

CANADA / JUDGMENT

Homan v. Nemanishen

2021 BCSC 2515

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 2515 Homan v. Nemanishen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Homan v. Nemanishen,

2021 BCSC 2515

Date: 20211224

Docket: S205373

Registry: Vancouver

Between:

Warren Maurice Homan

Plaintiff

And

Dr. Gerald Nemanishen, the College of Physicians and Surgeons of British Columbia, John or Jane Doe Pharmacist, and the College of Pharmacists of British Columbia

Defendants

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

(Hearing proceeded via MS Teams)

Counsel for the Plaintiff:

J. M. Green

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A. P. P. Severide

Counsel for the Defendants, the College of Physicians and Surgeons of British Columbia:

A. R. Westmacott, Q.C.

A. K. Harlingten

Place and Date of Hearing:

Vancouver, B.C.

November 12, 2021

Place and Date of Judgment:

Vancouver, B.C.

December 24, 2021

INTRODUCTION

- [1] The plaintiff, Warren Homan, is addicted to opioid pain medications. Mr. Homan alleges that he became addicted as a result of his use of various opioids, as prescribed by his doctor, the defendant, Dr. Gerald Nemanishen.
- [2] On May 21, 2020, Mr. Homan commenced this action. Mr. Homan seeks to recover damages arising from what he describes as Dr. Nemanishen's negligence in prescribing these opioids. In addition, Mr. Homan alleges that the other defendants, The College of Physicians and Surgeons of British Columbia (the "College") and The College of Pharmacists of British Columbia, and unnamed pharmacists were also negligent in respect of Dr. Nemanishen's prescribing practices of opioid medications in relation to his care.
- [3] On this application, the Colleges applies to strike Mr. Homan's notice of civil claim (NOCC) as it relates to the College, on the basis that it discloses no reasonable cause of action. The College alleges that, in fulfilling its statutory role as the regulator of the practice of medicine in BC, it does not owe a private law duty of care to Mr. Homan.
- [4] Dr. Nemanishen does not take any position on the application. The College of Pharmacists of British Columbia does not appear on this application.

BACKGROUND FACTS

- [5] The College is a corporation continued under the Health Professions Act, R.S.B.C. 1996, c. 183 (the "Act"), and has the duty and powers to superintend the profession of medicine in BC in the public interest: s. 16.
- [6] At all material times, Dr. Nemanishen was a registered physician licensed by the College.

- [7] In January 2013, Mr. Homan became a patient of Dr. Nemanishen. Mr. Homan alleges that, as a result of complaints of back pain, Dr. Nemanishen began prescribing opioid medication for Mr. Homan's use. He further alleges that these prescriptions continued over the ensuing years until their doctor/patient relationship ended in November 2016.
- [8] As mentioned before, Mr. Homan alleges that he has become addicted to the opioid medication prescribed to him. He also alleges that, as a result, he has sustained various physical and psychological injuries.

LEGAL FRAMEWORK

- [9] There is no dispute concerning the relevant test under the Supreme Court Civil Rules, R. 9-5(1)(a).
- [10] The Court must consider the pleading with a view to determining whether it is "plain and obvious" that it discloses no reasonable cause of action: *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2021 BCCA 142 [H.M.B.] at paras. 48-53. To determine whether it is "plain and obvious" that the NOCC does not disclose a reasonable cause of action, the pleaded facts are to be taken as true, but allegations based on assumptions and speculation are not to be taken as true: *H.M.B.* at paras. 54-55.
- [11] The plaintiff must plead those material facts essential to formulate a complete cause of action. If a material fact is omitted, a cause of action is not effectively pleaded. Material facts should be stated with certainty and precision and state the defendant's wrongful acts and the consequent damage: *McGregor v. Holyrood Manor*, 2014 BCSC 679 at paras. 7-8, *aff'd* 2015 BCCA 157.
- [12] Rule 9-5(2) provides that evidence is not admissible under Rule 9-5(1)(a). Both Mr. Homan and the College have filed affidavit evidence in the materials before me. As the Rule requires, I have disregarded such evidence.

MR. HOMAN'S PLEADING

- [13] In essence, Mr. Homan claims that the College breached its duty to warn him about the risk that his doctor's "opioid prescribing practices" posed to him. Mr. Homan also claims that the College was negligent in its supervision of Dr. Nemanishen which, in turn, caused him to suffer physical and psychological injuries.
- [14] Under "Part 1: Statement of Facts" of Mr. Homan's pleading against the College, he alleges that the College had knowledge of Dr. Nemanishen's prescribing of opioid medication to him, which ought to have put it on an inquiry relating to that matter. Mr. Homan further alleges that at no time did the College tell him that it had "concerns" that Mr. Homan's health may have been jeopardized by Dr. Nemanishen's opioid prescribing practices: paras. 19-20.

- [15] Mr. Homan's pleading does not include any material facts alleging that he had any interactions with the College in respect of the care he received from Dr. Nemanishen or at all.
- [16] Under "Part 3: Legal Basis" of Mr. Homan's pleading against the College, he alleges that:
- a) the College had knowledge of circumstances involving Dr. Nemanishen's prescribing practices that ought to have put it on an inquiry relating to those practices. In addition, the College became aware of or ought to have become aware of Dr. Nemanishen's "improper" opioid prescribing practices: paras. 32-33;
 - b) the College failed in its duty to investigate or adequately investigate Dr. Nemanishen's opioid prescribing practices and to take appropriate action or take "steps to protect the plaintiff", including notifying Mr. Homan that he should "seek to mitigate his injuries at the earliest possible opportunity": paras. 34, 36, 38, 39(f);
 - c) the College was "reckless and grossly negligent" in failing to investigate or adequately investigate Dr. Nemanishen: para. 35;
 - d) the College "failed to act in good faith" in failing to take any or any adequate action to prevent Dr. Nemanishen from injuring patients, including Mr. Homan, by notifying them of its concerns regarding Dr. Nemanishen: paras. 37, 39(e)); and
 - e) the College breached its duty of care owed to Mr. Homan, including by: (i) failing to establish, monitor and enforce standards of practice to enhance the quality of practice and reduce incompetent, impaired or unethical practice; (ii) failing to establish and maintain a continuing competency program; (iii) failing to establish, monitor and enforce standards of professional ethics; (iv) failing to adequately train and instruct its employees and representatives to "make a report of any inquiry received respecting improper prescribing of opioid medications by a physician"; (v) failing to warn Dr. Nemanishen's patients of concerns regarding "problematic opioid prescribing"; (vi) failing to inform Dr. Nemanishen's patients that they should seek legal counsel; and (vii) failing to encourage patients to make a formal complaint against Dr. Nemanishen: para. 39.

DISCUSSION AND ANALYSIS

- [17] The parties agree that the key question to be determined on this application is whether the College owed Mr. Homan a private law duty of care. Mr. Homan alleges negligence in the manner in which the College exercised its statutory authority under the Act; accordingly, if no such duty was owed, Mr. Homan's claim against the College must be struck.
- [18] The analytical framework is found in *Cooper v. Hobart*, 2001 SCC 79 which discussed the application of the Anns test set out in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.):

[30] In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the Anns analysis is best understood as follows. At the first stage of the Anns test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.

[Italics emphasis added; underline emphasis in original]

[19] Accordingly, at the first stage of the Anns test, questions of foreseeability and proximity arise in the context of the parties' relationship, with a preliminary consideration as to whether such a duty on the part of the College is already an established category. At the second stage, issues arise in relation to residual policy considerations that arise outside the relationship of the parties.

[20] See also the companion case to *Cooper*, *Edwards v. Law Society of Upper Canada*, 2001 SCC 80.

Does the Claim Fall Within a Recognized Category?

[21] As the Court noted in *Cooper* at para. 41, the first question is whether this case "falls within or is analogous to a category of cases in which a duty of care has previously been recognized". Mr. Homan asserts that a category of cases or an analogous duty of care similar to his claim against the College has already been recognized by the authorities which he says precludes the need for the Court to engage in the full Anns/*Cooper* analysis.

[22] The College refers to the comments in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, setting out the proper approach to this issue. There, the Court cautioned that care must be taken to fully consider the facts and circumstances that led to any prior categorization:

[27] Proximate relationships will not always, however, be identified so generally. In particular, whether proximity exists between two parties at large, or whether it inheres only for particular purposes or in relation to particular actions, will depend upon the nature of the particular relationship at issue (*ibid.*, at para. 27; *Haig*, at p. 479). Indeed, and as we explain below, factors which support recognizing "novel" proximate relationships do so based upon

the characteristics of the parties' relationship and the circumstances of each particular case (Cooper, at paras. 34-35).

- [28] It follows that, where a party seeks to base a finding of proximity upon a previously established or analogous category, a court should be attentive to the particular factors which justified recognizing that prior category in order to determine whether the relationship at issue is, in fact, truly the same as or analogous to that which was previously recognized. And, by corollary, courts should avoid identifying established categories in an overly broad manner because, again, residual policy considerations are not considered where proximity is found on the basis of an established category (Cooper, at para. 39). Analytically, this makes sense. For a court to have previously recognized a proximate relationship, second-stage residual policy considerations must already have been taken into account. When, therefore, a court relies on an established category of proximity, it follows "that there are no overriding policy considerations that would [negate] the duty of care" (ibid.). A consequence of this approach, however, is that a finding of proximity based upon a previously established or analogous category must be grounded not merely upon the identity of the parties, but upon examination of the particular relationship at issue in each case. Otherwise, courts risk recognizing *prima facie* duties of care without any examination of pertinent second-stage residual policy considerations.

[Emphasis added.]

- [23] In *Held v. Sechelt* (District), 2021 BCCA 350 at para. 15, the court noted the Supreme Court of Canada's "retreat" from broad categories of predetermined proximity. In *Burke v. Watson & Barnard* (A Firm), 2016 BCCA 439, the Court stated:
- [43] It is clear from these cases and *Cooper* that the duty of care must be well-established in the jurisprudence in order to negate the need for a full duty of care analysis. While there may be no strict rule about what level of authority will satisfy the requirement in *Cooper*, it does seem to us that it must be precedential in the sense that the weight of authority appears to have settled the issue.
- [24] The question then is whether there are case precedents that clearly establish such a duty on the part of the College.
- [25] Mr. Homan relies on a number of authorities which his counsel asserts avoids any need to conduct a full *Anns/Cooper* analysis.
- [26] Mr. Homan's counsel places significant reliance on *McClelland v. Stewart*, 2004 BCCA 458, leave to appeal ref'd [2004] S.C.C.A. No. 492. As his counsel candidly admits at this hearing, Mr. Homan's pleading essentially adopts the same allegations found in *McClelland*.
- [27] In *McClelland*., the Court was addressing pleadings filed against the College by a victim of sexual assault at the hands of her doctor. As here, the plaintiff's allegation was that the College had actual or constructive knowledge of the sexual assaults, but it failed to investigate the matter. Also, as here, there were no direct interactions between the plaintiff

and the College. Southin J.A.'s decision for the court, at para. 16, was that it was possible that the law on the liability of regulatory bodies was similar to that in Quebec, referring to the recent decision of *Finney v. Barreau du Québec*, 2004 SCC 36. She therefore found that it was not plain and obvious that no reasonable claim had been advanced.

- [28] In *Finney*, the Court upheld the imposition of liability upon the Barreau de Quebec arising from the harm incurred by a client as a result of the actions of a rogue lawyer. Importantly, the Court also considered the issue not only under the civil code, but also from a common law perspective. After cautioning at para. 1 that cases where a law society is found in breach of its duty of care will be "rare", the Court found that the imposition of a duty under the *Cooper* test was also justified under the common law where:
- [46] The decisions by the Barreau were operational decisions and were made in a relationship of proximity with a clearly identified complainant, where the harm was foreseeable.
- [29] It is apparent from *McClelland* that the Court did not conduct any proximity analysis as directed by *Anns/Cooper*, nor did it review the legislative framework by which the College operates under the Act.
- [30] The College argues that the lack of any analysis in *McClelland*, given there was no analogous duty of care established at that time, casts doubt on its continuing precedential value, particularly in light of more recent authorities from the BC Court of Appeal on this issue.
- [31] In my view, these BC Court of Appeal authorities are sufficient to question the import of the Court's reasoning in *McClelland* as establishing a clear precedent that the College has a duty in Mr. Homan's circumstances where it is exercising its statutory duties under the Act.
- [32] In *Wu v. Vancouver (City)*, 2019 BCCA 23, leave to appeal ref'd [2019] S.C.C.A. No. 90, the court addressed whether the City of Vancouver had a private law duty of care to decide on a development permit application within a reasonable time under the applicable bylaws. At paras. 49-50, Harris J.A. noted the significant evolution under the *Anns/Cooper* framework over recent decades, noting the increased emphasis on the analysis of proximity. The court then stated:
- [58] What I take from these broad principles is that, as a general proposition subject only to arguably rare exceptions, statutory duties owed by public authorities are insufficient to ground private law duties arising out of interactions that are inherent in the exercise of the public law duty. Indeed, it is difficult to convert public law duties into private law duties where those public law duties exist to promote a public good. Generally, discharging public law duties does not give rise to a private law duty of care to particular individuals.
- [59] Typically, if a private law duty of care is recognized, it will arise from specific interactions either between the public authority and the claimant sufficient to create the necessary proximity or in the context of a statutory scheme: *Imperial Tobacco* at paras. 45-46. An example of such an approach is found in *Fallowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, where the Court emphasized the specific features of the relationship between the plaintiffs

and the regulator in the circumstances of the case. There, a combination of factors, including the regulatory regime and the interactions and knowledge of regulators, were necessary to ground a finding of proximity. *Vlanich v. Typhair*, 2016 ONCA 517, para. 31, helpfully explains how proximity may arise between a public authority and a member of the public where a public authority assumes responsibility for ensuring compliance with standards.

- [33] In *Walkom v. Law Society of British Columbia*, 2019 BCCA 391, following *Wu*, the court also distinguished *Finney* and *McClelland*, including that the decision in *Finney* was grounded on the allegations of "specific interactions" between the Barreau and the plaintiff (i.e., complaints against the lawyer) that could establish proximity in the relationship: paras. 73-78. In *Walkom*, the claim was struck as disclosing no reasonable cause of action.
- [34] In *Held* at para. 22, *Waterway Houseboats Ltd. v. British Columbia*, 2020 BCCA 378 is described as the leading BC case as to what must be shown to establish proximity to ground a *prima facie* duty of care. In *Waterway Houseboats* at para. 201, the court acknowledged that no precedent existed to establish a private law duty of care on the part of the Province of BC in relation to decisions under the Water Act, R.S.B.C. 1996, c. 483, thus necessitating a full analysis under the *Anns/Cooper* framework.
- [35] The College also points to other BC court decisions striking claims against health colleges which are substantially similar to Mr. Homan's claim including: *Jack v. Behrens*, 2002 BCSC 1454 (the College); *McGregor* at paras. 81-106 (College of Registered Psychiatric Nurses of BC); *Lenning v. Hicks*, 2014 BCSC 1126 (the College). I also have been referred to authorities from other provinces, being *Rogers v. Faught* (2002), 212 D.L.R. (4th) 366 (Ont. C.A.) (Colleges of Dental Surgeons/Dental Hygienists), *Nette v. Stiles*, 2010 ABQB 14 (College and Association of Chiropractors); and, *Yashcheshen v. Bowen*, 2019 SKQB 43.
- [36] The facts and reasoning in *Lenning* are particularly relevant here. The plaintiff alleged that the College was negligent in not ensuring that the medical personnel treating her would be competent, similar to allegations here against Dr. Nemanishen. The claim in *Lenning* was dismissed against the College as disclosing no reasonable cause of action, after a full consideration of *Finney* and *McClelland*, both of which were distinguished:
- [38] In this case, the plaintiff complains that the applicant should have known or did know that Dr. Hicks was not providing adequate care to his patients. The applicant is tasked with the regulation of its members. Some of its functions include disciplinary action. The mere fact that the applicant knew that Dr. Hicks may have in other circumstances had complaints lodged against him does not establish such a close and direct relationship with the plaintiff to establish the required proximity.
- [39] There is nothing in the pleadings which would suggest any expectations, representations, or reliance on the part of the plaintiff that would give rise to a relationship of sufficient proximity between her and the applicant to establish a duty of care owed by the applicant.

- [40] As mentioned earlier, there has been no bad faith pled.
- [41] In my view the decisions of Cooper, Edwards, and the many other cases establish that a regulatory body does not owe a private law duty to a member of the general public without something more such as, but not limited to, a direct relationship between the parties. In this case there is not "something more".
- [37] I agree with the College that, if McClelland (following Finney) had definitively established that the College owes a prima facie private law duty of care in all cases, the Court in Lenning would not have engaged in a full proximity analysis in these same circumstances.
- [38] Mr. Homan's counsel also refers to other authorities.
- [39] He refers to *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 74 O.R. (2d) 225, 72 D.L.R. (4th) 580 (Ont. H.C.J.), leave to appeal ref'd (1991), 1 O.R. (3d) 416 (note) (Ont. C.A.). However, that case authority is dated, particularly since it arose prior to the establishment of the Anns/Cooper framework in 2001. Nor do the other cases referred to by Mr. Homan's counsel support that there is well-established precedent in this context such that the Anns/Cooper analysis need not be conducted. Both *Frazier v. Kendall*, 2021 BCSC 1791 and *Imperial Metals Corporation v. Knight Piésold Ltd.*, 2018 BCSC 1191 are plainly distinguishable on the pleadings and the legislation under consideration.
- [40] I conclude that there is no well-established precedent that the College has a private law duty of care sufficient to describe it as falling within an established category of relationship.

Anns/Cooper First Stage: Reasonable Foreseeability and Proximity

- [41] Since the development of the Anns/Cooper framework, there has been an increased emphasis on the analysis of proximity as opposed to the issue of reasonable foreseeability. The Supreme Court of Canada was clear in indicating that reasonable foreseeability is not, on its own, sufficient to ground a prima facie duty of care: *Wu* at para. 50, citing *Cooper* at para. 42; *Deloitte* at paras. 32-36.
- [42] Neither of the parties have made substantial submissions on the issue of reasonable foreseeability. On the face of Mr. Homan's pleading, the College disputes that his injuries, as plead, were a reasonably foreseeable consequence of the College's alleged inaction in relation to Dr. Nemanishen. The real dispute between the parties centers on the issue of proximity.
- [43] In *Waterway Houseboats* at para. 243, the court set out that there are two stages to the proximity analysis when determining whether a duty of care is owed by a government regulator. The task under the first stage is to "determine whether the statutory scheme discloses a legislative intention to exclude or confer a private law duty of care". At the second stage, if the legislation is not determinative, courts must look to the interaction between the regulator and the plaintiff to determine whether a sufficiently close and direct relationship exists to impose a prima facie duty of care.

[44] The Court in *Waterway Houseboats* at para. 243 summarized the relevant considerations in this first stage:

Stage one: the legislative scheme

- The existence of a legislative scheme does not foreclose the possibility of finding proximity, but it is generally insufficient on its own to establish proximity: *Cobble Hill* at para. 66; *Wu* at para. 54.
- At the first stage, the task is to determine whether the statute discloses a legislative intention to exclude or confer a private law duty of care: *Cooper* at para. 43; *River Valley Poultry* at para. 66; and *Imperial Tobacco* at para. 44.
- The first step is to identify the purpose of the legislation: *Cooper* at para. 43; *Taylor* at para. 76; and *Imperial Tobacco* at para. 44.
- Public law duties aimed at the public good do not generally create private law duties, even if the plaintiff is a person who benefits from the proper implementation of the scheme: *Wu* at para. 56.
- However, a statutory duty to act can be a strong indicator of an intention to create a private law duty of care: *Fullowka* at paras. 37-55; and *Elder Advocates* at para. 72.
- A private law duty is unlikely to be recognized if it conflicts with the public authority's duty to the public: *Los Angeles Salad* at paras. 39-40; *Cobble Hill* at para. 66; *Taylor* at para. 78; *Wu* at para. 57; and *Imperial Tobacco* at para. 44.
- Where the legislative scheme requires the government actor to exercise its powers having regard to multiple interests, including both the public interest and private interests, the legislation cannot be interpreted as expressly prohibiting consideration of a regulated party's interests: *Carhoun* at para. 104.
- It may be inferred that the legislature did not intend to create a private law duty of care where a statutory scheme provides immunity to the regulator or creates remedies for injured parties other than tort remedies: *Taylor* at para. 78; and *River Valley Poultry* at para. 67.
- The proximity analysis considers specific and limited policy considerations arising from the statute itself. The object is to determine whether there is a sufficiently close relationship between the claimant and the government authority. At the first stage, the policy considerations are relevant as the court is considering whether the legislature imposed proximity on two persons who had never met each other: *Carhoun* at para. 96; and *Cooper* at paras. 37-39.

[45] Similarly, in *Held*, the court concluded it was "clear that where negligence is alleged against a public authority, a court must undertake a proximity analysis rooted in the governing statute": para. 18. Further, the court commented:

- [23] Courts will more readily find a private law duty of care where the regulator is under a statutory duty to act, as opposed to exercising only permissive powers: *Waterway* at paras. 229-30. In contrast, where a regulator acts in the public interest, courts will be reticent to recognize a private duty of care lest it conflict with this objective: *Waterway* at para. 228, citing *The Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency*, 2013 BCCA 34 at para. 55, leave to appeal ref'd [2013] S.C.C.A. No. 134 .
- [46] See also *Wu* at paras. 54-58 which discuss the general principles that apply to the recognition of private law duties of care owed by public regulators to private parties.
- [47] With those principles in mind, I now turn to the specific statutory provisions that apply, including those found in the Act, to determine if the imposition of a private duty of care is evident from those provisions.
- [48] The purpose of the Act is the protection of the public. Under s. 16(1) of the Act, the College is charged with the duty to: (a) serve and protect the public; and (b) exercise its powers and discharge its responsibilities under all enactments in the public interest.
- [49] The objects of the College are established by s. 16(2) of the Act and include:
- (a) to superintend the practice of the profession;
 - (b) to govern its registrants according to this Act, the regulations and the bylaws of the college;
 - (d) to establish, monitor and enforce standards of practice to enhance the quality of practice and reduce incompetent, impaired or unethical practice amongst registrants;
 - (e) to establish and maintain a continuing competency program to promote high practice standards amongst registrants;
 - (g) to establish, monitor and enforce standards of professional ethics amongst registrants;
 - (i.1) to establish and employ registration, inquiry and discipline procedures that are transparent, objective, impartial and fair;
- [50] Other relevant provisions found in the Act, as summarized by the College's counsel are:
- a) **Quality Assurance Program:** The College also operates quality assurance programs under s. 26.1 of the Act to remediate or enhance the competence of registrants. Section 26.1(2) provide that the Quality Assurance Committee, or an assessor appointed by that committee, may: (a) assess the professional performance of a registrant; and (b) inspect the records, including patient records, of the registrant that are related to professional performance. If the Quality Assurance Committee concludes after assessing a registrant's professional performance that there is a deficiency in the manner in which the registrant's practice is being conducted, it may only "recommend" that the registrant: (a) undertake further education or training, (b) undergo clinical or other examinations, or (c) undertake other remedial activities that it considers will assist the registrant to remedy the deficiency.

- b) Confidentiality: Section 26.2 of the Act prohibits the Quality Assurance Committee from disclosing records and information provided by a registrant or a self-assessment prepared by a registrant for the purposes of a quality assurance program. Section 26.2(2) requires the Committee to disclose information in limited circumstances. Section 26.2(3) requires the Committee to notify the Inquiry Committee if it considers the action necessary to provide the public in certain circumstances, including where there has been an act of "professional misconduct" or "demonstrated professional incompetence". In the latter event, it is treated as a complaint to the Inquiry Committee under s. 32 of the Act.

In addition, subject to a limited exception, s. 53(1) of the Act requires that a person preserve confidentiality with respect to all matters or things that come to the person's knowledge while exercising a power or performing a duty under this Act unless the disclosure is

- (a) necessary to exercise the power or to perform the duty, or
- (b) authorized as being in the public interest by the board of the college in relation to which the power or duty is exercised or performed.

Section 53(2) provides that a person must not be compelled to give evidence in court or in proceedings of a judicial nature concerning knowledge gained in the exercise of a power or in the performance of a duty under Part 2.1 or 3 of the Act (i.e., under ss. 26-40) except in the limited enumerated circumstances. Section 53(3) provides that records relating to the exercise of a power or the performance of a duty under Part 2.1 or 3 are not compellable in court or in proceedings of a judicial nature except in the same limited enumerated circumstances.

- c) Complaints: Under s. 32(1) of the Act, a person wishing to make a complaint against a registrant must deliver the complaint in writing to the Registrar. Under s. 32(2), the Registrar must deliver the complaint to the Inquiry Committee for disposition.
- d) Inquiry Committee: Under s. 33(1) of the Act, if a complaint is delivered to the Inquiry Committee, the Committee must investigate the matter "as soon as possible". In addition to investigating written complaints under s. 33, the Inquiry Committee has, under s. 33(4), the discretion to initiate investigations on its own motion, including in relation to professional misconduct or unprofessional conduct or competence to practice. The Act requires notice of such investigations to the registrant, who is entitled to respond with any information he or she believes should be considered in investigating the complaint: s. 33(5). After considering this information, and at the conclusion of an investigation, the Inquiry Committee may make one of four dispositions of the matter: (a) take no further action; (b) take any action it considers appropriate to resolve a matter between a complainant and a registrant; (c) act under s. 36 to seek a consent agreement with remedial terms; or (d) direct the issuance of a citation for a discipline hearing under s. 37: s. 33(6).

- e) **Extraordinary Action:** Under s. 35(1), the Inquiry Committee may, if it considers action necessary to protect the public during an investigation under s. 33, impose limits on conditions of the practice or suspend the registrant. Under s. 39.3, the Registrar must notify the public of any such action.
 - f) **Discipline Committee:** Under s. 37 of the Act, the Registrar must issue a citation for a hearing if directed by the Inquiry Committee or the board. Provisions relating to that hearing are addressed in ss. 38-39 of the Act.
- [51] As stated, the gravamen of Mr. Homan's claim is that the College should have undertaken its own investigation of Dr. Nemanishen and taken actions against him to curtail his practice, while also warning patients, such as Mr. Homan, of risks associated with that practice.
- [52] In my view, the purpose of the Act and the statutory scheme under the Act do not evince any legislative intent to impose a private law duty on the College. Inarguably, the primary objective of the scheme under the Act is to promote the public good, such that no relationship of proximity arises with the public generally: Wu at para. 57-58, 63. See also Waterway Houseboats at paras. 266-267.
- [53] I agree with the College that, when viewed as a whole, the Act confers broad discretion on colleges, including the College, to take certain actions against its registrants where it considers it to be in the public interest; however, there is no statutory duty imposed on colleges to act in any particular circumstances, including those raised by Mr. Homan: Waterway Houseboats at para. 243. See also Held at para. 33 which discussed the statutory provisions there that were largely "permissive in nature".
- [54] In Imperial Metals, the Court found that the mandatory duty of the Province under the Mines Act, R.S.B.C. 1996, c. 293 had arguably created a private law duty of care: paras. 111(b) and 122. However, as it relates to this matter:
- a) the College has no mandatory duty under the Act to initiate any kind of investigative, punitive, or remedial process: ss. 26.1(2) and 35(1)(4); and
 - b) there is no allegation here that the College has stepped outside of its role as regulator, unlike the case in Imperial Metals: paras. 111(a) and 122. Even if there was such an allegation, the Court in Imperial Metals found that this was a persuasive reason only in conjunction with the fact that there was a mandatory duty to initiate a remedial process under the legislation: para. 111. In any case, even if either of these factors were present in this case, the Court in Waterway Houseboats confirmed that that there must in any case be a specific and "direct" interaction between the regulator and the claimant: paras. 274-277.
- [55] Both types of allegations were recognized as "examples" of circumstances that point to the existence of a proximate relationship: Waterway Houseboats at para. 273.

- [56] I also agree with the College that the circumstances considered in *Cooper* are similar to those raised here. In *Cooper*, the Court was considering whether the Registrar of Mortgage Brokers owed a duty to investors of the mortgage broker. At para. 44, the Court notes that the Registrar's duty was to the public as a whole, and any duty to individual investors would potentially conflict with that duty. The statutory scheme was similar to that found in the Act, which provided for investigatory actions and a hearing process.
- [57] In *Cooper*, the plaintiff was an investor who alleged that the Registrar of Mortgage Brokers was negligent in failing to oversee the conduct of a licensed investment company. The pleadings asserted the Registrar had been aware of the violations of the Mortgage Broker Act, R.S.B.C. 1996, c. 313, but failed to suspend the company's license and otherwise failed to notify investors that the company was under investigation. Had those steps occurred, the plaintiff alleged she could have avoided or mitigated her losses: para. 5.
- [58] In *Cooper*, the Court rejected that any such duty existed on the part of the Registrar, even though the Registrar might reasonably have foreseen that losses to the plaintiff would occur if the company was permitted to practice. The Court specifically noted that such a duty would no doubt come at the expense of other important interests, of efficiency, and at the expense of public confidence in the system as a whole: paras. 49-50.
- [59] These other interests not only include the public generally, but also the interests of the registrant, in terms of that person's rights in relation to inquiry and discipline procedures that are intended to be "transparent, objective, impartial and fair": Act, s. 16(2)(i.1). These other interests are also engaged as a result of the confidentiality requirements under the Act: ss. 26.2(1)-(3) and 53. As the cases discuss, the "quasi-judicial" decision-making function of both the Quality Assurance Committee, the Inquiry Committee and the Discipline Committee belie any such duty in favour of a patient, as alleged by Mr. Homan, that would disregard that function: *Cooper* at para. 52. This same point was made in *Rogers* at para. 21.
- [60] As noted by the College's counsel, the same conclusion was reached in *Edwards* (para. 14) and *Walkom* (para. 70) with respect to the statutory scheme relating to regulators of legal professionals in Ontario and BC, respectively. In *Edwards*, the plaintiffs alleged that the Law Society of Upper Canada failed to properly investigate the lawyer once it had notice of his trust accounting irregularities and "failed to warn beneficiaries": para. 4. The Court found no duty arose: para. 18. In *Walkom*, the court concluded that there was "no basis" to ground sufficient proximity between the plaintiff and the Law Society of BC under the Legal Profession Act, S.B.C. 1998, c. 9: paras. 69-70. As with *Cooper*, the statutory provisions addressed in *Walkom* and *Edwards* were directed toward the protection of the public, like the Act.
- [61] A further factor to be considered in the proximity analysis is whether the Act contains any applicable immunity provisions, that might indicate a legislative intent to impose a private law duty.

[62] Section 24 of the Act provides statutory immunity to the College's employees, agents, and officers with respect to the exercise of powers under the Act done in good faith:

24(1) No action for damages lies or may be brought against a member of a board or a person acting on behalf of or under the direction of a board or college because of anything done or omitted in good faith

- (a) in the performance or intended performance of any duty under this Act, or
 - (b) in the exercise or intended exercise of any power under this Act.
- (2) Subsection (1) does not absolve a college from vicarious liability for an act or omission for which it would be vicariously liable if this section were not in force.

[63] In addition, ss. 1 and 2 of the Disciplinary Authority Protection Act, R.S.B.C. 1996, c. 98 [DAPA], establish statutory limits to negligence claims against the College as a corporation while undertaking its investigative and disciplinary powers:

1. If,
 - (a) by an Act a corporation is established having as one of its purposes the regulation of the profession or occupation practised or carried on by the members of the corporation, and
 - (b) disciplinary powers over the members of the corporation in respect of their conduct in the profession or occupation regulated are conferred by the Act on the corporation, or on any body of its members, or on any official or member of the corporation,

no liability is incurred by the corporation, or by any body of the members, or by any official or member of the corporation, or by any person retained as counsel, solicitor or agent by the corporation for any act or thing done in the exercise of the disciplinary powers conferred or in doing any act or thing in preparation for the exercise of those powers, unless the act or thing is done maliciously and without reasonable and probable cause.

2. If any action is brought in respect of any act or thing referred to in section 1, the plaintiff expressly alleges in the pleadings that the act or thing was done maliciously and without reasonable and probable cause, and if at the trial of the action, on the general issue being pleaded, the plaintiff fails to prove the allegation, the action must be dismissed.

[64] The case authorities are replete with comments that the presence of such immunity provisions in the governing statute may further support the conclusion that no private duty of care can be said to have been intended through the legislative scheme: Cooper at paras. 44-45 and 48; Edwards at paras. 16-17; Waterway Houseboats at paras. 243 and 265; and Jack at paras. 12-17. In Waterway Houseboats at para. 243, when describing the legislative scheme, the court stated, in part:

It may be inferred that the legislature did not intend to create a private law duty of care where a statutory scheme provides immunity to the regulator or creates remedies for injured parties other than tort remedies.

[Citations omitted.]

- [65] The DAPA was specifically considered by the court in Walkom in addition to the relevant statutory immunity provision found in the Legal Profession Act, S.B.C. 1998, c. 9. In that case, the plaintiff's failure to plead a lack of good faith on the part of the Law Society was one basis upon which his claim failed to disclose any reasonable cause of action: paras. 32-33, 38 and 57.
- [66] As noted above, Mr. Homan's claim includes allegations that the College "failed to act in good faith" or was "reckless and grossly negligent" in various ways, parroting what was alleged in the pleading considered in McClelland. Mr. Homan's counsel suggests that this pleading alone is sufficient to raise a serious or genuine issue to be tried in respect of the College.
- [67] I disagree. As noted by the College, the Court in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 [Elder Advocates] addressed bad faith claims against the government of Alberta in the context of negligence claims relating to the performance of its statutory duties. After finding that no duty of care arose in respect of the negligence claims, the Court similarly dismissed the bad faith claim that was connected to that claim. The Court stated:
- [77] I agree with the Province's submissions that the allegation of bad faith, as pleaded, is bootstrapped to the duty of care claim, and cannot survive on its own when the plea of negligence is struck. The pleadings disclose the explicit link between bad faith and negligence
- [78] The law does not recognize a stand-alone action for bad faith. As the certification judge noted, at para. 408, the bad faith exercise of discretion by a government authority is properly a ground for judicial review of administrative action. In tort, it is an element of misfeasance in public office and, in employment law, relevant to the manner of dismissal. The simple fact of bad faith is not independently actionable.
- [68] These comments in *Elder Advocates* are apposite here. Mr. Homan's bad faith claim is a bare assertion of bad faith and is integrally linked to his allegations of negligence against the College in respect of what is said to have been a failure to investigate Dr. Nemanishen's prescribing practices and failure to act in respect of those practices.
- [69] This same approach is found in *Nette* at para. 30:
- [30] Although bad faith against ACAC is pled, I do not accept that this bare pleading, without more, is sufficient to create a duty of care if it otherwise does not exist. In *Williams*, at para. 28 [*Williams v. Canada (Attorney General)*, 2009 ONCA 378] the Court adopted the analysis of the motions judge who found:

... that to the extent the plaintiff relied on alleged negligence "involving, or calling [page 414] for, policy decisions," those allegations could not be saved by "the unparticularized assertion that... [the policy decisions] were made irrationally or in bad faith."

[70] See also *Yashcheshen* at para. 39 where the Saskatchewan court rejected that the use of the term "bad faith" in order to avoid the immunity provision did not provide any independent basis for the claim where there no private duty of care was found.

[71] The same can be said for the reasoning found in *Walkom*. Justice Fisher stated that the immunity clauses in the legislation were still a relevant factor in the proximity analysis based upon the plaintiff's failure to plead that the Law Society failed to act in good faith. However, I take the reasoning in that decision to be that even if a lack of good faith had been pled--with the potential avoidance of the immunity clauses in the legislation--the court still found that no private duty of care arose under the proximity analysis. On both of those bases--lack of any pleading of bad faith and that no duty of care arose in the circumstances--the claim against the Law Society failed: *Walkom* at para. 80.

[72] In summary, based on a review of the Act in the face of Mr. Homan's allegations, no private duty of care can be said to arise, either expressly or by implication, from the legislative provisions alone.

[73] Assuming the Act is not determinative, the next step is to consider whether there were any specific interactions between Mr. Homan and the College.

[74] The comments of the court in *Waterway Houseboats* at para. 243 are of assistance in summarizing the relevant considerations:

Stage two: interactions between the parties

- If the legislative scheme is not determinative, courts then consider the specific circumstances of the interactions between the regulator and the plaintiff to determine if a close and direct relationship exists sufficient to establish proximity: *Imperial Tobacco* at para. 50; and *Taylor* at para. 79.

- Findings of proximity based on the interactions between the regulator and the plaintiff are necessarily fact-specific: *Taylor* at para. 80.

- Proximate relationships may involve physical closeness, direct relationships or interactions, or the assumption of responsibility; or may turn on expectations, representations, reliance, or the nature of property or other interests involved. In short, proximity recognizes those circumstances in which one individual comes under an obligation to have regard for the interests of another so as to be required to take care not to act in a manner that would cause injury to those interests: *Cooper* at paras. 32-34; and *Wu* at para. 51.

- Courts have found a duty of care where there is a relationship and connection between the regulator and individual that is distinct from, and more direct than, the relationship between the regulator and that part of the public affected by the regulator's work: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 [Hill] at para. 33; *Fullock* at paras. 44 and 55; and *Taylor* at paras. 80-87.
- Courts have also found interactions between the plaintiff and regulator to create a duty of care where the nature of the duty imposed by the legislative scheme is consistent with the existence of a private law duty to an individual plaintiff: *Taylor* at para. 88; and *Hill* at paras. 36-41.
- Policy has a more limited role at the second stage of the proximity analysis where the regulator and the regulated party are in a direct transactional relationship: *Cooper* at paras. 37-39; and *Carhoun* at para. 96.

[75] As above, the court in *Waterway Houseboats* states that this aspect of proximity is fact specific. In *Cooper* (adopted as the proper approach in *Waterway Houseboats* at para. 272), the Court states:

[34] Defining the relationship may involve looking at expectations, representations, reliance and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care upon the defendant.

[76] Courts have found that a private law duty may arise from specific interactions between the public authority and the plaintiff sufficient to create the necessary proximity: *Waterway Houseboats* at para. 243; *Walkom* at para. 68; and, *Wu* at paras. 59 and 70.

[77] Mr. Homan's pleadings do not indicate that he had any direct relationship with the College. He did not file any complaint under s. 32 of the Act. He does not allege any representation, let alone a misrepresentation, by the College to him upon which he relied. Mr. Homan does not allege that any interactions between him and the College gave rise to any expectations. Simply put, Mr. Homan does not allege that he had any contact or direct interaction with the College in relation to his doctor-patient relationship with Dr. Nemanishen.

[78] Mr. Homan's counsel appears to suggest that his claim comes within one of the "exceptions" described by Justice Branch in *Imperial Metals* at para. 109 to support that certain types of interactions with the plaintiff and the regulator can support a finding of proximity. As I note above, the Court in *Waterway Houseboats* at para. 273 described that these were simply examples of situations where the facts pointed to a degree of proximity to support the claim. Even so, I found that these examples do not apply to the circumstances of the Mr. Homan.

[79] All of these arguments - including that others may have lodged complaints against Dr. Nemanishen - were considered and rejected by this Court in Lenning at paras. 38-39. Mr. Homan's allegations, even if true, do not establish any specific interactions between the College and Mr. Homan to ground a proximity finding.

[80] I conclude that Mr. Homan has also failed in establishing any proximity to the College that would give rise to a duty of care, based on a failure to plead material facts which, if true, would ground a finding of specific interactions between him and the College.

Anns/Cooper Second Stage: Residual policy concerns

[81] Even if Mr. Homan established a prima facie duty of care under the first stage, the Court is required to consider whether any policy concerns arise apart from any relationship between the parties.

[82] In Cooper, the Court described the issues at para. 37 as follows:

This brings us to the second stage of the Anns test. As the majority of this Court held in Norsk, at p. 1155, residual policy considerations fall to be considered here. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized? Following this approach, this Court declined to find liability in Hercules Managements, supra, on the ground that to recognize a duty of care would raise the spectre of liability to an indeterminate class of people.

[83] I agree with the College that these considerations also point to negating any such duty of care on the part of the College.

[84] Firstly, Mr. Homan seeks damages from the College and Dr. Nemanishen for the same injuries. However, Mr. Homan is afforded a remedy under the law against Dr. Nemanishen, who also faces allegations of negligence and who, presumably, does not dispute that he owed Mr. Homan a duty of care: Wu at para. 79.

[85] Further, as with all BC physicians, any liability on the part of Dr. Nemanishen would be covered under professional liability insurance, as is required by the College's bylaws: s. 4-10 of the bylaws of the College. See also Edwards at para. 15.

[86] Secondly, public policy concerns arise in respect of the College balancing the public and private interests in the "quasi-judicial" process under the Act: Cooper at para. 52. A duty of care owed to Mr. Homan, or other patients, would potentially conflict with the College's public law duties as a regulator. This public policy factor militates against the recognition of such a duty.

- [87] Thirdly, imposing a duty of care here would also raise the specter of indeterminate liability, such as was discussed in *Cooper* at para. 54.
- [88] The College refers to the comments in *Carlstrom v. Professional Engineers Ontario*, 2004 CanLII 24763 (Ont. S.C.J.), aff'd 2004 CanLII 34509 (Ont. C.A.) at para. 9 that to recognize such a duty in similar circumstances would effectively make the governing authority:
- an insurer of every client of every engineer or complainant respecting an engineers' conduct.
- [89] Those comments are apposite here, where recognizing a duty on the part of the College would effectively make the College an insurer of every doctor in relation to every patient dissatisfied with the doctor's conduct, including in relation to the prescribing practices of that physician.
- [90] The Court in *Cooper* at para. 55 recognized that this entailed a risk of substantial cost to the public, if such a duty arose. As in *Cooper*, I cannot discern any intention under the Act to impose such a duty so as to backstop the liability of doctors. This same concern arose in *Elder Advocates*, where the Court stated that the claim against the government under its health care regime would also fail under the second stage:
- [74] . Related to this concern is the fear of virtually unlimited exposure of the government to private claims, which may tax public resources and chill government intervention. It is arguable that to impose a duty of care on the plaintiff class on the facts pleaded would open the door to a claim in negligence by any patient in the health care system with an entitlement to receive funding for health services, whether primary or extended. This raises the spectre of unlimited liability to an unlimited class, decried by Cardozo C.J. in *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), at p. 444: see *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, at paras. 59-66.
- [91] Mr. Homan's response to this point is that any liability on the part of the College cannot be said to be "indeterminate" liability since *McClelland*, *Walkom*, and the DAPA require an "enhanced" standard of proof requiring a lack of good faith or "recklessness".
- [92] In my view, this is not a complete answer to this concern of indeterminate liability. Again, whether the actions of the College are said to arise from negligence simpliciter or "bad faith", the public policy aspects of the Act, supplemented by the DAPA, serve to confirm that the College was never intended by the legislature to stand as a backstop insurer to any doctor. It would be illogical to consider such immunity provisions in the context of a review of the Act as a whole toward discerning the intent of the Legislature not to impose a duty, yet consider those same immunity provisions as part of public policy concerns to support that such a duty exists given the limitations under those provisions.

- [93] In my view, these concerns about indeterminate liability are well founded. I agree with the College that any duty could create a degree of indeterminate liability for the College and that it cannot be reconciled with the legislative intent of the scheme under the Act: Wu at paras. 74-78; Deloitte at paras. 40-45. These factors militate against the recognition of such a duty.
- [94] In conclusion, if I was required to move to a consideration of public policy considerations under the second stage of the Anns/Cooper test, I find that these considerations militate in favour of negating any such private law duty on the part of the College owed to Mr. Homan.

REPLY PLEADING

- [95] In the alternative, the College also filed a notice of application seeking to strike portions of Mr. Homan's reply pleading.
- [96] On December 17, 2020, the College filed a Response to Civil Claim (RTCC) which I understand was substantively a pro forma pleading.
- [97] On March 16, 2021, the College filed its Amended RTCC. That document revealed that, in fact, during the time that Mr. Homan was Dr. Nemanishen's patient, the College had been reviewing Dr. Nemanishen's prescribing practices to some extent. In addition, the College's pleading revealed that, during that same time, the Inquiry Committee of the College had opened an investigation of Dr. Nemanishen's practice of prescribing opioids. That investigation was ongoing when Mr. Homan ceased to be a patient and it was never concluded because Dr. Nemanishen retired in January 2019.
- [98] On June 9, 2021, Mr. Homan filed a reply pleading. Mr. Homan's counsel agrees that para. 1 should be struck. Further, in that reply pleading (paras. 7-12 and 18-19), Mr. Homan alleges further substantial allegations against the College. These further allegations are substantially the same as those in the NOCC, but now relate specifically that allegations that the College knew and was familiar with Dr. Nemanishen's opioid prescribing practices from 2011.
- [99] The College seeks an order striking out paras. 7-12 and 18-19 of Mr. Homan's reply. In addition to repeating its argument on the lack of duty of care, the College says that these portions of the reply pleading are not responsive to its RTCC, contain argument, are embarrassing, unnecessary and irrelevant, and disclose no reasonable cause of action. Finally, the College says that many of these paragraphs simply seek to amend or "bolster" Mr. Homan's claim by adding additional allegations.
- [100] The College relies on the reasoning found in *Certus Strategies (British Columbia) Corporation v. Insurance Corporation of British Columbia*, 2005 BCSC 608 where similar issues arose. In that decision, Justice Goepel (as he then was) found that the reply pleading was not responsive, repeated allegations from the notice of civil claim and purported to supplement or amend a notice of civil claim. He concluded that the pleading was "embarrassing" and ought to be struck:

- [20] Unfortunately, the plaintiffs' reply does not meet that standard. I have reviewed in detail the schedule prepared by the defendant setting out its objections to the various paragraphs in the reply. I agree that most of the defendant's objections are well-founded. The reply contains a mixture of material facts, argument and evidence. It is often not responsive to the statement of defence and repeats allegations found in the statement of claim. It raises new causes of action and in some instances attempts to amend or clarify the statement of claim.
- [21] In my view, the reply is an embarrassing pleading. It contains much that is unnecessary and irrelevant. It is constructed in a manner which makes it difficult to answer. It will hamper a speedy, just and efficient determination of this case on the merits.
- [101] Another issue arises with respect to Mr. Homan's reply pleading.
- [102] Rule 3-6(1) provides that a plaintiff may, within seven days after the response to civil claim has been served, file and serve on all parties of record a reply that accords with Rule 3-7. No subsequent pleadings are permitted to be filed by a defendant without leave of the court: Rule 3-6(2).
- [103] Accordingly, to the extent that the reply contains new allegations, the College is prejudiced since it is unable to file any further amended RTCC, without leave of the Court.
- [104] In his written argument, Mr. Homan's counsel casts paras. 7-12 and 18-19 of the reply simply as material facts to assert a postponement of the limitation period.
- [105] As noted by the College's counsel, Mr. Homan's reply pleading is inextricably tied to the Amended RTCC, which is tied to the NOCC. As such, if the College is successful in its application to establish that no duty of care arose, this further application to strike the reply becomes unnecessary. The reply - even if the impugned paragraphs just relate to the limitation issue - does not have any independent status if the original NOCC is struck as against the College.
- [106] In any event, the allegations in the reply suffer from the same difficulty in that no duty of care arose on the part of the College in respect of Mr. Homan relating to his doctor-patient relationship with Dr. Nemanishen.
- [107] Accordingly, I will not address this alternative argument relating to the reply given my conclusions on the Anns/Cooper test, as above.

CONCLUSION

- [108] I find that it is plain and obvious that Mr. Homan's Notice of Civil Claim contains no reasonable cause of action as against the College. That pleading is struck in its entirety as it relates to the College, without leave to amend.
- [109] The College is awarded its costs of this action on the usual scale.

"Fitzpatrick J."

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