, O. Reg. 34/10, ss. 44-45 [*SABS*].

2. Ms. Bent Spoke Out on a Matter of Important Public Interest

21. In addition to Ms. Bent and OTLA, many judges have recognized the serious and systemic issue of unfair and biased insurer assessor reports and have criticized the practices of some insurance assessment companies and questioned the independence of insurer assessors. In *Macdonald v. Sun Life Assurance Co. of Canada*,[21] Spiegel, J. criticized an insurance assessment company for going "far beyond what can be considered a proper "quality control" function" when it suggested substantive changes to a medical assessor report. He found that their "actions constituted an unwarranted and undesirable interference with the proper function of an expert witness...and should be met with appropriate sanctions designed to send a clear message that such conduct will not be tolerated."

22. MacLeod-Beliveau, J., in *Daggitt v. Campbell*,[22] touched on the type of conduct admitted to by Dr. Platnick in this case when discussing biased insurer experts: "When an expert and that expert's report is notably partisan, **acts as judge and jury**, advocates for the insurer rather than being impartial, is not credible, and fails to honour the undertaking to the court to be fair, objective, and non-partisan, it directly affects a party's right to a fair trial."

23. As Cunningham, J. explained in his report on the automobile insurance dispute system, the "problem is obvious. An expert retained by an insurer who supports a claimant is unlikely to be retained again."[23]

3. The Confidential Listserv Post

24. On November 14, 2014, following the sudden settlement of a FSCO arbitration involving her catastrophically injured client and the insurer, Ms. Bent posted the following message to a restricted-access, confidential OTLA listserv comprised of plaintiff-side personal injury lawyers (the "Confidential Listserv Post") who, like Ms. Bent, "devote the bulk of their practice to representing accident victims making claims against insurance companies, primarily in the motor vehicle area" (ONSC, paras. 7, 66):

> From: "Maia L. Bent" <MBent@lerners.ca>
> Subject: Sibley Alters Doctors' Reports

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[21] *Sun Life*, *supra* note 2 at paras. 101-103; see also *Burwash*, *supra* note 2.
[22] *Daggitt*, *supra* note 2 at para. 27.
[23] Cunningham Report, *supra* note 2 at pp. 6, 22-23.

> Date: November 10, 2014 at 9:30:18 AM EST
> To: "otlalawyers@lists.trialsmith.com" otlalawyers@lists.trialsmith.com
>
> 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.[24]

25. The motion judge and the Court of Appeal agreed that Ms. Bent's expression relates to a matter of important public interest concerning the administration of justice and the integrity of the automobile insurance dispute system in Ontario (ONSC, paras. 3, 68, 71, 132, ONCA, para. 36).

4. The Confidential Listserv Post Was Republished Through No Fault of Ms. Bent's

26. Only OTLA lawyers may access the listserv. As a precondition for access, all of the listserv members had signed a confidentiality undertaking, which prohibits the sharing of listserv posts to

[24] Nov. 10, 2014 OTLA Listserv Post from Maia Bent, AR, Vol. III, Tab 18A, p. 31-32.

anyone, including to other members of OTLA, law firm partners, associates and staff (the "Undertaking").[25] OTLA takes the Undertaking very seriously.[26]

27. In breach of the Undertaking, a listserv member leaked the Confidential Listserv Post. Once it was leaked, an advocacy group named FAIR made the Confidential Listserv Post public (ONSC, para. 75). It was then republished in the December 29, 2014 issue of Insurance Business Magazine (IBM),[27] an insurance trade magazine (ONSC, para. 75).

28. Ms. Bent did not intend, anticipate or authorize that the Confidential Listserv Post be distributed to anyone outside the listserv.[28]

29. Contrary to what is alleged in the Statement of Claim,[29] Ms. Bent's direct and unchallenged evidence is that she did not provide an interview to IBM or give IBM permission to publish the Confidential Listserv Post.[30] The IBM article itself makes no mention of an interview or any communication with Ms. Bent whatsoever and specifically cites its source of the Confidential Listserv Post as Rhona DesRoches of FAIR.[31] Neither Ms. DesRoches nor FAIR have been sued by Dr. Platnick.

5. Dr. Platnick's Lawsuits

30. On January 27, 2015, Dr. Platnick sued Ms. Bent in defamation for **$16,300,000**.[32] Then, on March 25, 2015, he sued IBM in defamation for **$16,300,000**.[33] On February 20, 2018, he sued the Globe and Mail in defamation for **$16,300,000** for its reporting of this case.[34]

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[25] Bent Aff., AR, Vol. III, Tab 18, p. 8 (para. 18); OTLA Listserv Undertaking and Indemnity [Undertaking], AR, Vol. IV, Tab 18K, pp. 48-49; Bent Transcript, AR, Vol. XII, Tab 26, p. 27 (q. 112).
[26] Bent Transcript, AR, Vol. XII, Tab 26, p. 27 (q. 112).
[27] Dec. 29, 2014 Insurance Business Magazine article [IBM Article], AR, Vol. XI, Tab 25, pp. 28-30.
[28] Bent Aff., AR, Vol. III, Tab 18, p. 2 (para. 4), p. 4 (para. 6), p. 8 (para. 19), p. 28 (para. 39); Bent Transcript, AR, Vol. XII, Tab 26, p. 37 (q. 148), p. 157 (q. 596), p. 160 (qq. 609-610).
[29] Statement of Claim, AR, Vol. II, Tab 13, p. 12 (paras. 24j-k).
[30] Bent Aff., AR, Vol. III, Tab 18, p. 28 (para. 40).
[31] IBM Article, Vol. XI, Tab 25, pp. 28-30.
[32] Statement of Claim, AR, Vol. II, Tab 13, p. 3 (para. 1).
[33] *Howard Platnick et al. v. KMI Publishing and Events Ltd*., CV-15-524707.
[34] *Howard Platnick et al. v. The Globe and Mail Inc. et al*, CV-18-59241.

31. Sibley has not sued Ms. Bent or disputed the content of her post in any way.

32. This lawsuit has limited Ms. Bent's freedom of expression. She testified that, as a result of this litigation, she no longer feels free to be entirely frank and open about the important issue of insurer assessor practices and the impact they have on the victims MVAs and the automobile insurance industry as a whole.[35]

6. The Merits Test - Consideration of The Defences Pleaded

33. Ms. Bent defended the action on the basis that, among other things, she published her words on an occasion of qualified privilege and that the words complained of are substantially true. She also pled that she is not responsible for the republication of her words outside the listserv.[36]

a. The Qualified Privilege Defence

34. Both the motion judge and the Court of Appeal agreed that the Confidential Listserv Post was an expression related to a matter of public interest and, for the purposes of the motion, that it was published on an occasion of qualified privilege (ONSC, paras. 115-116 , ONCA para. 89).

35. Ms. Bent believed that she was fairly and accurately setting out what happened during both the arbitration that had just settled and the other case involving Dr. Platnick (the "Dr. Dua case") (ONSC, paras. 111-112).[37] In that regard, the following are the key facts Ms. Bent knew and believed at the time she sent the Confidential Listserv Post, which support Ms. Bent's defence of qualified privilege and which were relied on by the motion judge in dismissing the action.

i. Ms. Bent's Good Faith and Honest Belief Regarding Dr. King's Sworn Testimony and the Platnick Report

(1) The Platnick Report

36. In the recently settled arbitration that Ms. Bent spoke out about, Dr. Platnick had issued an ESR, which concluded that Ms. Bent's client was not catastrophically impaired (the "Platnick

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[35] Bent Aff., AR, Vol. III, Tab 18, pp. 4-5 (paras. 8-10). Bent Transcrpt, AR, Vol. XII, Tab 26, pp. 190-194 (qq. 730-734), pp. 196-198 (qq. 740-744).
[36] Statement of Defence, AR, Vol. II, Tab 14, p. 22 (para. 36), pp. 24-26 (paras. 42-45).
[37] Bent Transcript, AR, Vol. XII, Tab 26, pp. 137-138 (q. 528); Bent Transcript, AR, Vol. XIII, Tab 27, p. 27 (q. 888), p. 31 (q. 898), p. 34 (q. 911).

Report").[38] In it, Dr. Platnick falsely stated that the non-catastrophic decision was the consensus assessment of the entire team of assessors.

(2) Dr. King's Testimony

37. As reported by Ms. Bent in the Confidential Listserv Post, during the arbitration, Dr. King, the neurologist assessor, testified that he had never seen the Platnick Report, was not a part of a consensus opinion, was not personally involved in any discussion related to the Platnick Report and never signed off on it.[39] He also testified that large portions of his assessor report were removed by Sibley without his knowledge or consent.[40] There is no dispute in this proceeding that Ms. Bent accurately reported the evidence of Dr. King.

38. The arbitration settled soon after Dr. King testified, on very favourable terms to the claimant: The insurer designated her catastrophically impaired and agreed that she was entitled to enhanced benefits going forward; payment in full of all past benefits owing plus interest (which Ms. Bent testified is "virtually impossible to get on a settlement"[41]); and payment of lawyer fees and disbursements going back many years on a full indemnity basis.[42] Ms. Bent had never seen such full indemnity costs paid in an arbitration ever.[43]

(3) The Production Documents

39. In terms of her warning to her colleagues to always get the underlying files, Ms. Bent relied on information discovered as a result of an expansive production order obtained from the FSCO Arbitrator.[44] The production documents, which were filed in the arbitration,[45] revealed that some assessor reports served by the insurer were materially different than the original assessor reports

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[38] Executive Summary Report dated Oct. 8, 2009 [Platnick Report], AR, Vol. IV, Tab 18O, p. 185.
[39] Excerpts from Dr. King's Testimony, AR, Vol. V, Tab 18R, pp. 33-35 (qq. 281-291).
[40] Excerpts from Dr. King's Testimony, AR, Vol. V, Tab 18R, pp. 15-18 (qq. 173-186), pp. 27-28 (qq. 219-225).
[41] Bent Transcript, AR, Vol. XII, Tab 26, pp. 135-136 (q. 520).
[42] Bent Transcript, AR, Vol. XII, Tab 26, p. 136 (q. 523).
[43] Bent Transcript, AR, Vol. XII, Tab 26, pp. 135-136 (qq. 520-521).
[44] Arbitration Order dated July 13, 2013, AR, Vol. X, Tab 21A, pp. 112-113.
[45] Bent Aff., AR, Vol. III, Tab 18, pp. 13-14 (paras. 28-30).

submitted to Sibley.[46] As a result of seeing the productions, Ms. Bent believed the Platnick Report was "not a fair summary of the total picture of [her client's] impairments."[47]

40. In particular, the productions revealed the following:

a) Sibley directed the physiatrist assessor to make material revisions to his report,[48] which resulted in him removing his catastrophic impairment decision altogether.[49]

b) Sibley directed the psychologist assessor to make substantive changes to his report but he refused to alter it out of concern that he would be "assenting to actual influence" by Sibley and it would compromise the integrity of his assessment.[50] He also refused to sign the Platnick Report because he disagreed with Dr. Platnick's conclusion that Ms. Bent's client was not catastrophically impaired.[51]

c) The psychiatrist assessor refused to sign the Platnick Report, noting that he had never spoken to or met Dr. Platnick or discussed with him any findings and because a "'consensus' is quite clearly and explicitly contradicted."[52]

41. The interference with assessor reports was significant. It only requires one medical assessor on the team to make a catastrophic impairment finding in order for the insurer to make the designation.[53] By falsely stating that there was a consensus amongst the assessors, Dr. Platnick provided the insurer with the ammunition to deny the claimant ongoing benefits, which, in fact, occurred. It was only after the production order that the inconsistency between the assessor's original reports and the Platnick Report came to light.

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[46] Bent Transcript, AR, Vol. XII, Tab 26, pp. 77-78 (q. 303).
[47] Bent Transcript, AR, Vol. XII, Tab 26, pp. 80-81 (qq. 315-316).
[48] Email to Dr. Hanada from Judy Farrimond dated July 16, 2009, AR, Vol. V, Tab 18U, p. 129.
[49] Dr. Hanada Report dated May 27, 2009, AR, Vol. V, Tab 18T, p. 127; Dr. Hanada Amended Report dated Oct 8, 2009, AR, Vol. V, Tab 18W, p. 143.
[50] Aug 7, 2009 Letter from Dr. Genest to Judy Farrimond, , AR, Vol. V, Tab 18Z, pp.172-173.
[51] Oct 27, 2009 Email from Dr. Genest to Judy Farrimond, AR, Vol. V, Tab 18CC, p. 182.
[52] Oct 8, 2009 Letter from Dr. Rubens to Judy Farrimond, AR, Vol. V, Tab 18FF, pp. 204-205.
[53] See Bent Aff., AR, Vol. III, Tab 18, pp. 18-19 (para. 37d) ; Platnick Transcript, AR, Vol. XIII, Tab 28, pp. 158-159 (qq. 508-509).

ii. Ms. Bent's Good Faith and Honest Belief Regarding the Dr. Dua Case

42. Regarding the Dr. Dua case, Ms. Bent provided the following uncontradicted evidence concerning what she knew and believed when she made the Confidential Listserv Post:

a) Her client was in "extreme crisis" owing to several suicide attempts[54] and awaiting a catastrophic impairment determination to receive life-saving medical benefits.[55]

b) The insurer had **served Ms. Bent with a copy of a final report** authored by Dr. Dua, the psychiatrist assessor, which concluded that Ms. Bent's client was catastrophically impaired with an Extreme Impairment in mental and behavioural impairment (the "Final Dua Report").[56] This was the only report by Dr. Dua she ever received from the insurer (ONCA, para. 76). She had no reason to know about any other report (ONSC, para. 111).

c) The insurer accordingly designated Ms. Bent's client catastrophically impaired.[57]

d) After receiving the Final Dua Report and the insurer's catastrophic impairment designation, Ms. Bent received Dr. Platnick's ESR.[58] Dr. Platnick's ESR stated that Dr. Dua had concluded that her client was not catastrophically impaired having only a Moderate Impairment. Because this was in complete contradiction to both the decision in the Final Dua Report and the insurer's catastrophic impairment decision, Ms. Bent reasonably believed and concluded that Dr. Platnick changed Dr. Dua's mental and behavioural impairment decision.[59]

43. When she sent the post, Ms. Bent remembered the case "quite clearly."[60] Her client had been suicidal. She had been appalled by the insurer's delay.[61] **The contents of Ms. Bent's file confirmed what she knew and wrote in the Confidential Listserv Post**.

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[54] Bent Transcript, AR, Vol. XIII, Tab 27, pp. 11-12 (q. 845).
[55] Letter from Maia Bent to State Farm dated Feb. 27, 2012, AR, Vol. X, Tab 21C, p. 119.
[56] Bent Transcript, AR, Vol. XIII, Tab 27, pp. 24-25 (q. 882); Independent Psychiatric Examination Report dated Nov. 4, 2011 (Excerpts) [Final Dua Report], AR, Vol. V, Tab 18HH, p. 213.
[57] Letter to Maia Bent from State Farm dated Mar. 8, 2012, AR, Vol. X, Tab 21F, p. 129.
[58] Bent Transcript, AR, Vol. XIII, Tab 27, pp. 14-15 (q. 848).
[59] Bent Transcript, AR, Vol. XIII, Tab 27, pp. 14-15 (q. 848).
[60] Bent Transcript, AR, Vol. XIII, Tab 27, p. 6 (q. 820).
[61] Bent Transcript, AR, Vol. XIII, Tab 27, p. 6 (q. 820), pp. 10-11 (qq. 841-844).

(1) No Evidence of Express or Actual Malice

44. In a trial on the merits, in order to defeat the defence of qualified privilege, a heavy burden is on the plaintiff to prove the existence of actual or express malice, including the fact that it was the **predominant motive**.[62] Dr. Platnick failed to adduce any evidence of malice, let alone that Ms. Bent was predominantly motivated by malice in making the Confidential Listserv Post.

45. Ms. Bent testified that she sent the Confidential Listserv Post in order to educate the Listserv members of the importance in a catastrophic impairment dispute of always obtaining production of the entire file in order to scrutinize expert reports filed by the insurer, to advocate for auto accident victims, and to ensure that the dispute resolution system is fair and unbiased.[63] The "didactic intent" of the Confidential Listserv Post was clear (ONSC, para. 116).

(2) Ms. Bent's Statements Did Not Exceed the Privilege of the Occasion

46. In the **restricted and confidential context** of the listserv, Ms. Bent spoke candidly and appropriately because in that particular forum, in that particular context, and to those particular people, "that type of free expression is very common."[64]

47. Further, the identification of Dr. Platnick was relevant and connected to Ms. Bent's warning to her colleagues:

a) First, Dr. King provided sworn testimony in the FSCO arbitration of and concerning Dr. Platnick and the Platnick Report, which Ms. Bent accurately reported on.

b) Second, it was in the spirit of open discussion and of leading, guiding and educating listserv members that Ms. Bent identified Sibley and Dr. Platnick (ONSC, para. 111).[65] Naming both of them was consistent with the full and frank discussion that typically occurred on the Listserv, **the expectation of members to identify parties involved**, and the need to warn

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[62] Raymond E. Brown, *Brown on Defamation* (Canada, United Kingdom, Australia, New Zealand, United States), 2nd ed (Toronto: Carswell, 2019) at Ch 16.6 [Brown on Defamation].
[63] Bent Aff., AR, Vol. III, Tab 18, p. 4 (para. 6), p. 8 (para. 19); Bent Transcript, AR, Vol. XII, Tab 26, p. 33 (q. 137), pp. 133-134 (qq. 514-515), pp. 148-149 (qq. 565-566).
[64] Bent Transcript, AR, Vol. XII, Tab 26, pp. 137-138 (q. 528).
[65] Bent Transcript, AR, Vol. XII, Tab 26, pp. 25-26 (q. 102), p. 35 (q. 142), p. 125 (q. 489), p. 133 (q. 514), pp. 137-138 (q. 528), pp. 148-149 (qq. 565-566).

others who might have cases involving those specific parties.[66] Ms. Bent testified that specific information was more relevant to lawyers than a vague description of an assessment company or insurer physician and such information would ensure that lawyers would be vigilant in obtaining full documentary disclosure, especially if they had an upcoming arbitration those parties.[67]

c) Third, Ms. Bent mentioned the Dr. Dua case because it was another case involving Dr. Platnick and she believed it was important to stress to her colleagues that the issues with bias and unfairness in the dispute process are serious and systemic.[68]

b. The Substantial Truth Defence

48. Ms. Bent made two references to Dr. Platnick in the Confidential Listserv Post. The first related to Dr. King's sworn testimony regarding the Platnick Report. The second related to the Dr. Dua case wherein Ms. Bent stated that Dr. Platnick changed Dr. Dua's decision from catastrophically impaired to non-catastrophically impaired.

49. The following are the key facts relied on by the motion judge, which support the substantial truth of the alleged innuendo of professional misconduct.

(1) Dr. King and the Consensus Report

50. With respect to the first reference, the description of Dr. King's evidence reported by Ms. Bent was objectively true (ONSC, para. 103) and Dr. Platnick has not pled or taken the position otherwise.

51. With respect to the Platnick Report, Dr. Platnick knowingly issued a false and misleading report, which represented that the non-catastrophic impairment decision was a consensus decision of the entire team of assessors when it was not. In that regard, Dr. Platnick admitted that at the time he issued the Platnick Report, he did not know whether a consensus existed.[69] He agreed that he used the word "consensus" in his report, which was both a misnomer and was **misleading**.[70] He

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[66] Bent Transcript, AR, Vol. XII, Tab 26, p. 33 (q. 137), pp. 133-134 (qq. 514-515), pp. 148-149 (qq. 565-567).
[67] Bent Transcript, AR, Vol. XII, Tab 26, pp. 148-149 (q. 566).
[68] Bent Transcript, AR, Vol. XIII, Tab 27, pp. 133-134 (qq. 515-517), pp. 148-149 (q. 566).
[69] Platnick Transcript, AR, Vol. XIII, Tab 28, p. 159 (q. 510).
[70] Platnick Transcript, AR, Vol. XIII, Tab 28, pp. 149-150 (q. 467), pp. 167-168 (q. 549).

admitted that none of the assessors had signed off on his report or agreed to it and admitted that the Platnick Report was therefore not a consensus report.[71] He agreed that it was wrong to say a consensus conclusion had been reached.[72]

52. Dr. Platnick **omitted relevant impairment findings** [73] from the assessor reports provided to him despite his report indicating that he incorporated the findings of all assessors[74] and stressed other findings to support the non-catastrophic conclusion, e.g. He excluded altogether the psychologist's and psychiatrist's catastrophic impairment findings. He also omitted a number of the neurologist's impairment findings, including his finding of a chronic pain syndrome. The omitted impairment findings show that **Dr. Platnick knew that assessors were not in agreement on the non-catastrophic impairment conclusion**. In fact, Dr. Platnick admitted that his report was only a selective digest of what he saw fit to include regardless of the findings of the assessors.[75]

53. When he issued the Platnick Report, Dr. Platnick **knew that the insurer would rely on it to deny the claim** and prevent the claimant from accessing enhanced benefits,[76] which it did (ONSC, para. 15, ONCA, para. 20); knew that it may eventually be used at an arbitration;[77] understood that greater weight would attach to it if the assessors were in agreement on the non-catastrophic impairment determination;[78] and knew that it only took one medical assessor on the team to make a catastrophic impairment finding for the claimant to receive the designation and be eligible for enhanced benefits.[79]

(2) Dr. Dua

54. With respect to the second reference, Dr. Platnick produced an amended report purportedly authored by Dr. Dua which contained a non-catastrophic impairment (Moderate Impairment)

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[71] Platnick Transcript, AR, Vol. XIII, Tab 28, p. 150 (qq. 468-469), pp. 159-160 (qq. 513-517).
[72] Platnick Transcript, AR, Vol. XIII, Tab 28, p. 160 (q. 516).
[73] See Bent Aff., AR, Vol. III, Tab 18, pp. 19-23 (paras. 37(e), (n)-(p), (r)-(s)).
[74] Platnick Report, AR, Vol. IV, Tab 18O, p. 181.
[75] Platnick Transcript, AR, Vol. XIII, Tab 28, p. 148 (q. 459).
[76] Platnick Transcript, AR, Vol. XIII, Tab 28, pp. 100-101 (qq. 228-229).
[77] Platnick Transcript, AR, Vol. XIII, Tab 28, pp. 104-105 (qq. 248-249).
[78] Platnick Transcript, AR, Vol. XIII, Tab 28, pp. 141-143 (qq. 428-433).
[79] Platnick Affidavit, AR, Vol. VI, Tab 19, p. 43 (para. 80); Platnick Transcript, AR, Vol. XIII, Tab 28, pp. 158-159 (qq. 508-509).

decision (the "Amended Dua Report").[80] He claimed that the Amended Dua Report provided the basis for the non-catastrophic impairment decision in his ESR.

55. Dr. Platnick admitted that the changed decision from catastrophic to non-catastrophic impairment only arose after his **direct interference with Dr. Dua's original catastrophic impairment decision** (ONSC, para. 22).[81] Before then, Dr. Dua had already issued the Final Dua Report and it had been served on Ms. Bent by the insurer.

56. With respect to Dr. Platnick's interference with Dr. Dua and the Final Dua Report, it was Ms. Bent's position that Dr. Platnick's own admissions support the truth of the alleged professional misconduct innuendo:

a) Dr. Platnick **admitted that he received the Final Dua Report, that it was a final report**[82] and that it contained a catastrophic impairment decision (Extreme Impairment).[83]

b) During Ms. Bent's cross-examination, Dr. Platnick's counsel repeatedly and wrongly asserted that Dr. Platnick had only ever received Dr. Dua's Amended Report, suggesting that the Final Dua Report was only a draft.[84] This made little sense. As Ms. Bent explained,

> But the final version [Final Dua Report] has already been served on their client who is the insurance company. Why would you serve the insurance company with a report that is not completed, that…critically changes the ultimate question from CAT to non CAT and not even identify the fact that it is still under review or there is some issue or problem. It doesn't make any sense.[85]

c) Dr. Platnick admitted that the insurance assessment company asked him to direct Dr. Dua to remove portions of the Final Dua Report that related to the claimant's pain.[86]

d) Although he repeatedly emphasized in his affidavit that he does not speak to assessors[87] and has nothing to do with requests by insurance assessment firms to make substantive

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[80] Amended Dua Report, AR, Vol. IX, Tab 19AA, p. 86.
[81] Platnick Aff., AR, Vol. VI, Tab 19, pp. 66-69 (paras. 99(a)-(c), (f)).
[82] Platnick Aff., AR, Vol. VI, Tab 19, p. 66 (para. 99a).
[83] Platnick Aff., AR, Vol. VI, Tab 19, pp. 66-67 (paras. 99a-b).
[84] Bent Transcript, AR, Vol. XIII, Tab 27, pp. 22-25 (qq. 877, 882) pp. 27-28 (qq. 887, 890).
[85] Bent Transcript, AR, Vol. XIII, Tab 27, pp. 24-25 (qq. 882-883).
[86] Platnick Aff., AR, Vol. VI, Tab 19, p. 67 (para. 99c).
[87] Platnick Transcript, AR, Vol. XIII, Tab 28, pp. 117-119 (qq. 308-317); Platnick Aff., AR, Vol. VI, Tab 19, p. 27 (para. 59).

changes to independent assessor reports,[88] Dr. Platnick admitted that at the request of the assessment company he spoke to Dr. Dua and counselled her to remove findings of pain altogether from the Final Dua Report.[89]

e) Although he has no medical specialist qualifications, it was his position that Dr. Dua, a psychiatrist, must remove from the Final Dua Report any reference to the claimant's pain.[90] He admitted that he counselled Dr. Dua to remove her pain findings as he believed they were outside the scope of her expertise and inappropriate to include,[91] which he admits she did after he contacted her. The misdirection by Dr. Platnick was significant. As discussed further below, in *Fournie v. Coachman*,[92] the FSCO arbitrator ruled that a psychiatrist is, in fact, permitted to included findings of pain under mental and behavioural impairment.

f) Further, although the Amended Dua Report removes the catastrophic impairment decision in terms of mental and behavioural impairment, it continues to state that Ms. Bent's client had "sustained a catastrophic impairment…"[93] Like in the Platnick Report, Dr. Platnick's ESR in the Dr. Dua case omitted this and other highly favourable catastrophic impairment conclusions altogether from his report (ONSC, paras. 44-46).

g) His ESR in the Dr. Dua case also did not disclose that (1) Dr. Dua had previously issued the Final Dua Report to the insurer, (2) that Dr. Platnick had received it, and (3) that Dr. Platnick had counseled Dr. Dua to remove her findings of pain on behalf of the insurance assessment company (ONSC, paras. 45, 46, 111).

57. As such, Dr. Platnick's ESR in the Dr. Dua case was false and/or misleading. The issuing or signing of a false or misleading document constitutes an act of professional misconduct under O. Reg. 856/93, s. 1(1)18 of the *Medicine Act, 1991*, S.O. 1991, c. 30.[94]

58. All of the above provided evidence of professional misconduct and supported the substantial truth defence.

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[88] Platnick Aff., AR, Vol. VI, Tab 19, pp. 26-27 (paras. 57, 59).
[89] Platnick Aff., AR, Vol. VI, Tab 19, pp. 66-69 (para. 99(a)-(c), (f)).
[90] Platnick Aff., AR, Vol. VI, Tab 19, pp. 67-68 (para. 99(c)-(e)).
[91] Platnick Aff., AR, Vol. VI, Tab 19, pp. 66-69 (para. 99(b), (f)).
[92] *Fournie v. Coachman Insurance Co.*, FSCO Appeal Order A07-000297 [*Fournie*] at pp. 16, 21.
[93] Amended Dua Report, AR, Vol. IX, Tab 19AA, p. 86.16.
[94] O. Reg. 856/93, s 1(1)18.

7. The Balancing Test - The Lack of Evidence of Harm Caused by the Confidential Listserv Post

59. Dr. Platnick did not provide any evidence of serious harm arising from the publication of the Confidential Listserv Post to the listserv. Rather, all of the damages claimed originate from the repetition of the words outside the listserv. Ms. Bent's direct and unchallenged evidence is that she did not intend or authorize the leak.[95] It was also not reasonable for her to anticipate it. As a precondition to accessing the listserv, the plaintiff-side personal injury lawyer recipients had all signed a confidentiality undertaking agreeing not to repeat anything from the listserv to anyone, including other OTLA members who were not on the listserv.[96] OTLA took this undertaking very seriously.[97] There was no evidence that the republication was the natural and probable result of her publication to the listserv.[98]

60. All of the evidence of damages alleged are in respect of "vendor companies", "insurers", "the insurance industry", and "adjusters from small and large insurance companies,"[99] none of whom had access to the listserv (ONSC, para. 74).

61. Dr. Platnick did not plead that any of the recipients of the Confidential Listserv Post were his clients or that he enjoyed a reputation amongst that particular audience (ONSC, paras. 74, 124).

8. Judicial History

a. Judgment of The Motion Judge (2016 ONSC 7340, Dunphy, J)

62. The motion judge provided detailed reasons in a 44-page decision wherein he dismissed the action.

(1) The Merits Test

63. With respect to the **merits test**, the motion judge applied a practical and common-sense approach, which recognizes the "summary nature of the motion and the quality of evidence that can reasonably be expected or demanded" (ONSC, para. 86).

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[95] Bent Aff., AR, Vol. III, Tab 18, pp. 28-29 (paras. 39-41).
[96] Undertaking, AR, Vol. IV, Tab 18K, pp. 48-49; Bent Aff., AR, Vol III, Tab 18, p. 8 (para. 18).
[97] Bent Transcript, AR, Vol. XII, Tab 26, pp. 27-28 (qq. 112-116).
[98] See *Black v. Breeden*, [2012] 1 SCR 666, 2012 SCC 19 at para. 20.
[99] Platnick Aff., AR, Vol. VI, Tab 19, p. 5 (para. 10), pp. 7-8 (paras. 14, 16), pp. 11-23 (paras. 22-23, 26, 29-32, 35, 37, 39, 43-44, 48).

64. In order to give meaning to the burden on the plaintiff imposed by the Legislature, he cautioned that a judge must not be satisfied with evidence offered by the plaintiff that is "mere speculation" and "mere suspicion" (ONSC, para. 117). Rather, there must be an objective basis for the judge's belief that the defendant has no valid defence(s) to the proceeding that is based on compelling and credible evidence (ONSC, para. 85). He relied on the uncontradicted and unchallenged evidence of Ms. Bent and the admissions of Dr. Platnick when determining that he was not satisfied there were grounds to believe Ms. Bent had no valid defence of qualified privilege and substantial truth, each of which was a complete answer to the claim (ONSC, paras. 113, 118). He specifically noted that he was not making conclusive findings (ONSC, para. 114).

65. With respect to the qualified privilege defence, the motion judge accepted Ms. Bent's unchallenged evidence that she neither intended nor authorized the republication of her words outside the listserv and that her words were appropriate based on the particular context and circumstances of the listserv (ONSC, paras. 115-116). He also found that there was no credible basis to support the allegation of malice (ONSC, paras. 116, 134). Rather, he found that the evidence supports the belief that Ms. Bent "reported fairly and accurately based on the facts reasonably known to her," (ONSC, paras. 111, 112) and that her statements were relevant, "valuable and useful" to the lawyers representing accident victims who were reading the communication (ONSC, para. 111).

66. With respect to the substantial truth of the alleged innuendo of professional misconduct, the motion judge noted that Ms. Bent's reporting of Dr. King's testimony was objectively true (ONSC, para. 103); that Dr. Platnick admitted that there was no consensus when he issued his report and admitted that the insurer relied on his report to deny the claimant enhanced benefits (ONSC, paras. 14-17); that the Platnick Report itself "suggests that the opinion being conveyed was a consensus opinion" when it "plainly was not" (ONSC, para. 103); that the Platnick Report was "on its face misleading" (ONSC, paras. 103-108); and that the *Medicine Act, 1991* regulations provide that the signing or issuing of a report by a doctor that he knew or ought to have known is false or misleading is an act of professional misconduct (ONSC, para. 110).

67. He also considered that Dr. Platnick admitted to persuading Dr. Dua to change her final decision from catastrophic impairment to non-catastrophic impairment without disclosing his

interventionist role and without including any of her favourable catastrophic impairment findings in his ESR (ONSC, paras. 22, 44, 46).

(2) The Balancing Test

68. The motion judge acknowledged that s. 137.1(4)(b) requires the motion judge to weigh two competing interests: the public interest in allowing the claim to proceed and the public interest in protecting the expression (ONSC, para. 120).

69. After considering a number of factors, including the strong public interest in lawyers sharing information with each other that is intended to improve the administration of justice (ONSC, para. 132); the actual libel chill caused by the lawsuit; the lack of evidence of malice; the lack of evidence of harm caused by the publication of the Confidential Listserv Post to its intended audience; the restricted and confidential nature of the listserv; and Ms. Bent's evidence that she neither intended nor authorized the republication, the motion judge properly exercised his discretion and found that he was not satisfied that the public interest favoured continuation of the proceeding over protection of Ms. Bent's expression (ONSC, paras. 74, 124, 133-134).

b. Judgment of the Court of Appeal (2018 ONCA 687, Doherty, Brown, and Huscroft, JJ.A.)

70. The Court of Appeal allowed the appeal on the basis that the motion judge erred in his application of s. 137.1(4) and concluded that on a proper application of the provision, Dr. Platnick had met his onus. In doing so, it interfered with the motion judge's factual determinations in the merits test and with the motion judge's discretionary decision to protect Ms. Bent's speech in the balancing test. It engaged in what can only be described as a *de novo* assessment of the evidence in respect to each strand of the s. 137.1(4) dismissal test, making findings either inconsistent with the evidence or not available to it based on the record.

(1) The Reformulated Merits Test

71. The Court of Appeal agreed that the evidence relied on by the judge must be objective, and found that the term "satisfies the judge" indicates that the balance of probabilities is the applicable standard of proof[100] but it rejected the motion judge's requirement that "grounds to believe" be based on evidence that is "credible and compelling" (ONCA, para. 46). Instead, it departed from

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[100] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 at para. 68 [*Pointes*].

the well-known meaning of reasonable "grounds to believe" and reformulated the merits test altogether, stating that the question the judge must ask is: "Could a reasonable trier conclude that Ms. Bent had no valid defence to the allegation?" If an affirmative answer is "within the range of conclusions available on the motion record" then the plaintiff has met his onus (ONCA, para. 44).

The Qualified Privilege Defence

72. The Court of Appeal overturned the motion judge's decision, finding that there were grounds to believe there was no valid defence of qualified privilege because the statements were arguably "made maliciously or with reckless disregard for the truth, or because it was not appropriate to the legitimate purpose of the occasion attracting the privilege" (ONCA, paras. 90. 93). It disregarded or failed to consider the motion judge's findings concerning the value and usefulness of Ms. Bent's statements to lawyer members of the listserv, the complete lack of evidence of malice or recklessness, the unchallenged and uncontradicted evidence that Ms. Bent reported honestly, fairly and accurately based on the facts reasonably known to her, the unchallenged evidence that Ms. Bent neither intended nor authorized the repetition of her words outside the listserv, and the restricted and confidential nature of the listserv.

The Substantial Truth Defence

73. Determining that there were grounds to believe that Ms. Bent had no valid defence of substantial truth, the Court of Appeal approached the defence as though Ms. Bent had to prove each specific allegation in the Confidential Listserv Post in order to succeed in her defence rather than prove only the harshest common sting of the words, i.e. professional misconduct (ONCA, paras. 59-61).

74. Without justification, the Court of Appeal reassessed the evidence and ignored or minimized the significance of Dr. Platnick's admissions, which supported the motion judge's finding that there were no reasonable grounds.

(2) The Court of Appeal's Restricted Approach to the Balancing Test

75. The Court of Appeal replaced the motion judge's discretionary decision with its own, finding that Dr. Platnick satisfied his burden in the balancing test (paras. 109-110). It concluded that since Dr. Platnick quantified his damages and provided *potentially* credible evidence of a temporal connection between the harm alleged and Ms. Bent's expression, it was enough to establish

significant harm and outweigh the public interest in protecting Ms. Bent's speech (ONCA, paras. 105-106, 108).

76. With respect to the issue of causation and liability for the damages claimed, the Court of Appeal, ignoring Dr. Platnick's own evidence that the "serious harm" was caused by the leak of the Confidential Listserv Post to the insurance industry, stated that the motion judge was not permitted to consider the scope of Dr. Platnick's damages or whether it was reasonably foreseeable that Ms. Bent's allegations would spread beyond the recipients of the Confidential Listserv Post (ONCA, para. 108). With no factual foundation and in complete contradiction to Ms. Bent's unchallenged evidence, it then suggested that plaintiff-side personal injury lawyers could not be trusted to honour the signed Undertaking, inferring that it was "almost inevitable that an email sent to several hundred people involved in acting for claimants injured in motor vehicle accidents, alleging serious improprieties on the part of a medical expert routinely used by insurers, would rapidly find a much broader audience" (ONCA, para. 107).

PART II –QUESTIONS IN ISSUE

77. The primary issue on this appeal is whether the motion judge was justified in dismissing the action pursuant to s. 137.1. In order to resolve this, the following questions must be resolved:

> **Issue 1a:** Did the Court of Appeal err in its interpretation of "grounds to believe" and its formulation of the **merits test**. **Answer**: The Court of Appeal erred by recasting the specific words of the provision, ignoring the well-known meaning of the term "grounds to believe," and creating a test with such a low threshold that it gives little to no practical effect to the purpose of the PPPA.
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> **Issue 1b:** Did the Court of Appeal err by restricting the factors that the motion judge could consider in assessing whether the alleged harm caused by the expression is "sufficiently serious" that it outweighs the public interest in protecting the expression? **Answer**: The Court of Appeal erred by creating a mechanical test that prohibits the motion judge from considering the plaintiff's own evidence that the alleged harm arises from the republication of the words complained of (a separate and distinct libel), credible evidence that the defendant is not liable for the republication, the absence of evidence of malice and by unjustifiably interfering with the motion's judge's proper exercise of discretion.

PART III – STATEMENT OF ARGUMENT

Issue 1a: The Court of Appeal erred in its interpretation of "grounds to believe" and its formulation of the merits test.

A. The Motion Judge Properly Interpreted and Applied S. 137.1(4)(a)

78. The merits test requires the motion judge to assess whether there are "valid" defences to the proceeding. For the purposes of the s. 137.1 motion, the motion judge must therefore consider, but not determine, fundamental issues central to the action at an early stage.

79. The legislation contemplates that the motion judge be permitted to (1) determine whether he or she finds a particular piece of evidence credible and (2) weigh the evidence before him or her and determine whether he or she is satisfied that there are grounds to believe the defendant has no valid defences to the proceeding. In that regard,

a) s. 137.1 places no limit on the judge's power to weigh the evidence on the record or to assess whether a particular piece of evidence is credible;

b) cross-examinations are permitted,[101] which aid the judge in determining the credibility and reliability of the evidence; and

c) the legislation's seven hour limit on cross-examinations under s. 137.2(4) is the same as the time limit for examinations for discovery set out in the *Rules of Civil Procedure*[102] and an extension of the seven hour limit may be permitted.[103]

80. Recognizing the summary nature of the motion, the motion judge correctly called for an approach to the merits test that does not set the bar for the plaintiff so high that it filters out claims that should proceed or so low that it filters out few, if any (ONSC, para. 86). Considering the clear purposes of the PPPA and the specific text of s. 137.1(4)(a), the motion judge adopted and *adapted* the "compelling and credible" information test articulated by this Court in *Mugesera v. Canada (Minister of Citizenship and Immigration)* [104] (ONSC, paras. 84-85). This test demands that the evidence necessary to form the judge's belief be based on more than mere speculation or mere

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[101] *CJA*, *supra* note 4 at s. 137.2(4).
[102] *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 31.05.1(1).
[103] *CJA*, *supra* note 4 at s. 137.2(5).
[104] *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100, 2005 SCC 40 at para. 114.

suspicion. This is appropriate. The purposes of s. 137.1 will not be realized if the plaintiff can satisfy the merits test based on bald allegations, rumours and suspicion that the defendant has no valid defences. The motion judge must therefore weigh the evidence and make determinations regarding the weight to be afforded the evidence available in order to determine whether grounds to believe exist.[105]

B. The Motion Judge's Approach is Consistent with Existing Jurisprudence and the Text of s. 137.1(4)(a)

81. The motion judge's interpretation of "grounds to believe" is consistent with existing judicial interpretations of the term and the text of the provision. While the term "grounds to believe"[106] is typically found in criminal and regulatory contexts, the Legislature specifically included it in the context of s. 137.1. It must have been "cognizant of [the meaning] and of the implication of using such language."[107] S. 137.1 contains no indication that the lawmakers intended to depart from the known legal meaning of reasonable grounds to believe. Such a departure would have to be clear, either by express language or necessary implication from the statute.[108]

82. The jurisprudence, albeit in different contexts, signals that a less onerous threshold of evidence is required to establish the existence of "reasonable grounds to believe" that does not require the judge to make conclusive findings on the issues in dispute. This approach is consistent with a s. 137.1 preliminary screening test where the legislation requires the motion judge to scrutinize the validity of the defences based on the available evidence but not make conclusive findings in respect to them. The jurisprudence consistently indicates that:

a) Reasonable grounds is a "practical, non-technical and common sense probability as to the existence of the facts and the inferences asserted."[109]

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[105] *Gunn v. The Halton District School Board (Compliance Audit Committee),* 2012 ONCJ 684 at para. 48 [*Gunn*].

[106] As the Court of Appeal stated, and Ms. Bent agrees, in s. 137.1, the term "reasonable" is implicit in the legislation as it is a judge who is forming the opinion (*Pointes, supra* note 100 at para. 69).

[107] *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 S.C.R. 915, at para. 29 [*Will-Kare*], cited in *R. v. D.L.W.*, [2016] 1 SCR 402, 2016 SCC 22 at para. 20 [*D.L.W*].

[108] *Will-Kare, ibid.* at para. 35; *D.L.W, ibid.* at para. 21 .

[109] *Gunn*, *supra* note 105 at para. 43, citing *R. v. Sanchez*, 1994 ONSC 5271.

b) On language in a statute that requires the judge himself or herself to be satisfied that reasonable grounds to believe exist, "**it is for the justice to come to his own conclusion on materials presented to him**."[110]

c) It is the role of the judge to weigh the evidence and make determinations regarding what weight to afford the evidence on the record in order to determine whether grounds to believe exist.[111]

d) Reasonable grounds connotes "a *bona fide* belief in a serious possibility based on credible evidence."[112]

e) "Reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information."[113]

f) Reasonable grounds requires there be credible and objective evidence to support the claim.[114]

g) "[W]hat constitutes sufficient credible evidence will vary from case to case depending on the context." [115]

83. The focus of the judge's inquiry in the merits test must be on the nature of the evidence available and the sufficiency of the evidence presented, having regard to the particular context of the s. 137.1 screening motion. In this case, the motion judge did not believe the plaintiff had met his onus. He committed no error in his application of the s. 137.1(4)(a) test.

84. The Court of Appeal disagreed and articulated an inconsistent approach to the merits test that deprives the motion judge of the authority granted to him or her by the legislation.

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[110] *George v. Rockett*, [1990] HCA 26 at para. 8.
[111] See e.g. *Gunn, supra* note 105 at para. 48.
[112] *Chiau v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16793 (FCA), [2001] 2 F.C. 297 (C.A.) at para. 60, cited in *Mugesera, supra* note 104 at para. 114.
[113] *Mugesera, supra* note 104 at para. 114, citing *Sabour v. Canada (Minister of Citizenship & Immigration)*, 2000 CanLII 16300 (FC), 9 Imm. L.R. (3d) 61 (F.C.T.D); applied in *Gunn, supra* note 105 and *Kett v. The Corporation of the Township of Scugog*, 2019 ONSC 942.
[114] *CarGurus, Inc. v. Trader Corporation*, 2017 FCA 181 at para. 23 [*CarGurus*].
[115] *Ibid*.

C. The Court of Appeal Departed from the Specific Language of the Provision

85. The Court of Appeal erred in crafting a merits-based test that departs from the language of the provision and the well-known meaning of "grounds to believe."

86. First, the Court of Appeal ignored the clear and specific wording of s. 137.1(4)(a), which requires "the judge" hearing the motion to determine whether the evidence available is sufficient to form reasonable grounds. The Court of Appeal changed the wording of the provision, holding that the motion judge must speculate on whether "a judge" or "a reasonable trier" (ONCA, para 44) would conclude that reasonable grounds exist. There is no indication by the Legislature that this alternative approach to reasonable grounds was intended. It essentially removes from the motion judge the discretion conferred on him or her by the Legislature to come to his own conclusion on whether reasonable grounds exist.

87. Second, the Court of Appeal erred in concluding that the motion judge must not consider whether the evidence on the motion is credible, stating that the question is "whether, on the entirety of the material, there are reasonable grounds to believe that a reasonable trier could accept the evidence."[116] The inconsistency lies in the fact that a judge cannot decide if he or she is satisfied that reasonable grounds exist without considering whether the evidence is credible.

88. In *1704604 Ontario Ltd. v. Pointes Protection Association* (*Pointes*),[117] Doherty, J.A., writing for the panel, appeared to back-track on the issue: "I do not mean to suggest that a motion judge must simply take at face value the allegations put forward by the parties on the motion. An evaluation of potential merit based on a "grounds to believe" standard contemplates a limited weighing of the evidence, and, in some cases, credibility evaluations." These statements, in fact, support the motion judge's approach and indicate that the motion judge committed no error in his interpretation of s. 137.1(4)(a) and the Court of Appeal was wrong to interfere.

89. With respect to the assessment of the evidence, the Court of Appeal reasoned that the evidence relied on by the judge must be objective, and found that the term "satisfies the judge" in s. 137.1(4)(a) indicates that the balance of probabilities is the applicable standard of proof.[118] In *Pointes*, it acknowledged that "[j]udicial decision making is antithetical to decisions based on

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[116] *Pointes*, *supra* note 100 at para. 82.
[117] *Ibid.* at para. 82.
[118] *Ibid.* at para. 68.

unreasonable or speculative grounds."[119] Ms. Bent agrees. The motion judge properly applied this principle when he determined that his belief must be based on evidence that is credible and compelling (ONSC, paras. 86-87, 117, 134).

90. There is no question that the motion judge must be satisfied that **more likely than not**[120] there are grounds to believe that the defendant has no valid defences to the proceeding and that "evidence must always be **sufficiently clear, convincing and cogent** to satisfy the balance of probabilities test,"[121] It is difficult then to see how the Court of Appeal rejected the motion judge's approach to the merits-based test.

91. Finally, the Court of Appeal ultimately failed to appreciate that the "compelling and credible" evidence test articulated by the motion judge is not onerous and does not require the motion judge to make final determinations on the issues in dispute, nor does it risk turning s. 137.1 motions into summary judgment motions (ONCA, paras. 47-48). The motion judge was alive to the issues raised by the Court of Appeal, as his detailed reasons indicate. He committed no reversible error in his interpretation of the provision.

D. The Court of Appeal's Analysis Gives Little to No Practical Effect to the Merits Test

92. The Court of Appeal completely recast the merits test and departed from the well-known meaning of the term "grounds to believe," creating so low a threshold that the legislation has been gutted of any practical effect. It has essentially created a pointless merits test[122] that is inconsistent with the specific language of the provision, and the overriding purposes of the PPPA.

93. The Legislature intended that an action must be dismissed if the plaintiff **fails any part** of the s. 137.1(4) test. The language of the provision does not prioritize any one part of the test over another. It must have intended that the merits test be meaningful and practical. The Court of Appeal has all but guaranteed that most plaintiffs will glide through it.

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[119] *Ibid.* at para. 69.
[120] See *F.H. v. McDougall*, 2008 SCC 53 at para. 49.
[121] *Ibid* at para. 46.
[122] See *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at para. 27.

94. The Court of Appeal's neutering of the merits test is evident in *Bondfield v. The Globe and Mail*,[123] wherein the Court found that a "determination that a defence "could go either way" in the sense that a reasonable trier could accept it or reject it is a finding that a reasonable trier could reject the defence" and satisfies the merits test. The risk of this approach is that a motion judge will not consider whether the evidence on the motion **satisfies him or her** that there are grounds to believe there are no valid defences but only whether the defence satisfies a low "could go either way" threshold.[124]

95. The "could go either way" test is a complete departure from the specific words of the provision and the well-known meaning of the term "grounds to believe," which focuses on the nature of the evidence available and the sufficiency of the evidence to form the **judge's belief** that the defendant has no valid defences to the proceeding. It also gives no consideration to the overall purposes of s. 137.1, which are to protect and promote expression that relates to a matter of public interest.

E. The Court of Appeal Erred in its Assessment of Ms. Bent's Defences

1. The Qualified Privilege Defence is Valid

96. In order to justify its interference with the motion judge's conclusion on the qualified privilege defence, the Court of Appeal claimed that the motion judge failed to separately consider Ms. Bent's statement concerning the Dr. Dua case (ONCA, para. 88). This is incorrect. The motion judge, in fact, accepted Ms. Bent's unchallenged and uncontradicted evidence, which addressed both the issue of malice and the issue of whether Ms. Bent's statements concerning the Dr. Dua case were reasonably appropriate to the occasion (ONSC, paras. 111, 115-116). The Court of Appeal wrongly substituted its opinion for that of the motion judge without any regard to the principle of deference. In doing so, it committed a number of legal and factual errors in its evaluation of Ms. Bent's defence.

a. Failure to Properly Consider the Relevance of Ms. Bent's Statements

97. When finding that Ms. Bent's statement concerning the Dr. Dua case was arguably gratuitous (ONCA, para. 92), the Court of Appeal ignored the motion judge's finding that the second reference to Dr. Platnick was "valuable and useful" to the lawyers representing accident victims who were

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[123] *Bondfield Construction Company Limited v. The Globe and Mail Inc.*, 2019 ONCA 166 at para. 15 [*Bondfield*].

[124] See *Miceli v. Swinton*, 2019 ONSC 2926 at paras. 71, 73, 78, 79, 88, applying *Bondfield, ibid*.

reading the communication (ONSC, para.111). It also failed to consider that "[c]ourts take a broad view of a connection between the statement and the privileged occasion; **it need not be central to the topic or occasion but only relevant**."[125] If the words complained of are "not wholly unconnected with or irrelevant to such duty or interest" they are presumed to have been published in good faith.[126] This presumption was entitled to prevail unless Dr. Platnick adduced evidence that Ms. Bent's words were published maliciously, which he did not.

98. It also failed to consider the **particular context of the listserv**.[127] In the restricted and confidential context of the listserv, Ms. Bent spoke candidly and appropriately because in that particular forum, in that particular context, and to those particular people, "that type of free expression is very common"[128] and listserv lawyers wanted and expected members to identify the particular parties involved.

b. Error as to Malice Conclusion

99. The Court of Appeal concluded that Ms. Bent was arguably motivated by malice (ONCA, para. 90) without reference to any evidence in support of this finding. It completely ignored the motion judge's finding that Dr. Platnick adduced no evidence of malice. It also failed to appreciate that once a defendant shows that she is entitled to the protection of a qualified privilege, the "inference of malice which the law draws from the defamatory words disappears. The bona fides and honest believe of the defendant is presumed."[129] The plaintiff then has the **heavy burden of proving on a balance of probabilities that malice was the predominant motive**.[130]

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[125] Brown on Defamation, *supra* note 62 at Ch. 13.7(4).
[126] *Netupsky v. Craig*, [1973] SCR 55, 1972 CanLII 19 (SCC) at pp. 60-61, adopting the words of Schroeder, J.A. at p. 407 in the Court below (1970 CanLII 46 (ON CA)).
[127] *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, 1995 CanLII 59 (SCC) at para. 147 [emphasis added].
[128] Bent Transcript, AR, Vol. XII, Tab 26, pp. 137-138 (q. 528).
[129] Brown on Defamation, *supra* note 62 at Ch 16.6.
[130] *Ibid*. at Ch. 16.6.

100. In this case, there was no evidence of any personal animosity toward Dr. Platnick. Ms. Bent had no existing or prior relationship with Dr. Platnick.[131] She identified him because he was one of the parties involved in both of her cases.

101. Dr. Platnick failed to adduce any evidence of malice let alone that Ms. Bent was predominantly motivated by malice in making the Confidential Listserv Post. The Court of Appeal's conclusion that Ms. Bent was arguably motivated by malice was not open to it based on the evidentiary record.

102. The Court of Appeal erred in conflating the defences of qualified privilege and truth. It concluded that Ms. Bent was arguably reckless because, *in its view*, her reference to the Dr. Dua case could reasonably be seen as an *inaccurate* attack on Dr. Platnick's character (ONCA, para. 92). The Court of Appeal failed to consider that the "defence of qualified privilege recognizes that there is a social necessity of permitting full and frank communication in certain situations "without the inhibiting effect of the fear of a lawsuit if it happens that the facts communicated later turn out to be untrue and defamatory."[132] The issue was not the accuracy of Ms. Bent's statements but whether they were relevant to the topic having regard to the particular context of the listserv, and whether the plaintiff had adduced evidence that Ms. Bent was predominantly motivated by malice, which he did not.

103. Importantly, the Court of Appeal, when concluding that Ms. Bent was arguably reckless as to the truth (ONCA, para. 92), erred by failing to appreciate that Ms. Bent's statement concerning the Dr. Dua case was based on the facts reasonably known to her at the time she published the Confidential Listserv Post: The evidence on the record is that Ms. Bent remembered the specific facts of the Dr. Dua case well, especially in light of the circumstances: Her client had been suicidal and in extreme crisis and the insurer had been delaying the claim decision. The insurer had only served her with the Final Dr. Dua Report, which contained the catastrophic (Extreme) impairment decision and it had ultimately accepted the catastrophic impairment claim. Dr. Platnick's ESR, in complete contradiction, had a non-catastrophic decision. The Court of Appeal acknowledged that "Ms. Bent received only the first report prepared by Dr. Dua" (ONCA, para.76). Her recollection

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[131] Bent Aff., AR, Vol. III, Tab 18, p. 12 (para. 27).
[132] Brown on Defamation, *supra* note 62 at Ch. 13.2(2).

was accurate and based on documents served on her by the insurer. **A review of her file in advance of sending her warning would have disclosed nothing that contradicted her statement**.

c. Failure to Consider s. 25 of the LSA

104. The Court of Appeal also failed to consider that s. 25 of the *LSA* extends protection of the defence of qualified privilege to people like Ms. Bent who speak out in good faith on a matter of public interest, even where the expression is republished by the media or others, as was the case here. Reading s. 25 of the *LSA* together with s. 137.1 of the *CJA*, it is clear that the Legislature intended to protect expression like Ms. Bent's and dismiss lawsuits at an early stage under the merits test.[133] The Court was obliged to and failed to consider this factor in its analysis.

2. The Substantial Truth Defence is Valid

105. With respect to its assessment of Ms. Bent's substantial truth defence, the Court of Appeal made a number of errors.

106. First, the Court of Appeal took an unduly restrictive approach to the defence of substantial truth, failing to appreciate that the defence could succeed as long as Ms. Bent could prove the alleged innuendo of professional misconduct (the harshest and common sting of the words).[134] It failed to consider that proving the innuendo of professional misconduct through **either** the false and misleading Platnick Report **or** the Dr. Dua Case would be sufficient to establish the defence.

107. Second, the Court of Appeal mischaracterized Ms. Bent's statements in the Confidential Listserv Post:

a) Ms. Bent did not allege in paragraph 2 of the Confidential Communication that "Dr. Platnick had deliberately misrepresented the opinions of other experts who had examined [her client]" (ONCA, para. 67). Rather, she accurately reported on the sworn testimony of Dr. King. Dr. Platnick has never taken the position that Ms. Bent was inaccurate in her reporting of Dr. King's testimony.

b) Ms. Bent did not allege in the last paragraph of the Confidential Listserv Post that Dr. Platnick "changed Dr. Dua's report" (ONCA, para. 83). Rather, she stated that he "changed

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[133] See Advisory Panel Report, *supra* note 5 at Intro., paras. 69-78.
[134] Brown on Defamation, *supra* note 62 at 10.4(1)(d).

> the doctor's decision," a clear reference to a change reflected in his own ESR. The Court of Appeal failed to take into consideration the context in which the words were spoken and the audience to whom they were published.[135] In particular, it failed to consider (1) the entirety of the words in the Confidential Listserv Post and that Ms. Bent was referring to Dr. Platnick and his ESRs and (2) the particular listserv audience, all of whom were plaintiff-side personal injury lawyers who would understand that Ms. Bent was referring to a changed decision in Dr. Platnick's ESR. Given their specific expertise, they would not have interpreted the words to mean a physical change to an assessor's report.

108. Third, the Court of Appeal failed to grasp that Dr. Platnick admitted that when he issued the Platnick Report for use by the insurer to deny the catastrophic impairment claim, he knew there was no consensus amongst the entire team of assessors despite the Platnick Report stating that it was a "consensus assessment." It also failed to grasp the significance of Dr. Platnick's admission that his reference to a consensus conclusion was misleading and it was wrong to include the term "consensus." In this regard, the Court of Appeal failed to consider that the *Medicine Act, 1991* regulations provide that a doctor who signs or issues in his professional capacity "a document that the member **knows or ought to know is false or misleading**" constitutes an act of professional misconduct.[136]

109. Based on the evidence on the record, there was nothing to suggest that the motion judge's assessment of Dr. Platnick's explanations were "unreasonable" or "based on a misunderstanding of the evidence" (ONCA, para. 71). The motion judge's findings show a reasonable assessment of the evidence and his factual conclusions and inferences were well-supported by the evidence.

110. Fourth, it failed to appreciate that the SABS, which govern the assessment process, do not provide for ESRs or the intervention of doctors like Dr. Platnick who write summary reports which are relied on by insurers to deny claimants access to enhanced benefits.[137] Nor did it appreciate that Dr. Platnick, a GP, lacks any medical specialist qualifications to comment on, review and make findings in respect of the reports of specialist medical assessors or to direct specialists to remove

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[135] *Ibid*. at Ch. 5.1.
[136] *Professional Misconduct*, O. Reg. 856/93, s 18.
[137] *SABS*, *supra* note 20 at ss. 44-45.

substantive content from their reports and that such facts support the truth of the innuendo of professional misconduct.

111. Finally, it failed to consider that the motion judge, when assessing whether Ms. Bent could justify the innuendo of professional misconduct, was permitted to consider that Dr. Platnick's own admissions supported her defence. In that regard, with no qualifications, Dr. Platnick held himself out to be an expert on what could and could not go in the Final Dua Report. He interfered with Dr. Dua's independent findings. He acted as the "judge and jury" and misled Dr. Dua to edit the Final Dua Report based on a false characterization of the law in the area. He then failed to disclose his intervention in his own ESR.

112. Dr. Platnick was adamant that pain must not be included in the Final Dua Report under mental and behavioural impairment. He admitted that he counseled Dr. Dua to remove her findings. Yet, in *Fournie v. Coachman*, the FSCO arbitrator ruled that **a psychiatrist is permitted to consider pain under mental and behavioural impairment**.[138]

113. It was open to the motion judge to conclude that Dr. Platnick's admitted conduct supported rather than defeated the validity of Ms. Bent's substantial truth defence. The Court of Appeal had no sufficient basis to interfere.

Issue 1b: The Court of Appeal Erred By Restricting the Factors that the Motion Judge May Consider in the Balancing Test

A. The Motion Judge Properly Exercised His Discretion

114. In the balancing test, the motion judge must consider two factors: The public interest in allowing the proceeding to continue and the public interest in protecting the expression, and determine the weightier interest. The motion judge's exercise of discretion necessarily involves an equal consideration of both the evidence of the "serious" harm caused by the expression and the value in protecting and promoting the expression.

115. The motion judge considered and gave "sufficient weight to all relevant considerations"[139] in the balancing test and his reasons support this. He carefully considered both Dr. Platnick's evidence

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[138] *Fournie, supra* note 92 at p. 21.
[139] *Reza v. Canada*, [1994] 2 S.C.R. 394, 1994 CanLII 91 at p. 404.

of harm and the high value of Ms. Bent's expression, determining that the public interest in protecting Ms. Bent's speech outweighs the public interest in continuing the proceeding (ONSC, para. 135). His discretionary decision is entitled to considerable deference.

116. The Court of Appeal erred by interfering with the motion judge's decision and engaging in its own recalibration of the competing interests.[140] As this Court explained in *Elsom v. Elsom*, an appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice.[141] Neither of these circumstances exist in this case.

B. The Motion Judge Properly Considered the Public Interest in Protecting the Expression

117. The motion judge found that Ms. Bent's expression, which raises concerns about the integrity of the insurance dispute process put in place by the Legislature "and, in particular, the honesty and reliability of medical reports filed on behalf of insurers," (ONCA, para. 36) is precisely what s. 137.1 is designed to promote and protect.

> 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 (ONSC, para. 132).

118. He appreciated the high value of Ms. Bent's expression, the importance of fostering full and frank discussions on the listserv about the integrity of the automobile insurance dispute system,[142] and the intent of the Legislature to protect such expression from civil liability even when it is reported on by the media or others.

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[140] In *Pointes, supra* note 100 at para. 97, the Court of Appeal specifically cautioned about an appellate court taking such an approach, yet this is precisely what occurred in this case.

[141] *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375

[142] See *Campbell v. Jones*, 2002 NSCA 128, 2002 at paras. 58-59:"lawyers…have a special relationship with and responsibility to the public to speak out when elements of the justice system itself have breached the fundamental rights of citizens…"

119. The Court of Appeal had no basis to engage in its own re-calibration of the motion judge's assessment by diminishing the high value of Ms. Bent's expression because she identified Dr. Platnick in the Confidential Listserv Post and referred to the Dr. Dua case (ONCA, para. 109). First, there was no evidence to support the allegation that Ms. Bent was motivated by malice. Second, where, as in this case, there is a strong public interest in the expression[143] and the evidence shows that the words were relevant and published in good faith, the courts should be reluctant to conclude that the inclusion of a particular statement was unnecessary.[144] To adopt the Court of Appeal's approach would discourage "freewheeling debate on matters of public interest"[145] and undermine the purposes of the *PPPA*.

C. The Motion Judge Properly Considered The Harm Alleged

120. Given the specific language of s. 137.1(4)(b), which engages the issue of causation in the harm analysis, s. 25 of the *LSA*, which extends the protection of the qualified privilege defence where the expression has been republished by the media or others, and the particular facts of this case, the motion judge could not ignore and properly considered that,

a) there was no evidence of actual harm caused by the expression as published on the listserv;

b) given the context and particular audience of the listserv (advocates to the injured, none of whom were alleged to be clients (ONSC, para. 124)) presumed damages with respect to the Confidential Listserv Post's publication to the listserv would likely be nominal;

c) the harm allegedly suffered related solely to the republication of the words outside the listserv to the insurance industry (ONSC, para. 74);

d) the credible, uncontradicted and unchallenged evidence that the republication was neither intended, anticipated, nor authorized by Ms. Bent (ONSC, paras. 124-125); and

e) the lack of evidence to suggest that the listserv's signed confidentiality obligation was routinely ignored by lawyers on the listserv (ONSC, paras. 29-31).

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[143] See *Grant v. Torstar Corp.*, [2009] 3 SCR 640, 2009 SCC 61 at para. 112 [*Torstar*].
[144] See *Ibid.* at para. 73.
[145] *Ibid.* at para. 52, citing *WIC Radio Ltd. v. Simpson*, [2008] 2 SCR 420, 2008 SCC 40 at para. 2.

1. Credible Evidence of Actual Harm Caused by the Original Publication is Required

121. The Court of Appeal determined that the motion judge was not permitted to consider the scope of the plaintiff's damages claim (ONCA, para. 108). It wrongly suggested that Dr. Platnick need only adduce **potentially credible evidence**, which suggests a temporal connection between the harm and the expression (ONCA, paras.106, 108) and that presumed damages may be enough to satisfy the plaintiff's burden (ONCA, para. 101). In recent s. 137.1 decisions, the Court of Appeal wrongly found that the plaintiff will satisfy the balancing test without adducing any evidence of actual harm caused by the publication of the expression, relying solely on the principle of presumed damages.[146]

122. This mechanical approach[147] gives little to no practical effect to the specific language of s. 137.1(4)(b), which requires the judge to consider (credible) evidence of "the harm likely to be or have been suffered **as a result of the expression**" and the overall purposes of s. 137.1. This approach is also in conflict with the Court of Appeal's own reasoning that "it can hardly be said that a plaintiff seeks to "vindicate a serious wrong" if the plaintiff cannot demonstrate that he has or is likely to suffer any significant harm as a consequence of the alleged defamation" (ONCA, para. 123). As *Brown on Defamation* explains, where a plaintiff offers no evidence to show any harm to reputation from the publication, the presumption of damages may entitle a plaintiff to no more than nominal damages.[148] Given that it is publication to a third party that roots the liability,[149] the assessment of harm must consider the harm suffered as it relates to publication of the expression to its intended audience.

123. Further, the Legislature must have intended that the plaintiff show evidence of actual harm caused by the defendant's communication. While nominal damages are presumed in defamation,

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[146] See *Montour v. Beacon Publishing Inc*., 2019 ONCA 246 at paras. 29-42 [*Montour Publishing*] and *Lascaris v. B'nai Brith Canada,* 2019 ONCA 163 at paras. 40-41.

[147] See *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748, 1997 CanLII 385 (SCC) at para. 43: "A balancing test is a legal rule whose application should be subtle and flexible, but not mechanical."

[148] *Brown on Defamation*, *supra* note 62 at Ch. 25.7.

[149] *Ibid.* at Ch. 3.3(6).

substantial damages are not.[150] When Bill 83, the predecessor to the PPPA was being debated, the requirement for the plaintiff to adduce evidence of actual harm was specifically contemplated:

> For example, the current law simply presumes that a plaintiff who is defamed suffers harm. What this means is that the plaintiff doesn't need to demonstrate any actual or expected damage as a result of public expression. When it comes to discussion in matters of public interest, this is hardly appropriate. **Our Courts of Justice Act amendments would change that rule**.[151]

124. In *Lachaux v. Independent Print Ltd.*,[152] the Supreme Court of the United Kingdom (UKSC) recently had occasion to determine whether a screening provision in the *Defamation Act 2013* required a claimant to demonstrate as a fact that actual serious harm has occurred. While the provision does not require the court to balance competing interests, it contains similar language which engages issues of causation of harm: "A statement is not defamatory unless its publication *has caused or is likely to cause serious harm* to the reputation of the claimant."[153]

125. The UKSC concluded that the plain meaning of the provision refers to some historic serious harm, which must be shown as a fact to have actually occurred and "probably future harm" and not to harm *liable to be caused* given the inherent injurious tendency of the words.[154] As it explained:

> A given statement said to be defamatory may cause greater or lesser financial loss to the claimant, depending on his or her particular circumstance **and the reaction of those to whom it is published**. Whether that financial loss has occurred and whether it is "serious" are questions which cannot be answered by reference only to the inherent tendency of the words.[155]

126. In interpreting s. 1, the UKSC specifically considered that the common law presumption of harm to reputation does not presume "serious" harm and that the provision introduced a "new threshold of serious harm which did not previously exist."[156]

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[150] *Ibid.* at Ch. 25.2.
[151] Ontario, Legislative Assembly, *Hansard*, 40th Parl, 2nd Sess, No 63 (25 September 2013) at 1349 (L Berardinetti).
[152] *Lachaux v. Independent Print Ltd*, [2019] UKSC 27 [*Lachaux*].
[153] *Defamation Act, 2013* Chapter 26 (UK), s. 1.
[154] *Lachaux*, *supra* note 151 at paras. 14, 21.
[155] *Ibid*. at para. 15 [emphasis added].
[156] *Ibid.* at para. 13.

127. If, as the Court of Appeal would suggest, a plaintiff will automatically satisfy the s. 137.1(b) test by referring to the seriousness of the libel and its inherently injurious nature,[157] without showing credible evidence of actual harm, then this legislation will do little to screen out actions where no serious harm has actually been suffered by the plaintiff as a result of the defendant's expression. Such a mechanical approach would also fail to give proper consideration to the value of the expression and the public interest in protecting it.

128. Arguably, where the judge determines that the value of the expression is strong, the plaintiff's evidence of harm must reach a level of seriousness that it outweighs the need to protect such important expression. This must be determined by the motion judge based on the particular facts of the case and the evidence available.

2. Liability for the Republication Was a Relevant Factor In This Case

129. In determining that that harm caused by Ms. Bent's was not sufficient to outweigh the public interest in protecting her expression, the motion judge properly considered Ms. Bent's unchallenged evidence that she neither intended nor authorized the republication (the sole basis for the harm alleged) and the fact that

> 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 listserv members (ONSC, para. 124).

130. Doherty, J.A., dismissed the motion judge's finding as "highly debatable" and "unreasonable" (ONCA, para. 107). Without any factual foundation and contrary to the unchallenged evidence of Ms. Bent, he then inferred:

> I would have thought it almost inevitable that an email sent to several hundred people involved in acting for claimants injured in motor vehicle accidents, alleging serious

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[157] In *Montour Publishing*, *supra* note 146 at paras. 32-37, the Court of Appeal referred to the now overturned approach of the England and Wales Court of Appeal in *Lachaux v. Independent Print Ltd.*, [2017] EWCA Civ 1334, finding that the presumed harm arising from a serious libel is sufficient to establish serious harm under s. 137.1(b).

> improprieties on the part of a medical expert routinely used by insurers, would rapidly find a much broader audience (ONCA, para. 107).

131. In doing so, the Court of Appeal implied that plaintiff-side personal injury lawyers could not be trusted to honour a signed contract and ignored altogether that confidentiality is the hallmark of their profession. It also implied that as a result of this "inevitable" breach of the listserv's confidentiality provisions, Ms. Bent would be liable for the publication of her words outside the listserv. In this regard, it failed to consider that s. 25 of the LSA extends protection of the defence of qualified privilege for people like Ms. Bent who speak out in good faith about a matter of public interest even where the expression is republished by the media or others.

132. It also failed to consider the following well-established principles of defamation law concerning liability for a defamation:

a) in defamation law, a person is only liable for his or her own publication, not repetition by another.[158] Indeed, the republication to IBM, an insurance trade magazine, is the subject of a separate $16,300,000 lawsuit brought by Dr. Platnick against IBM;

b) liability for damages will not flow to a defendant where a republication has occurred that the defendant neither authorized nor intended to make;[159] and

c) a defendant "is not obliged to anticipate the wrongful act of a third person."[160]

133. The Court of Appeal wrongly interfered in the motion judge's discretionary decision. A failure to show proper deference to the decisions of motion judges will result in a flood of appeals from s. 137.1 decisions, inconsistent with the legislation's intent of protecting the public from expensive and drawn out lawsuits that have the effect of limiting expression that relates to a matter of public interest.

PART IV – SUBMISSIONS ON COSTS

134. Ms. Bent requests costs in this Court and in the Court of Appeal. Ms. Bent also requests that the costs order of the motion judge in the 137.1 motion be restored.

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[158] *Brown on Defamation, supra* note 62 at Ch. 7.5(1).
[159] *Ibid*.
[160] *Ibid.* at Ch. 3.3(6).

PART V – ORDER SOUGHT

135. Ms. Bent asks that this Court grant the appeal, with costs.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

N/A

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of July 2019.

Per: _____
Howard Winkler

Per: _____
Eryn Pond

PART VII – AUTHORITIES

Cases:

NO.	AUTHORITY	PARAGRAPH REFERENCE
1.	*1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685	71, 81, 87, 88, 89, 116
2.	*Bondfield Construction Company Limited v. The Globe and Mail Inc.*, 2019 ONCA 166	94
3.	*Black v. Breeden*, [2012] 1 SCR 666, 2012 SCC 19	59
4.	*Burwash v. Williams*, 2014 ONSC 6828	5, 21
5.	*Campbell v. Jones*, 2002 NSCA 128	22, 118
6.	*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748, 1997 CanLII 385 (SCC)	122
7.	*CarGurus, Inc. v. Trader Corporation*, 2017 FCA 181	82
8.	*Chiau v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16793 (FCA), [2001] 2 FCR 297	82
9.	*Daggitt v. Campbell*, 2016 ONSC 2742	5, 22
10.	*Elsom v. Elsom*, 1989 CanLII 100 (SCC), [1989] 1 S.C.R. 1367	116
11.	*F.H. v. McDougall*, 2008 SCC 53	90
12.	*Fournie v. Coachman Insurance Co.*, FSCO Appeal Order A07-000297	56, 112
13.	*George v. Rockett*, [1990] HCA 26	82
14.	*Grant v. Torstar Corp.*, [2009] 3 SCR 640, 2009 SCC 61	119
15.	*Gunn v. The Halton District School Board (Compliance Audit Committee)*, 2012 ONCJ 684	80, 82
16.	*Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, 1995 CanLII 59 (SCC)	98
17.	*Kett v. The Corporation of the Township of Scugog*, 2019 ONSC 942	82
18.	*Lachaux v. Independent Print Ltd*, [2019] UKSC 27	124, 125, 126
19.	*Lachaux v. Independent Print Ltd* [2017] EWCA Civ 1334	127
20.	*Lascaris v. B'nai Brith Canada*, 2019 ONCA 163	121
21.	*Macdonald v. Sun Life Assurance Company of Canada*, 2006 CanLII 41669 (ON SC)	5, 21

NO.	AUTHORITY	PARAGRAPH REFERENCE
22.	*Miceli v. Swinton*, 2019 ONSC 2926	94
23.	*Montour v. Beacon Publishing Inc.*, 2019 ONCA 246	121, 127
24.	*Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100, 2005 SCC 40	80, 82
25.	*Netupsky v. Craig*, 1970 CanLII 46 (ONCA)	97
26.	*Netupsky v. Craig*, [1973] SCR 55, 1972 CanLII 19 (SCC)	97
27. o	*Reza v. Canada*, [1994] 2 SCR 394, 1994 CanLII 91 (SCC)	115
28.	*Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC)	92
29.	*R. v. D.L.W.*, [2016] 1 SCR 402, 2016 SCC 22	81
30.	*R. v. Sanchez*, 1994 CanLII 5271 (ON SC)	82
31.	*Sabour v. Canada (Minister of Citizenship & Immigration)*, 2000 CanLII 16300 (FC), 9 Imm. L.R. (3d) 61 (F.C.T.D)	82
32.	*WIC Radio Ltd. v. Simpson*, [2008] 2 SCR 420, 2008 SCC 40	119
33.	*Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 SCR 915	81

Secondary Sources:

NO.	AUTHORITY	PARAGRAPH REFERENCE
34.	Anti-SLAPP Advisory Panel Report to the Attorney General (October 28, 2010)	6, 104
35.	Brown on Defamation (Canada, United Kingdom, Australia, New Zealand, United States), 2nd Edition, Ch. 3.3(6)	122, 132
36.	Brown on Defamation (Canada, United Kingdom, Australia, New Zealand, United States), 2nd Edition, Ch. 5.1.	107
36.	Brown on Defamation (Canada, United Kingdom, Australia, New Zealand, United States), 2nd Edition, Ch. 7.5(1)	132
37.	Brown on Defamation (Canada, United Kingdom, Australia, New Zealand, United States), 2nd Edition, Ch. 10.4(1)(d).	106
38.	Brown on Defamation (Canada, United Kingdom, Australia, New Zealand, United States), 2nd Edition, Ch. 13.2(2).	102
39.	Brown on Defamation (Canada, United Kingdom, Australia, New Zealand, United States), 2nd Edition, Ch. 13.7(4).	97

NO.	AUTHORITY	PARAGRAPH REFERENCE
40.	Brown on Defamation (Canada, United Kingdom, Australia, New Zealand, United States), 2nd Edition, Ch. 16.6.	44, 99
41.	Brown on Defamation (Canada, United Kingdom, Australia, New Zealand, United States), 2nd Edition, Ch. 25.2.	123
42.	Brown on Defamation (Canada, United Kingdom, Australia, New Zealand, United States), 2nd Edition, Ch. 25.7	122
44.	Ontario, Ministry of Finance, *Ontario Automobile Insurance Dispute Resolution System Review*, *Final Report* by The Honourable Justice Douglas Cunningham (Online: Ministry of Finance, 2014)	5, 23
45.	Ontario, Legislative Assembly, *Hansard*, 40th Parl, 2nd Sess, No 63 (25 September 2013) at 1349 (L Berardinetti)	123

PART VIII – STATUTES, REGULATIONS, RULES, ETC.

NO.	STATUTE, REGUGLATION, RULE, ETC.	SECTION, RULE, ETC.
1.	*Courts of Justice Act*, R.S.O. 1990, c. C.43	s. 137.1(1)
	Tribunaux judiciaires (Loi sur les), L.R.O. 1990, chap. C.43	s. 37.1(1)
2.	*Libel and Slander Act*, R.S.O. 1990, c. L.12	s. 25
	Diffamation (Loi sur *la)*, L.R.O. 1990, chap. L.12	s. 25
3.	Ontario Regulation 856/93: Professional Misconduct under *Medicine Act*, 1991, S.O. 1991, c. 30	s. 18
	Règlement de l'Ontario 856/93: Inconduite professionnelle prévue par la loi de 1991 sur les médicaments 1991, c. 30, art. 18	s. 18
4.	*Protection of Public Participation Act*, SBC 2019, c. 3	
5.	*Protection of Public Participation Act*, 2015, S.O. 2015, c. 23	
	Protection du droit à la participation aux affaires publiques (Loi de 2015 sur la), L.O. 2015, chap. 23	
6.	R.R.O. 1990, Reg. 194: Rules of Civil Procedure under *Courts of Justice Act, R.S.O. 1990, c. C.43*	Rule 31.05.1(1)
	R.R.O. 1990, Règl. 194: Règles de procédure civile en vertu de *tribunaux judiciaires (Loi sur* les*), L.R.O. 1990, chap. C.43*	regele 31.05.1(1)
7.	*Statutory Accident Benefit Schedule*, O. Reg. 34/10	s. 44 s. 45
	Annexe sur les indemnités d'accident *légales*, Règl. de l'Ont. 34/10, en vertu de *assurances (loi sur les), l.r.o. 1990, chap. i.8*	s. 44 s. 45

***Libel and Slander Act*, R.S.O. 1990, c. L.12, s. 25**	***Diffamation (Loi sur la)*, L.R.O. 1990, chap. L.12, s. 25**
Application of qualified privilege **25** Any qualified privilege that applies in respect of an oral or written communication on a matter of public interest between two or more persons who have a direct interest in the matter applies regardless of whether the communication is witnessed or reported on by media representatives or other persons. 2015, c. 23, s. 4	**Application de l'immunité relative** **25** L'immunité relative qui s'applique à l'égard d'une communication verbale ou écrite portant sur une affaire d'intérêt public entre deux personnes ou plus qui ont un intérêt direct dans l'affaire s'applique, que des représentants des médias ou d'autres personnes soient témoins de la communication ou en fassent état. 2015, chap. 23, art. 4.

Ontario Regulation 856/93: Professional Misconduct under Medicine Act, 1991, S.O. 1991, c. 30, s. 18	**Règlement de l'Ontario 856/93: Inconduite professionnelle prévue par la loi de 1991 *sur les médicaments* 1991, c. 30, s. 18**
1. (1) The following are acts of professional misconduct for the purposes of clause 51 (1) (c) of the Health Professions Procedural Code: … 18. Signing or issuing, in the member's professional capacity, a document that the member knows or ought to know is false or misleading	1. (1) Sont considérés comme des fautes professionnelles au sens de l'alinéa 51 (1) c) du Code de procédure des professions de la santé:… 18. Signer ou émettre, à titre professionnel, un document que le membre sait ou devrait savoir être faux ou trompeur.

R.R.O. 1990, Reg. 194: Rules of Civil Procedure under *Courts of Justice Act, R.S.O. 1990, c. C.43, Rule 31.03.1(1)*	**R.R.O. 1990, Règl. 194: Règles de procédure civile en vertu de *tribunaux judiciaires (Loi sur les), L.R.O. 1990, chap. C.43, regel 31.03.1(1)***
Time Limit ***Not to Exceed Seven Hours*** **31.05.1** (1) No party shall, in conducting oral examinations for discovery, exceed a total of seven hours of examination, regardless of the number of parties or other persons to be examined, except with the consent of the parties or with leave of the court. O. Reg. 438/08, s. 29	**Durée maximale de l'interrogatoire** ***Maximum de sept heures*** **31.05.1**(1) Aucune partie ne doit procéder à des interrogatoires préalables oraux pendant plus de sept heures, quel que soit le nombre des parties ou des autres personnes qui doivent être interrogées, sans le consentement des parties ou l'autorisation du tribunal. Règl. de l'Ont. 438/08, art. 29