2004 CarswellOnt 2625
Ontario Superior Court of Justice

Deep v. Ontario

2004 CarswellOnt 2625, [2004] O.J. No. 2734,
[2004] O.T.C. 541, 131 A.C.W.S. (3d) 964

DR. ALBERT ROSS DEEP (Plaintiff) and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, THE MINISTRY OF HEALTH AND LONG TERM CARE, DR. STEVEN INGLE, DR. DAVID MCCUTCHEON, THE GENERAL MANAGER OF THE ONTARIO HEALTH INSURANCE PLAN AND MR. ERNIE EVES (Defendants) and DR. BARNET ISRAEL GIBLON, THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO (Defendants)

Spence J.

Heard: October 27, 2003; February 24, 2004; March 30, 2004; April 14, 2004
Judgment: June 25, 2004
Docket: 03-CV-243375CM

Counsel: Dr. Albert R. Deep -- in person
Mr. Walter Myrka, Mr. Richard Coutinho, Ms Vanessa Yolles for Crown Defendants
Mr. David A. Shiller for College Defendants

Subject: Civil Practice and Procedure; Torts; Public; Constitutional; Human Rights

Table of Authorities

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Statutes considered:

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Health Insurance Act, R.S.O. 1990, c. H.6
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s. 40.1 [en. 1996, c. 1, Sched. H, s. 34] — referred to

s. 40.2 [en. 1996, c. 1, Sched. H, s. 34] — considered

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s. 40.2(2) [en. 1996, c. 1, Sched. H, s. 34] — referred to

s. 40.2(6) [en. 1996, c. 1, Sched. H, s. 34] — considered

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s. 1 "statutory power of decision" — referred to

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R. 25.06(8) — referred to

R. 25.11 — referred to

Words and phrases considered

bad faith

Bad faith is a legal conclusion. It has been held to involve an allegation of an intent to deceive or to make someone believe what is false. It has been said to be equivalent to an allegation of dishonesty. Where a plaintiff's claim includes an allegation of bad faith, the pleading must be supported by sufficient particulars that support a legal conclusion of bad faith. If it does not, the pleading should be struck.

misfeasance in public office

Abuse of public office, or misfeasance in public office, is an intentional tort. The tort addresses the intentional malicious abuse of power or authority by a public official causing damage to a specific plaintiff.

after the cause of action arose

The phrase "after the cause of action arose" [in s. 7(1) of the *Public Authorities Protection Act*, R.S.O. 1990, c. P.38] means that the limitation period commences to run when the material facts upon which the action is based have been discovered or ought to have been discovered by the exercise of reasonable diligence.

MOTION by defendants to strike out plaintiff's statement of claim; CROSS-MOTION by plaintiff for summary judgment.

***Spence J.*:**

1 These two motions concern the action which the plaintiff, a medical doctor, has commenced against the defendants relating to actions taken by the defendants with respect to the plaintiff and his medical practice during various periods since 1982. The action is brought against Her Majesty the Queen in right of Canada and certain related persons (the "Crown Defendants") and against the College of Physicians and Surgeons of Ontario and Dr. Giblon (the "College Defendants").

2 The plaintiff's claim relates to two administrative acts which he says are improper and for which he says the defendants are responsible. The first is the withholding that was effected from his fees for the years 1982 to 1984. The second is the withholding of fees that was initiated in 2000 and is continuing.

3 The plaintiff asserts his claim on the basis of the common law, the statutory law and the *Charter of Rights and Freedoms*. The plaintiff seeks summary judgment in respect of his claim.

4 The defendants submit that the pleadings of the plaintiff are deficient in law and/or in factual allegations. The defendants submit, in defence to the plaintiff's motion for summary judgment that there are no genuine issues of fact requiring a trial and that the only issues are questions of law that ought to be decided in their favour.

5 The monthly remuneration of the plaintiff for medical services rendered to patients has been suspended by order of the General Manager of OHIP and these payments remain suspended. The suspension of payments was done pursuant to section 40.2 of the *Health Insurance Act*, R.S.O. 1990, c. H. 6, as am.. Section 40.2 provides in part as follows:

> 40.2(1) No person shall obstruct an inspector or withhold or conceal from an inspector any book, document, correspondence, record or thing relevant to an inspection.
>
> (2) Every physician who provides insured services shall co-operate fully with an inspector who is carrying out an inspection under the Act or with a member of the Medical Review Committee who is exercising powers or performing duties under the Act.
>
> (6) The General Manager may suspend payments under the Plan to a physician or practitioner during any period when he or she fails to comply with subsection (2) or (3) without just cause, whether or not the physician or practitioner is convicted of an offence.

6 The reference in section 40.2 to an inspector carrying out an inspection under the *Act* refers to provisions of the *Act* relating to such inspections. Section 40.1 sets out in detail the powers exercisable by an inspector. These powers include interviewing, entering and inspection of premises, inspection of records and removal of records for copying.

7 The plaintiff provided a statement of particulars dated March 2, 2003.

8 The Crown Defendants and the College Defendants respectively moved to strike out the statement of claim of the plaintiff. The motions to strike are brought under Rule 21 and Rule 25.

9 The plaintiff moved for an order to dismiss the motion of the defendants and moved for orders that would effectively constitute judgment in favour of the plaintiff subject to a trial for assessment of the damages claimed. The motion record of the plaintiff includes an affidavit of the plaintiff dated June 2, 2003 which the notice of motion states will be used at the hearing of the motion. The notice of motion is dated May 31, 2003. From its contents as stated above, the motion of the plaintiff is clearly in part intended to be responsive to the motion of the defendants to strike. The motion also seeks judgment without trial. The notice of motion does not state that it is brought under Rule 20. It is a motion of a kind that can be brought under Rule 20.01. Apart from an issue dealt with in the course of submissions, it was not disputed that the motion could be brought under Rule 20 and that Rule 20 is applicable to the motion.

10 The Crown Defendants and the College Defendants each delivered responding motion records. Each motion record contains an affidavit responding to the affidavit of the plaintiff dated June 2, 2003. The defendants seek the dismissal of the plaintiff's motion for summary judgment. They also seek summary judgment in their favour against the plaintiff.

11 The plaintiff filed a supplementary affidavit dated February 27, 2004.

12 The individual defendant Dr. David McCutcheon is the general manager of the Ontario Health Insurance Plan. The individual defendant Dr. Steven Ingle is a physician employed with the Provider Services Branch of the Ministry of Health and Long Term Care. The individual defendant Mr. Ernie Eves was the Premier of Ontario. The individual defendant Dr. Barnet Israel Giblon is a member of the Medical Review Committee of the College of Physicians and Surgeons. The Committee is continued as a Committee of the College under s. 5 of the *Health Insurance Act* and is assigned certain duties under the *Act*.

13 On the hearing of the motions, the plaintiff made his submissions on his Rule 20 motion for summary judgment first, and the other submissions followed.

Previous Litigation

14 The original decision approving the withholding in respect of the years 1982 to 1984 of which the plaintiff complains was made by the General Manager of OHIP dated December 29, 1981. The Health Services Appeal Board dismissed the plaintiff's appeal of the General Manager's decision on June 27, 1986. The Divisional Court of the Supreme Court of Ontario dismissed the plaintiff's appeal from The Health Services Appeal Board decision on December 15, 1987. The Court of Appeal dismissed the plaintiff's appeal from the Divisional Court decision on February 29, 1988.

15 By letter of May 18, 1988, OHIP was advised by the Ministry of the Attorney General of Ontario that the plaintiff's application for leave to appeal was dismissed by the Supreme Court of Canada on May 16, 1988.

16 The Crown Defendants also provided a copy of the order of Rivard J. and his related endorsement of December 15, 2000. The plaintiff had moved for an order to compel Her Majesty the Queen in right of Ontario and the Ministry of Health and Long Term Care to pay to the plaintiff the money withheld since August 15, 2000. From the endorsement of Rivard J. it would appear that the withholding referred to was the suspension that started in 2000 rather than the earlier withholding in 1982 to 1984. Rivard J. dismissed the motion. On motion by the defendants relating in part to the plaintiff's appeal from the order of Rivard J. to the Court of Appeal, Ground J. on March 9, 2001 expressed the view that he did not have jurisdiction to dismiss that appeal. He said the order was an interlocutory order and the plaintiff ought to have moved for leave to appeal to the Divisional Court. Ground J.'s order of March 9, 2001 does not deal with the appeal. The

order struck out the plaintiff's statement of claim that was in part the subject of the motion but did so without prejudice to the right of the plaintiff to initiate certain proceedings based on alleged breaches of the *Charter* rights of the plaintiff.

17 It does not appear that the decisions of Rivard J. and Ground J. affect the determinations made below.

Background

Statement of Claim: Relief Sought

18 In summary, the plaintiff asserts the following claims for relief:

> 1. A claim for the payment of the amounts withheld since August 2000 for failure to cooperate fully with an inspection under s. 39 of the *Health Insurance Act*. This claim is based on misapplication by the defendants of s. 40.2(6) of the *Health Insurance Act* and the unconstitutionality of s.40.2(2) and (6) of the *Act* and the effect on the plaintiff in terms of sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*.
>
> 2. A claim for the return of the funds taken in 1982 to 1984, on the basis that the action by the defendants superceded their legislative jurisdiction and violated principles of natural justice.
>
> 3. A claim that the College was negligent in assessing the file of a patient of the plaintiff and was incompetent in causing a referral to the College's quality assurance committee to appear on his certificate, causing loss and harm to him.
>
> 4. A claim that OHIP seeks improperly to reinvestigate matters previously litigated.
>
> 5. A claim for negligence by the defendants in the exercise of their statutory duties.
>
> 6. A claim that the defendants have acted in bad faith and in a highhanded and vindictive manner, warranting aggravated and punitive damages.

The Statement of Claim: Principal Allegations

19 The following statements taken from the following numbered paragraphs in the Statement of Claim state the principal allegations of the plaintiff:

> 4. The plaintiff states that his monthly remittance or remuneration for medical services rendered to his patients has been withheld and payment suspended by order of the general manager of OHIP since August 15, 2000 and $210,277.77 is owed to him by the MOHLTC

and/or Her Majesty the Queen in right of Ontario as of January 15, 2003 and further amounts for services billed after that date.

7. The plaintiff alleges that despite repeated lengthy representations to the defendants, the defendants continued with a policy of financial deprivation producing personal and professional hardship and injury, loss of enjoyment of life and the use of his earnings since the plaintiff relies upon the defendants for payment for his services.

8. The plaintiff alleges that he was targeted by the defendants and that their action was discriminatory and no other physician in Ontario was subjected to total withholding of payment in these circumstances. The plaintiff states that there is a reasonable apprehension of purposeful malfeasance.

9. The plaintiff alleges that the excuses proferred by the defendants for continuous suspension of payment are not reasonable or defensible since the plaintiff offered full cooperation with any appointed inspectors of the Medical Review Committee (the "MRC") of the College of Physicians and Surgeons (the "College") on at least three occasions, by letter of November 19, 2001, January 25, 2002, and March 19, 2002 and provided four available dates.

10. The plaintiff states that the defendants superceded their legislative jurisdiction and misapplied Subsection 40.2 of the Health Insurance Act, Part I, Schedule H - Amendment to the Health Insurance Act and Health Care Accessibility Act [and] the defendants are obligated to resume payment since there is no lack of cooperation and full compliance.

11. The plaintiff states that the defendants' veiled attempt to expand their jurisdiction to anticipate highly unlikely and improbable future non-cooperation with the process and this attempt is tantamount to unlawful fettering of discretion.

12. The plaintiff states that the improper activities of the defendants restricts his ability to practise his profession and has the effect of depriving him as a physician of his liberty within the meaning of Section 7 of the Charter of Rights and Freedoms under The Constitution Act 1982 by limiting his movement, including his right to choose his occupation and where to pursue it.

13. The plaintiff states that he already has been forced to place a mortgage upon his home at premium interest rates because of the withholding of his earnings and that the defendants imposed an unreasonable burden upon him and cannot expect him to provide continued high quality services without remuneration.

17. The plaintiff states that the defendants have a long history of dealing unfairly with him in this and other matters and that the Divisional Court found intemperance, an appearance of bias and a lack of impartiality on the part of the College in 1976.

18. The plaintiff states that the defendant College more recently charged violation of patient-physician confidentiality without proper justification by its Complaints Committee and negligently assessed one of his patient files resulting in hundreds of hours of professional time being expended by the plaintiff to answer frivolous and vexatious allegations at the College level and with the Health Professions Appeal and Review Board and he seeks indemnification for the professional work required and time expended. The College refused costs of a four day hearing it unilaterally cancelled.

19. The plaintiff states that because of alleged incompetence of an assessor and the Complaints Committee of the College an unjustifiable referral to the Quality Assurance Committee improperly appears on his " Certificate of Professional Conduct " issued by the College and this impropriety is potentially prejudicial to his professional reputation and status.

20. The plaintiff states that the defendants superceded their legislative jurisdiction and violated the principles of natural justice by taking $93,493.02 of the plaintiff's earnings in the period October 13, 1982 through November 13, 1984 without the customary and required hearings and review and in the light of recurrent activities of the College seeks a declaration that his rights were violated and an order for return of these funds as well.

22. The plaintiff states that the defendant Dr. Ingle improperly targeted his practice with verification letters and with the General Manager of OHIP made false allegations of fraud referring the plaintiff to the fraud squad in 1997 where a false and misleading information was sworn by Investigator L. Park leading to a malicious prosecution; the plaintiff was completely exonerated or acquitted of the charges but states that Dr. Ingle and the General Manager of OHIP purport to have the plaintiff's medical files reviewed again, this time by the Medical Review Committee of the College for the same time period, January 1993 to 1997. The plaintiff alleges that since all of his medical files were seized and photocopied by the MOHLTC (formerly the Ministry of Health) in December 1997, referral of the same allegations to a different body should be prohibited. The plaintiff alleges that these files were already reviewed in great detail and no fault found and OHIP is remiss in attempting to relitigate a matter which it lost previously in court. The plaintiff states that the addition of three months to the period of review and the addition of systolic time intervals in the referral are maliciously designed to camouflage the identical substance of the referral, and that moreover Dr. Ingle conducted a personal separate verification review of 20 randomly selected visits of 14 patients and was presented with 100% verification data.

23. The plaintiff alleges that in 1997 the defendants Ingle and the General Manager of OHIP had the option of either referring the investigation to the fraud squad or to the Medical Review Committee and ought to be prohibited from harassing the plaintiff with repetitive reviews.

The plaintiff alleges also that a test case went to trial in this court, in which it was alleged falsely that psychotherapy was not performed on the patient in question and her cardiac condition was wrongly diagnosed. The plaintiff says that he successfully defended the lawsuit and Coo J. found "In my view there is no merit in the claims for medical malpractice based on the heart issue or the psychotherapy issue."

25. The plaintiff states that the defendants the General Manager of OHIP and the Medical Review Committee ought to be prohibited from re-investigating the performance of systolic time intervals (which include the phoncardiogram, carotid artery pressure tracing, apexcardiogram and the electrocardiogram) by the principle of acquiescence, delay and laches. Despite billings for all of these procedures on a regular basis from 1977, no enquiry had been made, although the fee for these procedures had been substantially reduced and some are recently delisted.

The Statement of Claim: Further Details

20 The plaintiff pleads that the "activities of the defendants" violated his constitutional rights. No particulars are provided in support of these allegations. It must be taken that the plaintiff is essentially referring to the suspension of payment of the plaintiff's OHIP billings pursuant to the *Health Insurance Act*.

21 At paragraphs 1(4) and 16 of the statement of claim, the plaintiff seeks an order of prohibition apparently requiring the defendants to refund to the plaintiff the funds he claims are owing to him.

22 Paragraphs 20 and 21 of the statement of claim consist of a demand that monies totaling $93,493.02, stated to have been taken for the period from October 13, 1982 through November 13, 1984, be returned to the plaintiff. The relief sought in relation to those monies is further set out in paragraph 1(5) of the statement of claim. The moving parties served a demand for particulars of that allegation. In response to that demand for particulars, the respondent provided a written response in which he indicated that "a decision to deduct seventy per cent of payment for these services was made by the CPSO (College of Physicians and Surgeons) without personal representations by me". No further particulars were provided.

23 At paragraph 1(7) of the statement of claim, the plaintiff seeks an order of prohibition "prohibiting repeat investigations of the services provided by the plaintiff in the period January 1993 to December 1997". In the alternative the plaintiff seeks a "stay of proceedings". The basis for the relief sought appears to be found in paragraphs 22 through 25 of the statement of claim. The plaintiff appears to assert that he was already investigated for the period from 1993 to 1997 and the Crown has no business conducting further investigations for the same period.

24 Paragraph 29 of the statement of claim consists of an allegation of negligence made against all of the defendants. No particulars of that negligence are set out in the statement of claim.

25 Paragraphs 30 and 31 of the statement of claim and possibly paragraphs 32 and 33 consist of allegations of intentional wrongdoing and malice leveled against all defendants. No particulars in support of this allegation are pleaded.

26 The moving parties delivered a demand for particulars in which they sought particulars of the alleged involvement of Mr. Eves. The plaintiff delivered a 'provisions of particulars' but it does not disclose material facts relating to Mr. Eves.

27 With respect to Dr. McCutcheon, he is mentioned in paragraph 3 of the statement of claim and there are apparent references to him in paragraphs 22 and 23 thereof. Nevertheless, no material facts are pleaded to support any cause of action against Dr. McCutcheon personally.

28 In regard to Dr. Ingle, there is an allegation in paragraph 22 of the statement of claim that he "improperly targeted" the plaintiff's practice and made "false allegations of fraud". No particulars are provided to support this allegation against Dr. Ingle.

Certain Conduct of the Defendants Raised in the Affidavit of the Plaintiff

29 The affidavit of the plaintiff states that the defendants engaged in improper conduct as follows. The paragraph numbers are those used in the affidavit.

> 17. Now shown to me and attached to this my affidavit and marked Exhibit "D" is a Divisional Court Judgment, 1974, finding an appearance of bias, intemperance and a lack of impartiality on the part of the College of Physicians and Surgeons of Ontario in its dealings with me.
>
> 18. I believe that the College has a long history of dealing unfairly with me; an assessor of the complaints Committee prepared an incompetent report and improperly caused an unjustifiable referral to the Quality Assurance Committee to appear on my " Certificate of Professional Conduct " and this impropriety is potentially prejudicial to my professional reputation.
>
> 23. Concurrently, the College of Physicians and Surgeons of Ontario usurped unnecessarily hundreds of hours of my time and professional effort processing frivolous and vexatious complaints by the same Mrs. Klara Geller and another seriously mentally disturbed patient, Mr. David Paynes.
>
> 26. At least one employee of the Ministry of Health and Long-Term Care falsely and maliciously accused me of fraud with a false and misleading sworn statement. Mr. Park's malice was evident on examination for discovery and with regard to certain comments which he made to a solicitor.

27. The defendant College of Physicians and Surgeons of Ontario were negligent and incompetent in dealing with complaints lodged by Ms. K. Geller and Mr. David Paynes and used improper terms such as "obstreperous" against me; it proceeded with reckless disregard to the consequences of its actions and decisions and therefore with malice.

30. I believe that these statutes are misapplied and are improperly being used to legitimize a repeat inspection of medical files that had already been seized by Ministry of Health officials and intensively scrutinized and inspected with no impropriety found and such misapplication of the statute offends sections 7 and 15 Charter rights.

Affidavit Material of the Defendants

30 The Crown Defendants provided the affidavit of Mr. Garry Salisbury, an official in the MOHLTC. Mr. Salisbury 's affidavit states as follows at the paragraphs numbered as set out below.

23. Dr. Deep's refusal to co-operate with the Medical Review Committee is the sole reason payments to him were and remain suspended. Dr. Deep was not singled out for such suspension. The suspension arose because he has blatantly and persistently refused to comply with his obligations under the review requirements of the legislation and specifically section 40.2 thereof.

30. Contrary to the allegation at paragraph 32 of Dr. Deep's affidavit, the Ministry does not possess any photocopies of Dr. Deep's patient files that were made in connection with the 1997 criminal investigation. The requested review is not the same as the earlier criminal investigation. The Medical Review Committee has been requested to review certain aspects of Dr. Deep's practice which may or may not include a review of files that may have been earlier reviewed as part of the criminal investigation or proceeding.

31. With respect to paragraph 33 of Dr. Deep's affidavit, Dr. Ingle wrote to Dr. Deep on June 16, 1998 and informed him that the records provided by Dr. Deep were insufficient to verify the amount of time spent with each patient or whether the services were medically necessary. Appended as exhibit "A" to this my affidavit is a true copy of Dr. Ingle's letter.

31 The College Defendants provided the affidavit of Ms. Angela Alibertis, a case facilitator with the MRC.

Rule 21

32 Rule 21.01(1)(b) provides that a judge may strike out a pleading if it discloses no reasonable cause of action. The purpose of a rule 21.01(1)(b) motion is to test whether a plaintiff's allegations state a legally sufficient or substantively adequate claim. Where it is plain and obvious that is

discloses no cause of action, it should be struck: Rule 21.01(1)(b); *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at 976-977.

33 A claim will be found to be legally insufficient when either the allegations it contains do not give rise to a recognized cause of action, or it fails to plead the necessary legal elements of an otherwise recognized cause of action. As explained by Borins J.A. in *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) at p. 264,

> In some cases, a statement of claim will be vulnerable to dismissal under rule 21.01(1)(b) because the plaintiff has sought relief for acts that are not proscribed under the law. The typical textbook example is a statement of claim that alleges that the defendant made a face at the plaintiff, or that the defendant drove a car of an offensive colour. In other cases, however, the statement of claim may be defective because it has failed to allege the necessary elements of a claim that, if properly pleaded, would constitute a reasonable cause of action.

34 In order to survive the second type of rule 21.01(1)(b) motion, a plaintiff must, at minimum, plead the basic elements of a recognized cause of action pursuant to which an entitlement to damages is claimed. The absence of a necessary element of the cause of action will constitute a radical defect on the basis of which it is plain and obvious that the plaintiff cannot succeed. Accordingly, such a claim should be struck out.

35 On a motion under Rule 21, the plaintiff has the benefit of an assumption that the facts pleaded are true or capable of being proven. Accordingly, the court is left to consider the legal sufficiency of the plaintiff's claim stated in its best and most positive light by the plaintiff himself. However, a court is not required to take "allegations based on assumptions and speculations" as true for the purpose of assessing the cause of action at issue. A party may therefore not supply a missing element of a cause of action by pleading speculative allegations: *Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750 (Ont. H.C.), at 754.

36 Rule 21.01(1)(b) permits the court to strike out less than the entire pleading, where the portion being struck is a distinct purported cause of action. In exercising its discretion, the court should consider whether or not "paring down" the pleadings will actually result in savings of money or time for the parties.

> *Montgomery v. Scholl-Plough Canada Inc.* (1989), 70 O.R. (2d) 385 (Ont. H.C.).

Rule 25

37 With respect to the need to plead material facts in support of allegations, Rule 25.06 provides that:

> 25.06(1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. R.R.O. 1990, Reg. 194, r. 25.06(1).
>
> (2) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded. R.R.O. 1990, Reg. 194, r. 25.06(2).
>
> (8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. O. Reg. 61/96, s. 1.

38 Allegations of legal conclusions are not facts and are insufficient for the purposes of pleading. This is particularly so where allegations of intentional or malicious conduct are made. A plaintiff must plead circumstances, particulars or facts which are sufficient to enable a trier of fact to properly infer intentional or malicious conduct.

> *Conacher v. Rosedale Golf Assn.*, [2002] O.J. No. 575 (Ont. S.C.J.)
>
> *Pispidikis v. Ontario (Justice of the Peace)* (2002), 62 O.R. (3d) 596 (Ont. S.C.J.) at paras. 35-36
>
> *Wilson v. Toronto Police Service*, [2001] O.J. No. 2434 (Ont. S.C.J.) at paras. 66-67, aff'd., [2002] O.J. No. 383 (Ont. C.A.)

39 Rule 25.11 empowers the Court to strike out pleadings as follows:

> 25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
>
> (a) may prejudice or delay the fair trial of the action;
>
> (b) is scandalous, frivolous or vexatious; or
>
> (c) is an abuse of the process of the court.

40 "A pleading that demonstrates a complete absence of material facts will be declared to be frivolous or vexatious. Pleadings that are irrelevant, argumentative, or inserted for colour or that constitute bare allegations should be struck out as scandalous. The same applies to a document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party, and speculative, unsupported allegations of defamation." : *Senechal v. Muskoka (District Municipality)*, [2003] O.J. No. 885 (Ont. S.C.J.) at paras. 51, 52.

Rule 20

41 Rule 20.04(2)(a) provides that, on a motion for summary judgment, the court shall grant judgment if the court is satisfied that there is no genuine issue for trial with respect to the claim or defence.

Interaction of Rule 20 and 21 Motions

42 Certain of the submissions touched on the implications of the fact that this hearing involves motions under both Rule 20 and 21, but the point was not developed very far.

43 A motion to strike might stand to succeed either because the cause of action that is asserted does not as such exist at law or because, although the cause of action is a proper one, no facts are pleaded to support the entitlement of the plaintiff to assert the cause of action. If the only motion to be heard were the motion to strike then, *prima facie*, whichever of the two grounds of failure applied, the motion to strike would stand to succeed.

44 In principle it is always possible in the second type of situation that facts exist which, if they had been pleaded, would have supported the cause of action. If the only motion before the court were a motion to strike, there would be nothing before the court to raise any question on that score.

45 However, in the present case, there is a motion for summary judgment with affidavits from both sides. In these circumstances it seems to be only fair to take into account the affidavits and their bearing upon the summary judgment motion before making a final determination whether to strike a pleading that is factually deficient. Otherwise, it would be possible, at least in theory, to end up with a decision that would strike a pleading as factually deficient while at the same time granting the motion for summary judgment based on the facts established on the motion. Such a result would seem *prima facie* repugnant to good sense and fair process.

Assertions of Fact

46 On a motion to strike pleadings or on a motion for summary judgment, it is important to bear in mind that, on the motion to strike, the focus is on the facts pleaded and, on the motion for summary judgment, the focus is on the facts shown in the material. A pleading may appear to allege a fact and an affidavit may appear to affirm a fact when it does not actually do so. A typical instance of this kind of deficiency is the pleading or affidavit that states as a fact what is really a conclusion without a stated factual basis. For example, a party might state simply that the party was defamed by the other party without stating what the other party said that was defamatory. Such a statement fails to assert a fact and accordingly does not enable the other party to identify the factual basis of the case which it is required to meet. In the present case, the defendants submit that certain of the plaintiff's assertions are of this kind.

Possible Dispositions of Motions for Summary Judgment

47 Under Rule 20.04(2), if the plaintiff succeeds in showing that there is no genuine issue for trial in respect of the claim, the court is to grant summary judgment accordingly. Such a genuine issue might be one of fact or of law. A plaintiff might succeed in showing that there is no genuine issue of fact but there might still be a genuine issue of law. Or a defendant might show that the plaintiff has failed to establish that there is a genuine issue of fact. When the court is satisfied that the only genuine issue is a question of law, the court pursuant to Rule 20.04(4), may determine the question and grant judgment accordingly. Under this rule, in such circumstances, the court would grant judgment in the action itself in favour of the party who succeeds on the issue of law, and either grant or dismiss the claim of the plaintiff accordingly.

Statutory Bar by Section 39 of the Health Insurance Act and Section 38 of the Regulated Health Professions Act

48 Section 39 of the *Health Insurance Act* provides:

> Members of the Medical Review Committee, practitioner review committees, the Medical Eligibility Committee, employees of such committees, the General Manager and persons engaged in the administration of this Act are not liable for anything done or made in good faith by them in the performance of their duties under this Act and the regulations.

49 Section 38 of the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18 ("RHPA") provides:

> No action or other proceeding for damages shall be instituted against...a College...for an act done in good faith in the performance or in the intended performance of a duty or in the exercise or intended exercise of a power under this Act, a health professions Act, ... or a regulation or by-law under those Acts or for any neglect or default in the performance or exercise in good faith of the duty or power.

Analysis

Claim For Breach of Natural Justice and Statutory Breach

50 The plaintiff asserts a claim for breach of natural justice. Breach of natural justice is not a cause of action known in law. So it is plain and obvious that the statement of claim does not disclose a reasonable cause of action.

51 Since there is no nominate tort of statutory breach in Canada, the plaintiff's mere allegation of a breach of statute is insufficient. Rather, any purported breach of a statute must be considered

in the context of a claim of negligence: *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205 (S.C.C.).

Claim For Negligence and Bad Faith

52 It is clear that there can be no claim based on negligence absent a private law duty of care. The *Cooper* and *Edwards* cases referred to below make it clear that in lawsuits involving allegations of negligence against public officials, in determining whether a reasonable cause of action exists on the face of the pleadings, the court should assess the question of whether a private law duty of care exists in two stages:

> First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages to which a breach of it may give rise.
>
> *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.), at 751-752
>
> *Cooper v. Hobart* (2001), 206 D.L.R. (4th) 193 (S.C.C.), at 203
>
> *Edwards v. Law Society of Upper Canada* (2001), 206 D.L.R. (4th) 211 (S.C.C.), at 217-218

53 Careful analysis of the facts as pleaded, the regulatory regime in question and the statutory framework, is required to make these determinations.

54 At the first stage of the *Anns* test, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care. Thus, mere foreseeability is not enough. As stated by the House of Lords in *Hill*:

> It has been said almost too frequently to require repetition that foreseeability of likely harm is not in itself a sufficient test of liability in negligence. *Some further ingredient is invariably needed to establish the requisite proximity of relationship* between plaintiff and defendant, and all the circumstances of the case must be carefully considered and analyzed in order to ascertain whether such an ingredient is present.
>
> *Hill v. Chief Constable of West Yorkshire*, [1988] 2 All E.R. 238 (U.K. H.L.), at 241

55 There are categories of cases in which the courts have recognized proximity.

> *Cooper , supra* at 205-6

56 When a case falls within one of these situations or an analogous one, and reasonable foreseeability is also established, a prima facie duty of care may be posited.

57 As noted by the Supreme Court of Canada in *Cooper* , the statute is the only source of the Crown decision-maker's duties, private or public. Apart from the statute, a Crown decision-maker is in no different position from the ordinary man or woman on the street. If a duty to the plaintiff is to be found, it must be in the pertinent statutory provisions. If the statute does not provide for a private law duty of care, no such duty exists and there can be no claim in negligence.

Cooper , supra at 207-8

58 The provisions of the *Health Insurance Act* do not in any way evidence a legislative intent to confer any private law duty of care upon the plaintiff.

59 Section 39 of the *Health Insurance Act* provides that members of the Medical Review Committee, employees of the Medical Review Committee, the General Manager of OHIP and any person engaged in the administration of Act are "...not liable for anything done or made in good faith by them in the performance of their duties under this Act and the regulations." Section 38 of the RHPA contains a similar provision relating to the College.

60 The plaintiff at paragraph 29 pleads that the defendants were "negligent in their exercise of statutory powers and breached the duty required of them..." but has failed to plead material facts to support any allegation that the defendants owed him a private law duty of care. The allegations of negligence in the statement of claim fail to give rise to a reasonable cause of action and it is plain and obvious that any such claim cannot succeed.

61 With respect to the motion for summary judgment, the plaintiff has failed to provide any particulars in his supporting affidavit for the motion. The affidavits of Dr. Garry Salisbury and Angela Alibertis support the contention that the defendants acted appropriately and pursuant to their statutory obligations. The evidence is that the payment to the plaintiff of his OHIP billings was suspended because the plaintiff has persistently refused to comply with his duty to co-operate fully with attempts to review his medical practice and the OHIP billings generated by it.

62 Other aspects of the issue of negligence as it is raised in specific allegations against the College Defendants are dealt with separately below.

63 As noted, section 39 of the *Health Insurance Act* and section 38 of the RHPA each contain an exception from the exclusion of liability where action is not taken in good faith.

64 Bad faith is a legal conclusion. It has been held to involve an allegation of an intent to deceive or to make someone believe what is false. It has been said to be equivalent to an allegation of dishonesty. Where a plaintiff's claim includes an allegation of bad faith, the pleading must be

supported by sufficient particulars that support a legal conclusion of bad faith. If it does not, the pleading should be struck.

> *Rogers v. Faught*, [2001] O.J. No. 850 (Ont. S.C.J.) at paras. 34-8 aff'd [2002] O.J. No. 1451 (Ont. C.A.)
>
> *Wilson v. Toronto Police Service*, [2001] O.J. No. 2434 (Ont. S.C.J.), at para. 65-67 aff'd 2002 CarswellOnt 335 (Ont. C.A.)

65 The plaintiff's allegations of bad faith are found in paragraph 17 of the Statement of Claim (allegation that the College has a long history of dealing unfairly with him), paragraph 30 of the Statement of Claim (allegation that the defendants improperly proceeded with mala fide and reckless disregard of the consequences of its decisions, their conduct was reprehensible and aggravated damages are warranted), paragraph 31 of the Statement of Claim (allegation that the defendants acted in a high handed vindictive manner with callous disregard to the plaintiff and his rights) and paragraph 32 of the Statement of Claim (allegation that the action of the defendants was intentionally directed against the plaintiff and his property warranting punitive damages). Nor is there any affidavit evidence to support a claim of bad faith.

66 All of these allegations state legal conclusions unsupported by any particulars of the conduct of that constitutes bad faith.

67 Without any pleading of facts which would support a claim of bad faith, the claim against the defendants, to the extent that it is based on allegations of bad faith, could not succeed.

68 In the recently released decision of the Supreme court of Canada in *McCullock Finney c. Barreau (Québec)*, 2004 SCC 36 (S.C.C.) (released June 10, 2004), the court considered the proper interpretation of the provision in s. 193 of the *Professional Code of Quebec* which contains an immunity for acts done by the officers and staff of professional bodies in good faith. The court held that "gross or serious carelessness is incompatible with good faith" (paragraph 40) and that "the virtually complete absence of the diligence called for in the situations amounted to a fault consisting of gross carelessness and serious negligence" and the *Barreau* was therefore liable (paragraph 45). The court said, with reference to the *Edwards* and *Cooper* decisions, "the common law would have been no less exacting than Quebec law on this point".

69 It may well be arguable that, as a general matter, the test of good faith enunciated in *Finney* is less onerous than characterizations in earlier decisions. However, the problem with the allegations and assertions of the plaintiff in the present case is the lack of factual content. That problem would not be alleviated if the test in *Finney* were considered to be a different test for good faith from the one previously employed.

Claim for Misfeasance in Public Office

70 Abuse of public office, or misfeasance in public office, is an intentional tort. The tort addresses the intentional malicious abuse of power or authority by a public official causing damage to a specific plaintiff. To succeed in such a claim a plaintiff must establish the following:

> that the defendant is a public officer;
>
> the defendant exercised his/her power as a public officer;
>
> the defendant was acting with malice or improper purpose;
>
> the plaintiff has sufficient legal interest to sue;
>
> there is causal connection between the wrongful exercise of power by the defendant and the plaintiff's harm; and
>
> the plaintiff must prove his/her damages.
>
> *Odhavji Estate v. Woodhouse*, [2000] O.J. No. 4733, 52 O.R. (3d) 181 (Ont. C.A.) at paras. 21-23, appeal to the Supreme Court of Canada heard on February 17, 2003, decision reserved [2003 CarswellOnt 4851 (S.C.C.)].

71 The tort of misfeasance of public office cannot be committed negligently or inadvertently. The core concept involved is the intentional abuse of power. Consequently, other concepts are necessarily involved, such as dishonesty, bad faith, and improper purpose. These are all subjective states of mind: *Odhavji Estate* , *supra* at para. 23.

72 The plaintiff has failed to plead facts to support his allegation with respect to the defendants' purported abuses of power. Specifically, he has failed to plead material facts describing the following: which of the defendants has or have committed such abuses; what specific powers were abused; how and when such powers were abused; or that the plaintiff himself was the object of the impugned conduct.

73 Moreover, the plaintiff has failed to plead any facts that would support the allegation that the defendants (or any of them) acted with malice towards him; with the knowledge that their conduct lacked statutory authority, with the intent to injure him; or with knowledge that their acts would injure the plaintiff.

74 Accordingly, the plaintiff has failed to plead facts to support his allegations of "abuse of power" on the part of any of the defendants, so the claim of misfeasance could not succeed. With respect to the claim for summary judgment, the affidavit of the plaintiff fails to establish that a triable issue exists with respect to the allegations referred to in the previous two paragraphs.

Claim For Abuse of Process

75 The tort of abuse of process is narrow in scope. The test for the tort of abuse of process is fourfold. To be successful, the plaintiff must demonstrate that:

> he/she has been subjected to a legal process by the defendant;
>
> that this has been done predominantly to further some indirect, collateral and improper purpose;
>
> some definite act or threat has been made in furtherance of that purpose; and
>
> some measure of special damage has resulted.
>
> *Metropolitan Separate School Board v. Taylor*, [1994] O.J. No. 1870 (Ont. Gen. Div.) at para. 3
>
> *Scintilore Explorations Ltd. v. Larche*, [1999] O.J. No. 2847 (Ont. S.C.J.) at para. 209.

76 A bad or vindictive motive on the part of the defendants will not suffice, regardless of how devastating the effects of upon the plaintiff:

> [t]here must be a collateral purpose entirely discrete from any which the impugned proceedings were designed to serve within the legal system; financial loss or humiliation which would naturally tend to result from the action in question just will not do.
>
> *Scintilore Explorations Ltd.*, *supra* at para. 216.

77 An overt and definitive action or threat by the defendant is essential. There can be no liability where a defendant merely employs the legal process to its proper conclusions, regardless of the nature of the defendant's intentions.

> *Scintilore Explorations Ltd.* , *supra* at para. 217.
>
> *R. Cholkan & Co. v. Brinker*, [1990] O.J. No. 1, 71 O.R. (2d) 381 (Ont. H.C.), at 382.

78 The plaintiff has failed to plead any specific facts with respect to any allegation that the predominant purpose for any impugned legal proceeding was improper. He has failed to plead any specific facts that would suggest that a definite act or threat was made against him. Accordingly, the plaintiff's allegations with respect to abuse of process fail to give rise to a reasonable cause of action and it is plain and obvious that any such claim cannot succeed.

79 With respect to summary judgment, the affidavit of the plaintiff lacks any specific facts that would suggest that a definite act or threat was made against him and therefore do not raise an issue for trial.

Withholding of Payments Despite Alleged Cooperation of Plaintiff

80 The plaintiff maintains that in fact he offered full cooperation to the MRC in the course of its investigations. The defendants dispute this, based on the materials on the record. To the extent that is relevant to the nature and viability of the claims made by the plaintiff, the claim of the plaintiff that he has offered full cooperation is without merit. This is evident from the correspondence of the plaintiff on the subject, which concludes with his communication of March 25, 2002 in which he explicitly withdraws his earlier assurance of cooperation unless the amounts withheld from him are first refunded. There is no dispute that this communication was sent. The plaintiff says that it shows full cooperation on his part but it is self-evident that it shows the opposite. If the matter had to be addressed in terms of the test applicable under Rule 20, I would hold that no court could conclude from the evidence that the plaintiff had shown a genuine issue as to whether he had given full cooperation and therefore that the plaintiff has failed to show that any genuine issue exists in this regard.

Proceedings against Crown Defendants

81 Prior to the enactment of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P. 27, as amended, the Crown was immune from liability in tort. Following proclamation of that Act, any action in tort as against the Crown must strictly follow the requirements of that Act. The statute provides that the proper defendant in any action must be "Her Majesty the Queen in right of Ontario".

82 There is no basis in the statute or elsewhere for the commencement of an action against a ministry of the Crown. Accordingly, the Ministry of Health and Long Term Care is not a proper party and is not a suable entity at law. The plaintiff's claim against the ministry should be struck.

83 A claim against a Minister of the Crown is a claim against the Minister personally. Ministers are Crown servants for whom the Crown may be held vicariously liable. However, Ministers are not masters to other Crown servants, including their direct subordinates. Consequently, Ministers may not be held vicariously liable for the tortuous conduct of other Crown servants. A minister of the Crown is not vicariously liable for the torts of Crown servants since ministers are themselves servants of the Crown.

Proceedings Against the Crown Act, ss. 1, 5

Sinclair v. Ontario, [1996] O.J. No. 3192 (Ont. Gen. Div.) at para. 5.

Canada (National Harbours Board) v. Langelier (1968), [1969] S.C.R. 60 (S.C.C.), at 71-72.

Air India, Re (1987), 62 O.R. (2d) 130 (Ont. H.C.), at 136

84 The individual defendants, Mr. Eves, Dr. Ingle and Dr. McCutcheon, also are not masters to other Crown servants. None of them can be held vicariously liable for the acts or omissions of other government actors. There can be no cause of action framed against any of them based on alleged theories of vicarious liability. In this case it would appear that this is the sole basis of the plaintiff's claims as regards Mr. Eves.

85 The Statement of Claim in this action fails to disclose any allegation as against the individual defendants in their personal capacity. As earlier indicated, the claim contains no material facts concerning Mr. Eves or Dr. McCutcheon. As regards Dr. Ingle, improper conduct is imputed to him but there is a complete absence of material facts or particulars. The plaintiff's action against them reveals no cause of action and it is plain and obvious that his claim against them cannot succeed.

86 Nothing in the *Health Insurance Act* suggests that any individual defendant owed a private law duty of care towards the plaintiff or anyone else. This is particularly so in the case of Dr. McCutcheon, the General Manager of OHIP. Further, both Dr. McCutcheon and Dr. Ingle are statutorily immunized from liability by section 39 of the statute.

Claim Based on Reinvestigation or Relitigation

87 The plaintiff, at paragraph 22 of his statement of claim, states that he was acquitted of charges of fraud in a separate criminal proceeding and claims that OHIP's review of his file is an attempt "...to relitigate a matter which it lost previously in the Provincial Court."

88 The Supreme Court of Canada distinguished between criminal offences and regulatory matters as follows in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 (S.C.C.), at 543:

> If a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11 [of the *Charter*]. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity.

89 The decision of the defendants to suspend payments to the plaintiff pursuant to section 40.2 of the *Health Insurance Act* is based on their opinion that the plaintiff persists in failing to cooperate with the inspection about which the plaintiff complains. The plaintiff's complaint is, in substance, that the suspension of payment is illegitimate because it pertains to an investigation which he says is an improper relitigation of a matter decided already in the criminal court. The purpose of the

suspension - namely, to ensure compliance with the plaintiff's duty under section 40.2 to cooperate with inspectors - is entirely different from and unrelated to any penalty prescribed for fraud in criminal proceedings. Accordingly, the plaintiff's allegation that OHIP is attempting to relitigate a matter discloses no reasonable cause of action.

Claim For Breach of Section 7 of the Charter

90 The plaintiff claims that the General Manager's decision to suspend payments to him pursuant to the *Health Insurance Act* violates his rights under s. 7 of the *Charter* "to life, liberty and security of the person," because it limits his "right to choose his occupation and where to pursue it". The plaintiff relies on the decision of the Court of Appeal of British Columbia in *Wilson v. British Columbia (Medical Services Commission)* (1988), [1989] 2 W.W.R. 1, 30 B.C.L.R. (2d) 153 D.L.R. (4th) 171 (B.C. C.A.), (leave to appeal refused [1988] 2 S.C.R. viii (S.C.C.)).

91 In the *Wilson* decision the Court of Appeal of British Columbia was dealing with a provincial health insurance plan for medical services under which doctors were required to obtain a number in order to practice in particular areas of the province. The Court said as follows at pages 186 and 187:

> To summarize: "Liberty" within the meaning of s. 7 is not confined to mere freedom from bodily restraint. It does not, however, extend to protect property or pure economic rights. It may embrace individual freedom of movement, including the right to choose one's occupation and where to pursue it, subject to the right of the state to impose, in accordance with the principles of fundamental justice, legitimate and reasonable restrictions on the activities of individuals....
>
> The issue then is not payment or no payment for medical services. Denial of the right to participate under the plan is not the denial of a purely economic right, but in reality is a denial of the right of the appellants to practise their chosen profession within British Columbia.

At page 188, the Court said:

> The economic component of the freedom which the doctors seek to assert is the right to be paid by or on behalf of the patient for such services as may be rendered. The problem with the impugned legislation is that the opportunity to pursue their profession, and the freedom of mobility in practice, can be denied by refusing to allow patients the right to have the doctor reimbursed under the plan. The rights being asserted in this case are personal rights affecting the freedom and quality of life of individual doctors. The effect upon them of the alleged deprivations is personal, and has far-reaching implications. It is not a purely business interest which is affected.

In the same vein, the Court said as follows at p. 193:

> Furthermore, we are not persuaded that the appellants are pursuing a mere economic interest in the nature of an income guaranteed by the government. The impugned enactments go beyond mere economic concerns or regulation within the profession. The appellants are all fully qualified and licensed doctors who have been excluded from pursuing the practice of their profession. It matters not whether the exclusion of the opportunity to practise is exclusion from practice everywhere in British Columbia, or exclusion from practice anywhere but specified geographic areas of the province.

92 The Supreme Court of Canada has repeatedly confirmed that the right to "life, liberty and security of the person" guaranteed by s. 7 does not include purely economic interests.

> *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at 1003.
>
> *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 (S.C.C.) at para. 86.
>
> *Siemens v. Manitoba (Attorney General)* (2002), 221 D.L.R. (4th) 90 (S.C.C.) at paras. 45-46.

93 In *Lister v. Ontario (Attorney General)* (1990), 72 O.R. (2d) 354 (Ont. H.C.) the court at 365 cited *Jamorski v. Ontario (Minister of Health)* (1988), 64 O.R. (2d) 161 (Ont. C.A.), at 168, where the Court of Appeal said: we are not here concerned with a limit being placed on a basic right or freedom. There is no constitutional right to practise medicine:

> *Blencoe* , *supra* at para. 86.
>
> *A & L Investments Ltd. v. Ontario (Minister of Housing)* (1997), 36 O.R. (3d) 127 (Ont. C.A.), at 135-136.
>
> *Kopyto v. Law Society of Upper Canada* (1993), 107 D.L.R. (4th) 259 (Ont. Div. Ct.), at 269.
>
> *Biscotti v. Ontario (Securities Commission)* (1990), 74 O.R. (2d) 119 (Ont. Div. Ct.), at 123-129, aff'd (1991), 1 O.R. (3d) 409 (Ont. C.A.), at 412.

94 In *Charboneau v. College of Physicians & Surgeons (Ontario)* (1985), 52 O.R. (2d) 552 (Ont. H.C.) at p. 561, the High Court of Justice considered similar peer assessment and inspection provisions under the former *Health Disciplines Act*. In upholding the provisions under s. 7, the Court emphasized the need for government control of a physician's practice as follows:

> In Ontario, at least, a licence is required to practise medicine and associated with the licence are standards of practice. There is no right to practise medicine nor could anyone seriously argue that there is without a licence and without those standards, which are enforced by the profession itself, under appropriate statutes and professional organisms. Where, as I

> have already held, enforcement of those standards reasonably requires some inroads on the confidentiality of patient records and information, it follows that a doctor will simply have to learn to earn his livelihood in those conditions. It cannot be for each doctor in the Province of Ontario to lay down the terms and conditions under which he will practise medicine. That would be chaos, as well as downright dangerous to the patients. I should think it much less likely that a doctor in Ontario will find his ability to earn a livelihood impaired through the disclosure of patient information involved in the peer assessment programme, than through the assessors finding his practices below an acceptable standard.

95 In the present case, the reason that the plaintiff is being denied the payment he would otherwise receive is that the General Manager of OHIP has suspended those payments pursuant to s. 40.2(6) of the *Act*. That provision is part of the mechanism created by the *Act* for the purpose of ensuing the effectiveness of the inspection provisions set out in s. 40.2 of the *Act*. As mentioned below these provisions serve to secure compliance with the *Act*.

96 In these circumstances, based on the reasoning in *Charboneau* quoted above, it is plain and obvious that the claim under s. 7 of the *Charter* discloses no reasonable cause of action. Nor for purposes of s. 20, is there any genuine issue for trial that could support the plaintiff on the motion for summary judgment or at trial.

Claim For Breach of Section 15 of the Charter

97 Section 15(1) of the Charter provides that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination...". In order to succeed under s. 15 of the *Charter*, the plaintiff must prove that he has been subjected to differential treatment based on an enumerated or analogous ground and that the differential treatment is discriminatory in the sense that it deprives him of his human dignity.

> *Law v. Canada (Minister of Employment & Immigration)* (1999), 170 D.L.R. (4th) 1 (S.C.C.) at para. 88.

98 In this case, OHIP payments to the plaintiff have been suspended based on a legislative scheme that applies to all doctors in Ontario. Although the plaintiff pleads that "no other physician in Ontario was subjected to total withholding of payments", there is no suggestion that he is being treated any differently from any other doctor who repeatedly violates his or her obligations to cooperate with MRC inspectors under s. 40.2 of the *Health Insurance Act*. As noted earlier, in view of the position taken by the plaintiff in his correspondence, a court could not find that the plaintiff was in compliance with the requirement to cooperate with the investigation.

99 Even if the plaintiff were treated differently from other doctors as he has alleged, it is clear that his rights under s. 15 have not been infringed. To infringe his s. 15 rights, that difference in treatment would have to be based on an enumerated or analogous ground, and would have to

deprive him of his human dignity. The payments were not suspended, for example, on the facts pleaded, because of his race, ethnic background, gender, citizenship status or any other enumerated or analogous ground.

100 In *Lister v. Ontario* the Court held that "[d]octors and dentists as individuals are a heterogeneous group who are linked together only by their profession or occupation". The Court concluded that even assuming doctors and dentists are being treated unequally by legislation, such treatment cannot amount to discrimination, that is, a distinction based on grounds enumerated in s. 15 or analogous thereto. The application of s.40.2(6) of the *Health Insurance Act* does not marginalize, ignore or devalue the plaintiff or fail to recognize his place in Canadian society. There is no harm to dignity and therefore the plaintiff cannot hope to succeed on *Charter* s. 15 grounds. Accordingly, based on the test for s. 15 as set out in *Law* and the decision in *Lister* , the motion to strike would succeed and the plaintiff's motion for summary judgment would fail.

Lister v. Ontario, *supra* at 367.

Law , *supra* at para. 53.

101 The plaintiff submitted that the proper test to be applied under s. 15 is the "similarily situated" test that the Court of Appeal is said to have applied in *Colangelo v. Mississauga (City)* (1988), 53 D.L.R. (4th) 283 (Ont. C.A.) .

102 The plaintiff submitted that, on the "similarily situated" test, the court should find that the treatment that the plaintiff has received from the defendants is not equal to the treatment accorded to other similarily situated persons. In particular, the treatment of doctors generally under the *Health Insurance Act* is said to involve such unequal treatment in comparison to other professionals and the treatment of the plaintiff, i.e. the withholding of all amounts otherwise due to him over the period of the withholding, is said not to be equal to the treatment received by other doctors.

103 The "similarily situated" test in *Colangelo* and other cases has been rejected more recently in other cases. In *R. v. Turpin*, [1989] 1 S.C.R. 1296, [1989] S.C.J. No. 47 (S.C.C.), the Supreme Court of Canada made it clear, as stated at para. 43, "differential treatment is permitted under s. 15 provided it is "without discrimination"". See also paras. 44 and 49. Similarily the decision of the Supreme Court in *R. v. Law* makes it clear that for s. 15 to apply, the treatment must be not only unequal but also discriminatory as set out in s. 15 and interpreted in the *Law v. Canada (Minister of Employment & Immigration)* decision.

104 In any event the plaintiff has not pleaded facts that would enable a court to determine that doctors in general and the plaintiff in particular are being treated in a manner that is unequal to the treatment accorded to similarily situated persons.

105 At paragraph 8 of the statement of claim, the plaintiff alleges that "no other physician in Ontario was subjected to total withholding of payment in these circumstances". The plaintiff does not in the paragraphs up to and including paragraph 8, allege any particular "circumstances". In the paragraphs that follow, the plaintiff asserts a number of adverse allegations about the conduct of the defendants. These allegations do not allege facts that would support a finding that the treatment the plaintiff received was discriminatory in comparison with the treatment received by other persons in similar circumstances to those of the plaintiff.

106 Apart from other considerations, there is nothing in the factual context of this case that would support a finding of impugnable discrimination. For such a finding to be made it would be necessary to find that the treatment of doctors under the *Health Insurance Act* or the treatment received by the plaintiff involves a violation of essential human dignity: see *Law v. Canada, supra* at para. 88 in [1999] 1 S.C.R. 497 (S.C.C.) at p. 549. Here the treatment of doctors relating to the manner in which they are paid is a feature of a plan designed to provide for the provision of medical services and for the payment of those services. The treatment received by the plaintiff is in keeping with a feature of the plan which is evidently designed to assist in ensuing the proper operation of the plan. The pleadings and the affidavit material of the plaintiff do not offer any basis to view the circumstances differently.

Constitutional Validity of Section 40.2(2) and 40.2(6) of the Health Insurance Act

107 The plaintiff asserts that sections 40.2(2) and 40.2(6) of the *Health Insurance Act* are themselves unconstitutional. The plaintiff does not allege any particular facts that could give rise to the conclusion that these provisions infringe ss. 7 or 15.

108 These provisions must be regarded as intended serve to secure compliance with the regulatory provisions of the *Act*. They obviously facilitate that effort and there is nothing to suggest that they have any other purpose.

109 The plaintiff asserts that the provision in s. 40.2(6) for the General Manager to determine what constitutes "just cause" for non-compliance with an inspection violates s. 7 because it allows for a "unilateral arbitrary dictatorial" decision. As stated above, s. 7 does not protect economic interests and is thus not engaged when payments are suspended under s.40.2(6). Moreover, the provision that payment can be suspended only where the non-compliance by the doctor is without just cause imposes a constraint upon the ability to suspend payments. If the objection to "without just cause" is that it is apparently unspecific and therefore must afford a degree of implicit discretion in practice, it is hard to see how a more specific standard could be more suitable in terms of concerns about justice. Any implicit discretion afforded to the General Manager would be subject to judicial review, as noted below. Regarding s. 15 of the *Charter*, even if physicians are treated differently from other professionals by legislation such as the *Health Insurance Act*, such treatment does not amount to discrimination.

Judicial Review of the Decision of the General Manager

110 The plaintiff at paragraphs 1(4), 7, 16, 24 and 26 of his statement of claim seeks a remedy in the nature of prohibition (a) to prevent repeat investigations, (b) to prevent the retention of his earnings and (c) to suspend the jurisdiction of the General Manager to retain or suspend payment.

111 Where a tribunal is about to take a specific action that is not authorized by statute, the prerogative writ of prohibition lies to prohibit a tribunal from exceeding its jurisdiction. It must be clear and beyond doubt that the tribunal lacks authority to proceed.

> *New Brunswick School District No. 15 v. New Brunswick (Human Rights Board of Inquiry)* (1989), 62 D.L.R. (4th) 512 (N.B. C.A.), at 518

112 To the extent the plaintiff is seeking to judicially review the decision of the General Manager, i.e. to obtain an order enjoining or prohibiting the General Manager's decision to suspend OHIP payments to him, this relief must be sought by notice of application for judicial review in the Divisional Court.

113 Section 6(1) of the *Judicial Review Procedure Act* provides:

> 6(1) Subject to subsection (2), an application for judicial review shall be made to the Divisional Court.
>
> *Judicial Review Procedures Act* R.S.O. 1990 c. J. 1 as amended ("JRPA"), s. 6(1)
>
> *Canada Post Corp. v. C.U.P.W.* (1989), 38 Admin. L.R. 305 (Ont. H.C.)

114 "Application for judicial review" is defined in s. 1 of the Act to mean "an application under subsection 2(1)".

> JRPA, s. 1

115 Section 2(1) of the JRPA provides that on an application by way of originating notice the court may grant relief in the nature of mandamus, prohibition, certiorari, or, in relation to an action seeking to review the exercise of a statutory power, a declaration or injunction.

> JRPA. s. 2(1)

116 "Statutory power" is defined in s. 1 of the JRPA to include a power or right conferred by or under a statute to exercise a statutory power of decision.

> JRPA, s. 1

117 In turn, a "statutory power of decision" is defined in s. 1 of the JRPA by the Act to mean:

> ...a power or right conferred by or under a statute to make a decision deciding or prescribing,
>
> > (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
> >
> > (b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is
>
> legally entitled thereto or not, and includes the powers of an inferior court.
>
> JRPA, s. 1

118 In deciding whether a legal proceeding is, in fact, an application for judicial review, the court should go beyond the language in which the relief claimed is framed to the substance of the claim.

> *Canada Post Corp. v. C.U.P.W.* , *supra* at p. 310

119 The plaintiff's action is, in substance, an application for judicial review to the extent that it seeks, within the meaning of subsection 2(1) of the JRPA, injunctive or prohibitive relief in relation to the exercise of the statutory power of the General Manager of OHIP under the *Health Insurance Act* and the impact which that exercise has on the benefits the plaintiff received under that Act. The issues of judicial review raised by the plaintiff should not be dealt with by way of an action before this court, but rather by the Divisional Court. There is no genuine issue for trial on this point that could support the plaintiff.

Claim For Return of Funds Taken in 1982-1984

120 The plaintiff claims that the defendants violated s. 7 and s. 15 of the *Charter* and superseded their legislative jurisdiction in taking $93,493.02 of his earnings in the 1982-1984 period. The s. 7 and s. 15 considerations are dealt with above.

121 The cause of action of the plaintiff would presumably have arisen in November of 1981 when the decision was taken to withhold from amounts payable to the plaintiff and on this basis would antedate the *Charter's* coming into effect and so would not be subject to its provisions.

122 The plaintiff did not raise s. 7 and s. 15 of the *Charter* in his statement of claim with respect to his claim for the return of the amounts withheld. Nor did he raise these constitutional claims in his notice of constitutional issue in regard to his claim for the return of the amounts.

123 There is no factual underpinning for the pleading that the defendants have superceded this legislative jurisdiction. The legislative provision is not pleaded, nor is the jurisdiction of the defendants under the legislation. Accordingly no factual basis is presented for this claim.

124 This claim is in essence a claim for breach of statute. As noted, the law in Ontario is clear that there is no tort of statutory breach. The civil consequences of a breach of statute are subsumed in the law of negligence. While proof of a statutory breach which causes damages may be evidence of negligence, the plaintiff has chosen to plead breach of statute. Accordingly, it is plain and obvious that the plaintiff's claim for the return of funds taken in 1982-84, based upon breach of statutory duty, has no basis in law and must be struck.

Rogers v. Faught (C.A.)., *supra* at para. 28

125 In his response to the demand of the defendants for particulars, the plaintiff states that these earnings were deducted by the Ministry of Health, not by the College or Dr. Giblon. There is accordingly no basis for this claim against the College and Dr. Giblon.

Claims Barred by the Limitation Period

126 Section 7 of the *Public Authorities Protection Act* provides:

> (1) No action, prosecution or other proceeding lies or shall be instituted against any person for any act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it is commenced within six months next after the cause of action arose, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

Public Authorities Protection Act, R.S.O. 1990 c. P. 38, s. 7(1)

127 The phrase "after the cause of action arose" means that the limitation period commences to run when the material facts upon which the action is based have been discovered or ought to have been discovered by the exercise of reasonable diligence.

Peixeiro v. Haberman (1995), 25 O.R. (3d) 1 (Ont. C.A.)

128 The limitation period for the tort of negligence commences to run from the date of the alleged acts of negligence.

Darroch v. Metropolitan Toronto Police Services Board, [1996] O.J. No. 4379 (Ont. Gen. Div.), para. 10

129 The statement of claim of the plaintiff in the present action was dated February 4, 2003. Accordingly, the allegations made with respect to the withholding of earnings from the period between October 13, 1982 and November 13, 1984 and allegations of negligence are barred by the limitation period. On this ground alone, the defendants would be entitled to summary judgment dismissing the claims relating to the withholdings for the 1982-1984 period.

Action is Barred by the Doctrine of Res Judicata

130 *Res Judicata* includes both cause of action estoppel and issue estoppel. The Ontario Court of Appeal has described the doctrine of cause of action estoppel and issue estoppel as follows:

> Cause of action estoppel prevents a party from relitigating a claim that was decided or could have been raised in an earlier proceeding.... Issue estoppel is narrower than cause of action estoppel. It prevents a party from re-litigating an issue already decided in an earlier proceeding, even if the causes of action in the two proceedings differ.
>
> *Minott v. O'Shanter Development Co.* (1999), 168 D.L.R. (4th) 270 (Ont. C.A.), at 277

131 Cause of action estoppel prevents a litigant from establishing a new and fresh cause of action by advancing a new legal theory in support of a claim based upon essentially the same facts in previous litigation.

> *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 30 O.R. (3d) 286 (Ont. Gen. Div.), at 297 -298.

132 The three requirements for issue estoppel are as follows:

> ...(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.
>
> *Minott v. O'Shanter Development*, *supra* at 278

133 As noted, the plaintiff sued to recover these amounts previously and was unsuccessful. He ultimately applied to the Supreme Court of Canada for leave to appeal but it was not granted. Accordingly, the plaintiff has previously litigated the same issues he is now raising in his action. So the plaintiff is estopped from advancing such claims again in the present action.

Particular Claims against the College Defendants

Claim against Dr. Giblon

134 Although Dr. Giblon is a named defendant, the Statement of Claim contains no allegation of any act or omission on his part giving rise to a cause of action. The Statement of Claim should be struck out against Dr. Giblon on this basis alone.

Claim For Negligence by College

135 The plaintiff alleges that the College recently charged him with violation of patient-physician confidentiality without proper justification and negligently assessed one of his patient files, resulting in hundred of hours of professional time being expended by him to answer the allegations at the College level and before the Health Professions Appeal and Review Board. The pleading does not state the outcome of the proceedings before the College or the Health Professions Appeal and Review Board.

136 The plaintiff also claims that the alleged incompetence of an assessor and the complaints committee of the College led to an unjustifiable referral to the quality assurance committee of the College appearing on his certificate of professional conduct which is potentially prejudicial to his professional reputation and status.

137 These claims do not make supported allegations of bad faith. These claims must therefore be treated as claims based in negligence.

138 In order to establish a claim in negligence, the plaintiff must first establish that the College owed him a duty of care and breached that duty.

Rogers v. Faught (C.A.), *supra*, para. 19

Edwards v. Law Society of Upper Canada, [2001] S.C.J. No. 77 (S.C.C.), at para. 9

139 The Court of Appeal has determined that colleges governed by the RHPA do not owe a duty of care to patients of the professions it governs.

Rogers v. Faught , (C.A.) *supra*, paras. 19-22

Edwards v. Law Society of Upper Canada , *supra*, at paras. 11-19

140 In *Edwards v. Law Society of Upper Canada* , the Supreme Court approved the reasoning of the Court of Appeal below in denying the existence of a duty of care:

> ...there are very sound policy reasons for not burdening this judicial or quasi-judicial process with a private law duty of care. The public is well served by refusing to fetter the investigative powers of the Law Society with the fear of civil liability. The invocation by the plaintiffs of the "public interest" role of the Law Society seems to be misconceived as it actually works

> to undermine their argument...[T]he Law Society cannot meet this obligation if it is required to act according to a private law duty of care to specific individuals such as the appellants. The private law duty of care cannot stand alongside the Law Society's statutory mandate and hence cannot be given effect to.
>
> *Edwards v. Law Society of Upper Canada*, *supra*, at para. 6

141 The Supreme Court ruled that even if it had found the existence of a *prima facie* duty of care, that duty of care would have been negated by residual policy considerations outside the relationship of the parties. The Court of Appeal confirmed in *Rogers v. Faught* that those same considerations would negate any duty of care being imposed on regulatory bodies governed by the RHPA:

> Finally, I note that in *Cooper* and *Edwards* the Supreme Court of Canada also held against potential liability in negligence of the regulators on the basis of the second stage of the *Anns* test, namely, the existence of policy reasons which negated any *prima facie* duty of care. The factors which the court relied on in this aspect of its analysis included the requirement in the governing statutes that the regulatory bodies balance public and private interests, the strong policy-making role of the regulators, the fact that some of their decisions were quasi-judicial in nature, the spectre of indeterminate liability and the impact on the taxpayer of judicial creation of a new and expensive insurance scheme in the absence of any indication that the legislature intended such a result. In my view, all of these factors are equally applicable to the scheme in issue in the present appeal; accordingly, the appellants cannot clear the hurdle of the second stage of the *Anns* test.
>
> *Rogers v. Faught* (C.A.), *supra*, para. 25
>
> *Edwards v. Law Society of Upper Canada*, *supra*, at para. 6

142 In any event, as noted, s. 39 of the *Health Professions Act* and s. 38 of the RHPA preclude liability where the action was taken in good faith. Reference is made to the discussion of good faith earlier in these reasons.

Other Issues

Sections 6 and 12 of the Charter

143 On his motion for summary judgment, the plaintiff seeks to add claims under ss. 6 and 12 of the *Charter*. These grounds are not included in his statement of claim or in his notice of constitutional question and therefore should not be considered by the court. Section 109 of the *Courts of Justice Act* requires notice of a constitutional question to be provided to both the Attorney

General of Ontario and the Attorney General of Canada. The Attorney General of Canada has not been given any notice of these new claims.

Courts of Justice Act, R.S.O. 1990, c. C. 43, s. 109

Paluska v. Cava (2002), 59 O.R. (3d) 469 (Ont. C.A.)

144 In any event, there is no basis for claims under either ss. 6 or 12 of the *Charter*. Section 6(2)(b) of the *Charter* confers the right to "pursue the gaining of a livelihood in any province". The Supreme Court of Canada has unanimously held that s. 6(2)(b) does not guarantee a freestanding right to work, but is qualified by a "mobility" element, and protects individuals who are denied the right to earn a livelihood because they commute across provincial borders to work.

Skapinker v. Law Society of Upper Canada, [1984] 1 S.C.R. 357 (S.C.C.)

See also: *Black v. Law Society (Alberta)*, [1989] 1 S.C.R. 591 (S.C.C.).

145 The plaintiff is not a trans-border commuter and alleges no facts that would bring him within the protection of s. 6(2) of the *Charter*.

146 Section 12 of the *Charter* prohibits "cruel and unusual treatment or punishment". The Supreme Court of Canada has made it clear that s. 12 only applies in a narrow set of circumstances. The measure must not be merely excessive, but "grossly disproportionate" to what would be appropriate so as to "outrage standards of decency". The constitutional standard for what constitutes cruel and unusual punishment under s. 12 is a stringent one that will only be met in rare and exceptional circumstances.

R. v. Goltz, [1991] 3 S.C.R. 485 (S.C.C.), at 498-503.

R. v. Smith, [1987] 1 S.C.R. 1045 (S.C.C.), at 1072-4.

147 Section 12 of the *Charter* is mainly concerned with criminal and penal proceedings. In this regard, the court in *Wowk v. Edmonton (Health Board)* stated: "I fail to see how legislation limiting a civil cause of action in tort can be said to be cruel and unusual treatment or punishment".

Wowk v. Edmonton (Health Board), [1994] 7 W.W.R. 78 (Alta. Master), at 83-84

148 The requirement that a doctor submit to the inspection requirement in the *Health Insurance Act* as a precondition for payment from OHIP is not a requirement that could, in any sense, be said to be a punishment or, if it is a punishment, to be one that outrages standards of decency or to be grossly disproportionate to that which is appropriate.

Effect of Application for Prohibition

149 The plaintiff submits that service of an application for an order of prohibition has the effect of "suspending the jurisdiction of the defendants in this manner". The plaintiff relies on the decision of the Supreme Court of Canada in *R. v. Batchelor* (1977), [1978] 2 S.C.R. 988, 81 D.L.R. (3d) 241 (S.C.C.). That decision concerned the significance to be attached to the Ontario Criminal Rule 8: see 81 D.L.R. (3d) at 255. Earlier in the decision, the court referred to the different approach in civil proceedings at p. 252 as follows:

> I note too that the concern here is with criminal not civil proceedings, and hence pronouncements in respect of civil proceedings such as that made by the Ontario Court of Appeal in *Re Cedarvale Tree Sevices Ltd. and Labourers' Int'l Union of North America*, Local 183 (1972), 22 D.L.R. (3d) 40 at p. 49, [1971] 3 O.R. 832, are not applicable. In that case, Arnup, J.A., speaking for the Court said this, speaking of administrative tribunals of an adjudicative character [at pp. 49-50]:
>
> > It is also clear law that such a tribunal is not required to bring its proceedings to a halt merely because it has been served with a notice of motion for an order of *certiorari* or prohibition. It is entitled, if it thinks fit, to carry its pending proceedings forward until such time as an order of the Court has actually been made prohibiting its further activity or quashing some order already made by which it assumed jurisdiction.

No Prohibition against the Crown

150 Section 14 of the *Proceedings Against the Crown Act* provides:

> (1) Where in a proceeding against the Crown any relief is sought that might, in a proceeding between persons, be granted by way of injunction or specific performance, the court shall not, as against the Crown, grant an injunction or make an order for specific performance, but in lieu thereof may make an order declaratory of the rights of parties.
>
> *Proceedings Against the Crown Act*, R.S.O. 1990 c. P. 27, s. 14(1)

151 Moreover, a statute does not bind the Crown unless it expressly so states:

> 11. No Act affects the rights of Her Majesty, Her heirs or successors, unless it is expressly stated therein that her Majesty is bound thereby.
>
> *Interpretation Act*, R.S.O. 1990 c. I. 11, s. 11

152 The plaintiff in his statement of claim seeks relief in the nature of "prohibition" and, in his cross-motion for summary judgment, seeks orders compelling the Crown to pay the plaintiff monies allegedly owing as well as prohibiting all the defendants, including the Crown, from conducting repeat investigations. Since the relief sought by the plaintiff is in the nature of a

mandatory injunction and since the *Health Insurance Act* contains no provision entitling the plaintiff to such relief, the Crown Defendants are entitled to summary judgment dismissing such claims in their entirety.

Conclusion

153 For the reasons set out above, the plaintiff's statement of claim against the defendants fails to disclose a reasonable cause of action to the extent set out above and accordingly, pursuant to s. 21 and s. 25, it is to be struck out to that extent. That disposition deals with all of the claims except those where, in these reasons, it has been necessary to refer to the facts disclosed in the material. In the case of those claims, for the reasons set out above, the defendants have shown that there is no genuine issue for trial in respect of the claims and the defendants are accordingly entitled to have the claim of the plaintiff dismissed and to have summary judgment against the plaintiff as requested. In the result, the entire statement of claim of the plaintiff fails and the claims of the plaintiff are dismissed.

154 The parties may consult me about costs.

Defendants' motion granted; cross-motion denied.

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