TAB 7

necessary to keep in step with evolving commercial reality and that it will not have unwarranted far-reaching effects.

VII. Application of the Sealed Contract Rule to the Mortgage in this Case

[53] Final Note's officer affixed the corporation's seal to the mortgage at issue in this case; it was argued at trial that it is necessary to determine whether Final Note intended to create a sealed instrument in doing so. However, the mortgage is in the form prescribed under the *LRRA* and is subject to its provisions. Section 13(1) of the Act has the effect of deeming all instruments governed by its provisions to be documents under seal, for all purposes. It is not in dispute that "person" as used in s. 13(1) of the Act means both individuals and corporations. Section 13(1) of the Act, therefore, has the substantive effect of deeming the mortgage to be an instrument under seal for all purposes, including the application of the sealed contract rule. Notwithstanding Final Note's intention in affixing its corporate seal to the mortgage, the sealed contract rule applies. The only parties to the mortgage are Final Note and FED. Since only the parties to an instrument under seal may be sued upon it, the appellant cannot maintain an action on the covenant in the mortgage against the respondent group of beneficial owners.

VIII. Disposition

[54] I would dismiss the appeal with costs.

Appeal dismissed.

Forget v. Sutherland

Court File No. C32601

Ontario Court of Appeal
Osborne A.C.J.O., Laskin and Borins JJ.A.

Heard: February 1, 2000
Judgment rendered: July 5, 2000

Professions — Physicians and surgeons — Discipline — Patient making complaint of sexual abuse to college — Also bringing civil action against physician for damages — Terms of settlement for civil action including physician's periodic payments and patient's recantation of allegations —

Patient bringing action when doctor halted payments — Physician's statement of defence referring to patient's complaint to college and subsequent recantation — Patient seeking to strike out pleadings — Documents prepared for professional disciplinary proceeding inadmissible in civil action — Regulated Health Professions Act, 1991, S.O. 1991, c. 18, s. 36(3).

Civil procedure — Pleadings — Statement of defence — Striking out — Patient bringing action against physician for sexual assault — Physician filing statement of defence with reference to patient's complaint to college of physicians and surgeons and subsequent recantation — Patient seeking to strike out these pleadings — Motions judge granting patient's motion on ground that the pleadings disclosed no defence — Preferable to strike out pleadings as resulting in prejudice or delay — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 21.01(1)(b), 25.11.

A patient made a complaint to the college of physicians and surgeons alleging that a doctor had sexually abused her. She also brought an action for damages against the doctor for sexual assault and breach of fiduciary duty. The civil action was settled on the basis that the doctor would pay the patient a series of payments over time, and that the patient would recant her allegations. The college was advised of the recantation and the complaint against the doctor was withdrawn. The doctor then refused to make any more payments under the settlement. The patient brought an action for the balance owing. The doctor's statement of defence alleged that the patient's complaints of sexual abuse were made fraudulently and in bad faith. The patient brought a motion to strike out the portion of the doctor's pleadings that referred to the patient's complaint to the college and her subsequent recantation. Rule 21.01(1)(*b*) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, permitted a party to move to strike out pleadings on the ground that they disclosed no defence. Rule 25.11 permitted the court to strike out pleadings that might prejudice or delay the fair trial of the action. The motions judge granted the motion under rule 21.01(1)(*b*), relying on s. 36(3) of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, which provided that any document prepared for a professional disciplinary proceeding against a doctor was inadmissible in a civil proceeding. The doctor appealed to the Ontario Court of Appeal.

Held, Borins J.A. dissenting, the appeal should be dismissed.

Per Laskin J.A., Osborne A.C.J.O. concurring: Although the settlement documents did not refer to the college proceedings, they were prepared for use in the disciplinary proceedings and were inadmissible in the civil action. The wording of s. 36(3) contained no exception for fraud or bad faith. To depart from the ordinary meaning by reading such an exception into the section would defeat the statutory purpose of encouraging the reporting of professional abuse. The purpose of s. 36(3) was to prevent not just patients but all participants from using documents generated for college proceedings in civil actions. Complaints made in bad faith could be dealt with effectively in the college discipline process. It was not premature for the motions judge to strike out the contested portions of the pleading prior to trial.

However, the motion should have been decided under rule 25.11. It was incorrect to decide the issue under rule 21.01(1)(*b*), because the doctor was entitled to maintain the defence of fraud, despite being unable to prove it by introducing evidence of the complaint and recantation.

Per Borins J.A. dissenting: It was an error to confuse pleading and proof, and the motions judge should not have assumed the role of a trial judge in determining the admissibility of relevant evidence. There was no reason to strike out the impugned portions of the pleading under rule 21.01(1)(*b*) because they disclosed a reasonable defence to the patient's claim. It might be that at trial s. 36(3) would preclude the doctor from introducing certain documentary evidence, but this did not preclude him from pleading such facts. Evidence might be available to prove the facts that did not offend s. 36(3), which excluded only a limited class of documentary evidence.

Cases referred to

By Laskin J.A.

B. (J.L.) v. Dr. B. (E.J.) (1997), 13 C.P.C. (4th) 206 — **refd to**
Macartney v. Warner (2000), 183 D.L.R. (4th) 345, 16 C.C.L.I. (3d) 8, 48 C.C.L.T. (2d) 19, 50 M.V.R. (3d) 108, *sub nom. Macartney v. Islic*, 46 O.R. (3d) 641, 129 O.A.C. 96, 93 A.C.W.S. (3d) 1016, [2000] O.J. No. 30 (QL) — **refd to**
Morguard Properties Ltd. v. Winnipeg (City) (1983), 3 D.L.R. (4th) 1, [1983] 2 S.C.R. 493, 24 M.P.L.R. 219, [1984] 2 W.W.R. 97, 25 Man. R. (2d) 302, 50 N.R. 264 — **refd to**
R. v. Calder (1996), 132 D.L.R. (4th) 577, 105 C.C.C. (3d) 1, [1996] 1 S.C.R. 660, 46 C.R. (4th) 133, 34 C.R.R. (2d) 189, 90 O.A.C. 18, 194 N.R. 52, 30 W.C.B. (2d) 180 — **refd to**
Roman Corp. v. Hudson's Bay Oil & Gas Co. (1971), 23 D.L.R. (3d) 292, [1972] 1 O.R. 444; affd 36 D.L.R. (3d) 413, [1973] S.C.R. 820 — **refd to**

By Borins J.A. (dissenting)

Air India Flight 182 Disaster Claimants v. Air India (1987), 44 D.L.R. (4th) 317, 62 O.R. (2d) 130, 6 A.C.W.S. (3d) 343
B. (J.L.) v. Dr. B. (E.J.) (1997), 13 C.P.C. (4th) 206
Brydon v. Brydon, [1951] O.W.N. 369
Duryea v. Kaufman (1910), 21 O.L.R. 161
Godman v. Times Publishing Co., [1926] 2 K.B. 273
Hunt v. Carey Canada Inc. (1990), 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, 117 N.R. 321, *sub nom. Hunt v. T & N plc*, 23 A.C.W.S. (3d) 101
M. (A.) v. Ryan (1997), 143 D.L.R. (4th) 1, [1997] 1 S.C.R. 157, 34 C.C.L.T. (2d) 1, 8 C.P.C. (4th) 1, 4 C.R. (5th) 220, 42 C.R.R. (2d) 37, [1997] 4 W.W.R. 1, 138 W.A.C. 81, 29 B.C.L.R. (3d) 133, 207 N.R. 81, 68 A.C.W.S. (3d) 835
Millington v. Loring (1880), 6 Q.B.D. 190
Montreal Trust Co. of Canada v. Toronto-Dominion Bank (1992), 40 C.P.C. (3d) 389, 34 A.C.W.S. (3d) 38
R. v. Mills (1999), 180 D.L.R. (4th) 1, 139 C.C.C. (3d) 321, [1999] 3 S.C.R. 668, 28 C.R. (5th) 207, 69 C.R.R. (2d) 1, [2000] 2 W.W.R. 180, 209 W.A.C. 201, 75 Alta. L.R. (3d) 1, 244 A.R. 201, 248 N.R. 101, 44 W.C.B. (2d) 124

Redmond v. Stacey (1917), 13 O.W.N. 79; affd 13 O.W.N. 179
Roman Corp. v. Hudson's Bay Oil & Gas Co. (1971), 18 D.L.R. (3d) 134, [1971] 2 O.R. 418; affd 23 D.L.R. (3d) 292, [1972] 1 O.R. 444; affd 36 D.L.R. (3d) 413, [1973] S.C.R. 820
Sentinel-Review Co. Ltd. v. Robinson, [1927] 2 D.L.R. 60, 60 O.L.R. 93, 31 O.W.N. 356

Statutes referred to

Canadian Charter of Rights and Freedoms
s. 24(2)
Medicine Act, 1991, S.O. 1991, c. 30
Regulated Health Professions Act, 1991, S.O. 1991, c. 18
s. 4
s. 36 [am. 1993, c. 37, s. 1; 1996, c. 1, Sch. G, s. 27; 1998, c. 18, Sch. G, s. 7]
s. 38 [am. 1998, c. 18, Sch. G, s. 8]
Schedule 1
Schedule 2, *Health Professions Procedural Code*,
s. 1.1 [enacted 1993, c. 37, s. 5]
ss. 25-70, as amended

Rules referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
rule 21.01(1)(*b*)
rule 21.01(2)(*b*)
rule 25.06(1)
rule 25.06(8) [rep. & sub. 61/96, s. 1]
rule 25.07(4)
rule 25.11

Authorities referred to

Driedger on the Construction of Statutes, 3rd ed., by Ruth Sullivan (Markham, Ont.: Butterworths, 1994)
Ontario: *Striking a New Balance: A Blueprint for the Regulation of Ontario's Health Professions: Recommendations of the Health Professions Legislation Review*, Chair Alan Schwartz (Toronto: Ministry of Health, Ontario, 1989)
Watson, Garry D. and Craig Perkins, *Holmested and Watson: Ontario Civil Procedure*, Vol. II (Toronto: Carswell, 1984) (looseleaf)

APPEAL from an order of the Ontario Divisional Court, 174 D.L.R. (4th) 174, 28 C.P.C. (4th) 149, 122 O.A.C. 317, 87 A.C.W.S. (3d) 657, upholding an order of Sanderson J., 72 A.C.W.S. (3d) 255, striking out portions of pleadings in a statement of claim that referred to a complaint to a college of physicians and surgeons and its subsequent recantation.

R. Manes and *D. Embury*, for appellant.
S. Vella and *J. Eades*, for respondent.

[1] LASKIN J.A. (OSBORNE A.C.J.O. concurring):—This appeal concerns the application of s. 36(3) of the *Regulated Health Professions Act, 1991*,[1] which provides that any document prepared for a professional discipline proceeding against a doctor is inadmissible in a civil action.

[2] The respondent, Murielle Forget, was a patient of the appellant, Dr. Norman Sutherland. She made a written complaint to the College of Physicians and Surgeons alleging that he had sexually abused her. She also sued him for damages for sexual assault and breach of fiduciary duty. The civil action was settled on Dr. Sutherland agreeing to pay Ms. Forget $500,000, by a series of payments over time. When the action was settled Ms. Forget signed a sworn statement recanting her allegations of sexual abuse. The College was advised of the recantation and the complaint against Dr. Sutherland was withdrawn. He then refused to make any more payments under the settlement.

[3] Ms. Forget issued a statement of claim for the balance owing. Dr. Sutherland delivered a statement of defence and counterclaim in which he alleged that Ms. Forget's complaints of sexual abuse were made fraudulently and in bad faith and that the settlement was void. In several paragraphs of his pleading he referred to Ms. Forget's written complaint to the College and her subsequent recantation. She brought a motion to strike out these paragraphs. Sanderson J. granted the motion, relying on s. 36(3) of the Act [summarized 72 A.C.W.S. (3d) 255]. Her decision was upheld by the Divisional Court [reported 174 D.L.R. (4th) 174]. Dr. Sutherland appeals to this court with leave. His two main arguments are that the admissibility of the complaint and recantation should be left to the trial judge and that s. 36(3) does not apply when fraud or bad faith is alleged. For the reasons that follow I would dismiss the appeal.

THE FACTS

[4] The facts used on the motion were taken from the pleadings and the documents referred to in the pleadings. For the purpose of the motion the allegations in the pleadings were accepted as true.

[5] The pleadings disclose that Dr. Sutherland became Ms. Forget's family doctor in 1976 and that he last treated her in December 1986. Ms. Forget worked for Dr. Sutherland in his family

practice clinic between April 1985 and 1987. In the summer of 1986 they began a sexual relationship, which ended in June 1992.

[6] In August 1993 Ms. Forget filed a complaint with the College of Physicians and Surgeons alleging that Dr. Sutherland had sexually harassed her, had forced her to have sexual intercourse without her consent, and had subjected her to sexual, emotional, mental and physical abuse for ten years. In November 1994 Ms. Forget sued Dr. Sutherland, making the same allegations as she had made to the College, and claiming damages for sexual assault and battery, breach of fiduciary duty, and intentional infliction of mental suffering.

[7] The parties settled the lawsuit in September 1995. They signed minutes of settlement under which Dr. Sutherland agreed to pay Ms. Forget $500,000 by weekly payments of $1,000 between October 1995 and December 1996, and a final payment of $436,000 on January 7, 1997. The payments were secured by Dr. Sutherland's interest in a real estate limited partnership. The consideration for the $500,000 was said to be "the loss of economic opportunity that she [Ms. Forget] perceives was promised to her".

[8] The minutes of settlement expressly recognized that Dr. Sutherland's ability to make the weekly payments depended on his ability to practise medicine. If he lost his license to practise the weekly payments would be suspended. The minutes of settlement also provided that if Dr. Sutherland defaulted on his payment obligations, Ms. Forget could sue for the balance owing on a motion for summary judgment. Dr. Sutherland could defend the motion only by disputing the amount owing or by showing that Ms. Forget had not kept the settlement and its terms confidential. Ms. Forget and Dr. Sutherland acknowledged that they had signed the minutes of settlement "voluntarily and without any duress or coercion", and that they had received legal advice "concerning the terms and ramifications" of the settlement.

[9] The minutes of settlement did not refer to the complaint filed by Ms. Forget with the College of Physicians and Surgeons. However, when the parties signed the minutes of settlement, Ms. Forget also signed a sworn statement in which she recanted all of her allegations of sexual abuse against Dr. Sutherland. She swore that their sexual relationship was consensual, that it started after their

doctor-patient relationship ended, and that her previous claims of sexual abuse were untrue. Ms. Forget's counsel wrote the College that her client had recanted her allegations against Dr. Sutherland. The complaint was withdrawn on October 23, 1995.

[10] Dr. Sutherland made weekly payments totalling $56,000 until the end of November 1996. He then defaulted and Ms. Forget sued for the balance owing of $444,000.

[11] Dr. Sutherland defended the action by asserting that the settlement had been obtained by fraud and undue influence, that it was unconscionable, and that it was contrary to public policy and therefore void. In essence, Dr. Sutherland's defence was that, both in civil proceedings and before the College, Ms. Forget had knowingly and in bad faith made false and inflammatory allegations capable of destroying his personal and professional life to extort money from him. He counterclaimed for a declaration that the settlement was invalid, repayment of the money he had paid Ms. Forget and damages for malicious prosecution.

[12] In paragraphs 11, 12, 15, 16, 19 and 20 of his statement of defence and counterclaim — which are the paragraphs of the pleading in question on this appeal — Dr. Sutherland referred to Ms. Forget's original complaint to the College and to her subsequent sworn recantation. In paragraph 11 Dr. Sutherland pleads that in August 1993 Ms. Forget made a formal complaint to the College alleging that he "had subjected her to sexual, emotional, mental and physical abuse for a period of 10 years"; in paragraph 12 he pleads that Ms. Forget submitted a 23-page signed statement to the College in which she made numerous allegations of improper conduct; in paragraph 15 he pleads that Ms. Forget's allegation both to the College and in her civil action were part of a fraudulent scheme to extort money from him by threatening him with professional and personal humiliation and ruin; then in paragraph 19 he pleads that Ms. Forget signed a sworn statement recanting most of her allegations. The salient parts of paragraph 19 are as follows:

> 19. On September 5, 1995 the Plaintiff executed a sworn statement recanting all or substantially all of the allegations which she had levelled against Dr. Sutherland. In particular, the Plaintiff swore that the sexual relationship between her and Dr. Sutherland was at all times consensual, that it did not commence until following the termination of the doctor patient

relationship between the parties and that the specific allegations of improper kissing, rape and improper sexual conduct at various medical offices were untrue, as follows:

. . . . .

(j) The Plaintiff specifically withdrew the following allegations that she had levelled against Dr. Sutherland:

(i) That Dr. Sutherland in any way misused the doctor patient relationship;

(ii) That Dr. Sutherland ever raped her;

(iii) That Dr. Sutherland took advantage of her;

(iv) That Dr. Sutherland at any time coerced her or manipulated her into having a sexual relationship with him;

(v) That Dr. Sutherland pushed her onto a couch and forced her to have sexual contact with him; and

(vi) That Dr. Sutherland and her had sexual intercourse at the Petawawa Clinic or at any medical facility as she had earlier alleged; and

(k) The Plaintiff swore that she now recognized that the statements that she had made to the College of Physicians and Surgeons of Ontario did not accurately set out the true nature of the relationship between the parties.

[13] Finally, in paragraph 20 Dr. Sutherland pleads that on September 7, 1995, Ms. Forget's lawyer wrote to the College advising it that Ms. Forget was recanting her allegations. He also pleads that the complaint was withdrawn on October 23, 1995.

[14] Ms. Forget then brought a motion under rule 21.01(1)(*b*) of the *Rules of Civil Procedure* [2] for an order striking out these paragraphs on the ground "they plead alleged facts which are inadmissible as evidence pursuant to section 36(3) of the *Regulated Health Professions Act*, S.O. 1991, c. 18 and are therefore frivolous, vexatious, scandalous and an abuse of process".

[15] Sanderson J. granted the motion.[3] She held that "the wording of s. 36(3) of the *Regulated Health Professions Act* is clear and unambiguous. Allegations of fact in a pleading which are incapable of proof must be struck." For the same reason she also struck out parts of an affidavit filed in support of a cross-motion by Dr. Sutherland to remove Goodman and Carr as solicitors of record for Ms. Forget. The cross-motion was then adjourned on consent.

[16] Dr. Sutherland's appeal to the Divisional Court (Rosenberg, Wilson and Cumming JJ.) was dismissed. Rosenberg J. held that Ms.

Forget's recantation was prepared for the discipline proceedings against Dr. Sutherland, and that the prohibition in s. 36(3) is absolute, admitting of no exception even for fraud. This court granted leave to appeal from the decision of the Divisional Court.

ANALYSIS

[17] Section 36(3) of the *Regulated Health Professions Act* ("RHPA") provides that no report or document prepared for a proceeding under that Act or under a health profession Act is admissible in a civil proceeding. Section 36(3) states:

> *Evidence in civil proceedings*
>
> 36(3) No record of a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*, no report, document or thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in a civil proceeding other than a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulations Act* or a proceeding relating to an order under section 11.1 or 11.2 of the *Ontario Drug Benefit Act.*

[18] Several points about s. 36(3) are not in dispute on this appeal. The *Medicine Act, 1991*, S.O. 1991, c. 30, which regulates the practice of medicine in Ontario, is a health profession Act.[4] Every health profession Act is deemed to include the *Health Professions Procedural Code.*[5] This Code provides for the filing of complaints and discipline proceedings against members of a health profession. Thus, Ms. Forget's complaint against Dr. Sutherland, which she filed with the College, is a document under s. 36(3), and a discipline proceeding against him is a proceeding under s. 36(3). This much he acknowledges.

[19] He submits, however, that the paragraphs of his pleading that refer to Ms. Forget's complaint and recantation should not be struck out for four reasons: first, the pleadings do not establish that Ms. Forget's recantation was prepared for use at a discipline proceeding against Dr. Sutherland; second and alternatively, at best the recantation was prepared only partly for a discipline proceeding, and unless a document is prepared solely for a College proceeding it is not protected under s. 36(3); third, even if the complaint and recantation were prepared for a discipline proceeding against Dr. Sutherland they are not protected by s. 36(3) because Ms. Forget's allegations of sexual abuse were made fraudulently and in bad faith and, finally, the court should not, on a motion, strike out

those paragraphs of his statement of defence and counterclaim that plead documents prepared for a discipline proceeding against him, and instead, should let the trial judge determine the admissibility of the documents.

1. Was Ms. Forget's recantation prepared for a discipline proceeding against Dr. Sutherland?

[20] Rosenberg J. correctly focused on the purpose for which Ms. Forget's recantation was prepared. If it was prepared for a College discipline proceeding against Dr. Sutherland then under s. 36(3) of the RHPA it is inadmissible in Ms. Forget's civil action for the balance owing under the settlement.

[21] However, in Dr. Sutherland's submission, neither the pleadings nor the documents referred to in the pleadings establish that the recantation was prepared for a discipline proceeding against him. He therefore contends that the motion to strike out paragraphs of his pleading was premature and that the admissibility of the recantation should be left to the trial judge. I disagree.

[22] Although the settlement documents do not refer to College proceedings, and the recantation itself does not disclose why it was prepared, I have no difficulty in concluding that it was prepared for use in a discipline proceeding against Dr. Sutherland. This was a package deal negotiated by lawyers. I pass no judgment on the morality of that deal. Presumably, however, Ms. Forget would not have signed the recantation unless she received the money payment, and Dr. Sutherland would not have agreed to pay her $500,000 unless he received the sworn recantation. He wanted the recantation to avoid a College discipline prosecution against him or at least to use it in his defence. The inescapable conclusion is that Ms. Forget's recantation is a document prepared for a proceeding under the *Medicine Act*. Unless Dr. Sutherland's other submissions have merit the recantation is inadmissible in Ms. Forget's civil action for the balance owing under the settlement.

[23] The Divisional Court reached the same conclusion, in part because it relied on what it viewed as a "concession" in the appellant's factum. I do not think that Mr. Manes, on behalf of Dr. Sutherland, made any concession about the purpose of the recantation, and the part of the appellant's factum relied on by the Divisional Court played no role in my conclusion.

2. *Does it matter whether the recantation was prepared solely or only partly for a discipline proceeding?*

[24] Dr. Sutherland seeks to distinguish between documents prepared solely for a College proceeding and documents prepared only partly for a College proceeding. He submits that to gain the protection of s. 36(3) a document must be prepared solely for a proceeding under the statute. He contends that at best the recantation was prepared only partly for a discipline proceeding against him, and partly to settle Ms. Forget's damages action. Thus, Dr. Sutherland submits that he can use the recantation to defend Ms. Forget's civil action to enforce the settlement.

[25] Section 36(3) does not make the distinction argued for by Dr. Sutherland and I do not find the distinction meaningful in this case. If documents are prepared for use in a College proceeding — as were both Ms. Forget's complaint and her subsequent recantation — then s. 36(3) provides that they are inadmissible in civil proceedings. Dr. Sutherland cannot avoid the application of s. 36(3) unless the subsection does not apply when fraud or bad faith is alleged.

3. *Does s. 36(3) apply where fraud or bad faith is alleged?*

[26] Dr. Sutherland wants to rely on Ms. Forget's complaint and recantation to support his defence in the civil action that the settlement was obtained by fraud. He submits that s. 36(3) would apply in this case only if Ms. Forget's complaint were filed in good faith. He argues that s. 36(3) does not apply when allegations in a document are made fraudulently or in bad faith.

[27] The wording of s. 36(3) contains no exception for fraud or bad faith. To accept Dr. Sutherland's argument would require the court to qualify the ordinary meaning of s. 36(3), to read words into the section to limit its application. I reject this argument.

[28] A basic principle of statutory interpretation is that the court should adopt the ordinary meaning of a legislative provision absent a good reason to reject it. The ordinary meaning is presumed to be the intended or most appropriate meaning unless the context, or the purpose and scheme of the legislation, or the consequences of adopting the ordinary meaning suggest otherwise. Professor Ruth Sullivan, who edited the third edition of *Driedger on the Construction of Statutes*, sets out the presumption in favour of the ordinary meaning:[6]

(1) It is presumed that the ordinary meaning of a legislative text is the intended or most appropriate meaning. In the absence of a reason to reject it, the ordinary meaning prevails.

(2) Even where the ordinary meaning of a legislative text appears to be clear, the courts must consider the purpose and scheme of the legislation, and the consequences of adopting this meaning. They must take into account all relevant indicators of legislative meaning.

(3) In light of these additional considerations, the court may adopt an interpretation in which the ordinary meaning is modified or rejected. That interpretation, however, must be plausible; that is, it must be one the words are reasonably capable of bearing.

[29] I find no relevant indicators of legislative meaning to displace the presumption in favour of the ordinary meaning of s. 36(3). The purpose of s. 36(3) is to encourage the reporting of complaints of professional misconduct against members of a health profession, and to ensure that those complaints are fully investigated and fairly decided without any participant in the proceedings — a health professional, a patient, a complainant, a witness or a College employee — fearing that a document prepared for College proceedings can be used in a civil action. This purpose would be defeated by reading a fraud or bad faith exception into s. 36(3). The mere allegation of fraud or bad faith, however unfounded, could make the provision inapplicable.

[30] Ensuring that documents prepared for College proceedings are always inadmissible in civil proceedings is especially important in cases, like this one, of alleged sexual abuse. Indeed, a fraud or bad faith exception to the application of s. 36(3) would be inconsistent with s. 1.1 of the *Health Professions Procedural Code*. Section 1.1 of the Code provides that "[t]he purpose of the provisions of this Code with respect to sexual abuse of patients by members is to encourage the reporting of such abuse". Without the absolute protection given by s. 36(3) patients might be discouraged from, not encouraged to, report complaints of sexual abuse. Gans J. made the same point in *B. (J.L.) v. Dr. B. (E.J.)* (1997), 13 C.P.C. (4th) 206 (Ont. Ct. (Gen. Div.)), at 209:

> The Code is designed to encourage the reporting of alleged acts of sexual abuse (s. 1.1), to provide assistance to those subjected to the same, and to eradicate this conduct on the part of the profession. If the proceedings are not clothed with an aura of confidentiality throughout, even if terminated before a hearing and ultimate decision, in my view, the underlying policy of the Code would be thwarted.

[31] Section 36(3) is one of a number of legislative provisions whose broad objective is to keep College proceedings and civil proceedings separate. Section 36(1) provides for the confidentiality of information that comes to the knowledge of College employees; and s. 36(2) provides that College employees cannot be compelled to testify in civil proceedings about matters that come to their knowledge in the course of their duties.

[32] Moreover, another provision of the RHPA, s. 38, shows that had the Legislature intended a fraud or bad faith exception in s. 36(3) it would have said so expressly. Section 38 gives various College, Board and Council employees and committee members immunity from lawsuits for acts done in the performance of their duties as long as the acts are "done in good faith".

[33] Do any indicators of legislative meaning support Dr. Sutherland's position? He points to two: the government report on which the RHPA was based; and giving s. 36(3) its ordinary meaning will produce absurd results. In my view, neither indicator relied on by Dr. Sutherland supports his position.

[34] He contends that the purpose of s. 36(3) was to protect doctors by preventing patients and other complainants from using College discipline proceedings as a "fishing expedition" or as a discovery tool for a damages action against the doctor. He argues that this purpose would be undermined without a fraud or bad faith exception to s. 36(3). He relies on the Schwartz Report,[7] a government study that recommended a sweeping overhaul of the regulation of health professionals in Ontario. The Schwartz Report produced draft legislation for the Legislature's consideration. The RHPA was modelled on this draft. One provision of the draft legislation, s. 21.03, was the basis for s. 36(3) of the RHPA. The Schwartz Report commented that s. 21.03 was needed to protect members of health professions in the light of the Report's recommendation to open complaint review and discipline hearings to the public:[8]

> In responding to proposals to open complaint review and discipline hearings to the public, a number of participants expressed the concern that injustice might be done to members by patients using the proceedings as a "fishing expedition" or to build a case against a member. The Review still believes that these and other proceedings should be open to the public, and the Review's proposals in this area have been endorsed by the Minister. It is impossible to prevent open proceedings from being used by plaintiffs and potential

plaintiffs as a forum for discovery. However, this section would prevent reports, decisions and all other documents and evidence generated for or in the course of such proceedings from being used in evidence against a member in a civil suit or proceeding.

[35] The relevance and use of government reports in interpreting legislative provisions has been much debated.[9] In my view, where legislation is closely tied to the recommendations of a government report — as the RHPA was tied to the Schwartz Report — then the report should be considered in interpreting the statute. It is relevant, though not determinative.

[36] The Schwartz Report has focused on one purpose of s. 36(3), to prevent patients from using discipline proceedings to build a civil case against health professionals. Had that been the only intended purpose, I think that the Legislature would have appropriately qualified the wording of s. 36(3). In my view, the purpose of s. 36(3) is to prevent not just patients but all participants in College proceedings from using documents generated for those proceedings in civil proceedings, in short to keep the two proceedings separate. Thus, the Schwartz Report does not determine the interpretation of s. 36(3).

[37] Dr. Sutherland also submits that giving effect to the ordinary meaning of s. 36(3) will produce absurd results. He argues that it will allow unscrupulous complainants to make allegations of professional misconduct against doctors fraudulently or in bad faith and leave those doctors without the means to defend themselves. He points to his own case as an example.

[38] In interpreting a legislative provision the court may take into account the consequences of adopting the ordinary meaning. The court should consider whether the ordinary meaning was intended if it produces absurd results. In my opinion, however, the ordinary meaning of s. 36(3) will not produce absurd results, and certainly not in this case where the parties agreed to a settlement that strictly limited the defences for nonpayment, defences that do not include fraud or bad faith. If a complaint of professional misconduct has been made in bad faith, ordinarily it can be dealt with effectively in the College discipline process.

[39] I therefore see no reason to depart from the ordinary meaning of s. 36(3) of the RHPA.

4. *Should the court on a motion strike out the paragraphs of Dr. Sutherland's statement of defence and counterclaim that plead documents prepared for a discipline proceeding against him?*

[40] Dr. Sutherland contends that regardless of how s. 36(3) is interpreted the admissibility of documents is a matter for the trial judge and therefore the challenged parts of his pleading should not have been struck out on a motion. I disagree. If a paragraph in a party's pleading pleads facts that cannot be proved at trial or pleads documents that cannot be admitted at trial, that paragraph may be struck out on a motion. As Aylseworth J.A. said speaking for this court in *Roman Corp. Ltd. v. Hudson's Bay Oil & Gas Co.*, [1972] 1 O.R. 444 at 446, 23 D.L.R. (3d) 292, affirmed [1973] S.C.R. 820, 36 D.L.R. (3d) 413:

> Nor do the appellants question the Court's power, in a proper case, to dismiss an action against certain defendants if it is one which, as to such defendants, cannot possibly succeed — or to strike out all or parts of a statement of claim with respect to such defendants as prejudicing or embarrassing a fair trial or as alleging facts which a plaintiff would not be allowed to prove at trial.

[41] Because the challenged paragraphs of Dr. Sutherland's statement of defence and counterclaim plead the complaint and the sworn recantation, both documents prepared for College discipline proceedings and therefore inadmissible in this civil proceeding, Sanderson J. was correct in striking out those paragraphs on a motion. However, in my view, she did so under the wrong rule.

[42] Ms. Forget's motion was brought and decided under rule 21.01(1)(*b*). I think that the motion should have been decided under rule 25.11. Rule 21.01(1)(*b*) permits a party to move before a judge to strike out a pleading on the ground that it discloses no defence. Dr. Sutherland has pleaded the defence of fraud in Ms. Forget's action for the balance owing under the settlement. He is entitled to maintain that defence, although he cannot prove it by introducing in evidence Ms. Forget's complaint to the College or her subsequent sworn recantation.

[43] Rule 25.11 permits the court to strike out any part of a pleading that may prejudice or delay the fair trial of an action. A pleading of documents that are inadmissible at trial will prejudice or delay the fair trial of the action. The pleading is irrelevant to the action.[10] Therefore the impugned paragraphs in Dr. Sutherland's

statement of defence and counterclaim should have been struck out under rule 25.11. In this case nothing turns on which rule was used to decide the motion. I would therefore not interfere with the decision of the motions judge or the decision of the Divisional Court.

[44] I add three qualifying comments. First, my reasons turn on my view that s. 36(3) of the RHPA is an absolute bar to the admissibility of the complaint and the sworn recantation in the civil action. Had I been of the view that either the complaint or the recantation might be admissible despite the language of s. 36(3), I would of course have left their admissibility to be determined by the trial judge.

[45] Second, s. 36(3) refers to a "report, document or thing", suggesting a distinction between, for example, a written complaint and the fact of a complaint having been made. The document, the written complaint, is inadmissible, but the fact a complaint was made may be provable at trial. That distinction, however, does not arise in Dr. Sutherland's pleading because he has pleaded the written complaint and the sworn recantation and their contents to support his defence, and it is these documents he seeks to prove at trial. Moreover, Dr. Sutherland did not draw this distinction in his submissions to this court.

[46] Third, my decision is not meant to preclude the trial judge from considering whether either Ms. Forget's complaint or her sworn recantation may be used to challenge her credibility on cross-examination. I note, however, the Supreme Court of Canada's judgment in *R. v. Calder* (1996), 105 C.C.C. (3d) 1 at 10, 132 D.L.R. (4th) 577, holding, albeit in a different context, that the use of evidence for the limited purpose of cross-examination on credibility is an "admission" of the evidence under s. 24(2) of the *Canadian Charter of Rights and Freedoms*.

[47] I would dismiss the appeal with costs, including the costs of the motion for leave to appeal.

[48] BORINS J.A. (dissenting):—This is an appeal, with leave, by Dr. Sutherland from the order of the Divisional Court, reported in (1999), 174 D.L.R. (4th) 174, which dismissed his appeal from the judgment of Sanderson J. [summarized 72 A.C.W.S. (3d) 255], striking out a number of paragraphs, and portions of other

paragraphs, contained in his statement of defence and counterclaim. For the reasons that follow, I would allow the appeal, and set aside Sanderson J.'s judgment.

BACKGROUND

[49] On August 23, 1993, the respondent, Murielle Forget, made a formal complaint to the College of Physicians and Surgeons of Ontario (the "College") alleging that the appellant, Dr. Norman Sutherland, had subjected her to sexual, emotional, mental and physical abuse for a period of ten years during which she was the appellant's patient and employee. The complaint was accompanied by a 23 page statement signed by the respondent outlining the particulars of Dr. Sutherland's alleged improprieties.

[50] On October 31, 1994, Ms. Forget and her daughter commenced an action against Dr. Sutherland claiming damages for sexual assault and battery, breach of fiduciary duty, intentional and negligent infliction of mental suffering, negligence and exemplary and punitive damages. The civil action repeated the allegations contained in the respondent's statement to the College.

[51] On September 5 and 6, 1995, Ms. Forget and Dr. Sutherland signed Minutes of Settlement resolving the civil action which, on the consent of all parties, was subsequently dismissed. A recital to the Minutes of Settlement stated:

> THE PARTIES have met pursuant to the Court Annexed Alternative Dispute Resolution process, and have had the opportunity to confidentially discuss and review the issues between them, and as a result they wish to finally resolve their differences and to embody the terms of their settlement in this agreement;

Paragraphs 4 and 5 of the Minutes of Settlement provided as follows:

> FURTHERMORE the Plaintiffs, Murielle Forget and Sylvie Leclair expressly stipulate that there was no abuse, misuse or any improper conduct secondary to a doctor-patient relationship that had existed;
>
> THE DEFENDANT agrees to compensate Murielle Forget for the loss of economic opportunity that she perceives was promised to her, and accordingly the Defendant will make periodic payments ("Periodic Payments") and a lump sum payment ("Final Payment") on or before January 7, 1997, in accordance with the schedule of payments outlined in paragraph 8 herein (collectively, the "Compensation");

[52] The schedule required Dr. Sutherland to make payments of $1,000 every week from October 16, 1995 to December 30, 1996,

and a final payment of $436,000 on January 7, 1997. These payments total $500,000. After Dr. Sutherland had made monthly payments totalling $56,000, he stopped making payments in November, 1996, at which time default occurred under the Minutes of Settlement, which, pursuant to its terms, entitled Ms. Forget to commence an action against him for the balance due of $444,000.

[53] On September 7, 1995, the respondent's lawyer wrote to the College advising it that the respondent had recanted all allegations against Dr. Sutherland contained in her statement of August 23, 1993. On September 5, 1995, the respondent swore an affidavit in which she recanted the allegations. It contains the following statements:

> Through the course of frank and confidential discussions held pursuant to the Court Directed Alternative Dispute Resolution process, and also through the course of on-going therapy, I have been able to clarify a number of the facts and the circumstances of my relationship with Norman Sutherland.
>
> . . . . .
>
> These statements were a reflection of my state of mind at the time that these statements are made. Through the alternative dispute resolution process, and also through therapy, I have been able to reconcile my perception of our relationship, and appreciate the true circumstances of our relationship.
>
> . . . . .
>
> Having had the opportunity to carefully consider what has transpired, I hereby recant any previous statements I have made to the College of Physicians and Surgeons. I now recognize that the statements made to the College of Physicians and Surgeons of Ontario do not accurately set out the true nature of the relationship.
>
> Having consulted with my Therapist, I have concluded that it is in my best interest to bring closure as part of my process of healing from this terminated relationship. I therefore do not intend to pursue any further adversarial proceedings against Norman Sutherland.

There is no evidence in the record to indicate whether the affidavit was sent to the College.

[54] On March 24, 1997, Ms. Forget commenced this action against Dr. Sutherland to recover $444,000, representing the amount which she claims he owes her pursuant to the Minutes of Settlement.

[55] Dr. Sutherland defended the action on the ground that the allegations against him contained in the complaint and statement

Ms. Forget filed with the College and in her civil action consequent thereto "were part of a fraudulent scheme designed and implemented by [Ms. Forget] for the purpose of extorting money by threatening [him] with professional and personal humiliation and ruin". In addition, he counterclaimed for the return of the $56,000 which he had paid Ms. Forget under the Minutes of Settlement and sought damages of $1,000,000 for malicious prosecution, intentional and negligent infliction of economic harm and intentional and negligent infliction of mental suffering and emotional harm.

[56] Paragraphs 21 and 22 of his statement of defence and counterclaim, which are central to Dr. Sutherland's defence, read as follows:

> 21. Dr. Sutherland states that the settlement relied upon by the Plaintiff is the direct result of the admittedly false allegations made by the Plaintiff, and that the said settlement is unconscionable as a matter of fact and law. Dr. Sutherland further states that the settlement relied upon by the Plaintiff was obtained in bad faith and through the exertion of undue influence in that the Plaintiff was at all times aware that the allegations that formed the basis of her complaint were untrue.
>
> 22. Dr. Sutherland states that the settlement relied upon by the Plaintiff is void as a matter of public policy in that it was obtained by the Plaintiff as a direct result of her promulgation of false and inflammatory allegations of sexual impropriety and abuse of power.

[57] The particulars on which Dr. Sutherland relies in support of his defence are pleaded in paragraphs 11, 12, 15, 16, 19 and 20 of his statement of defence. These paragraphs are extremely detailed and outline the background leading up to Ms. Forget's claim. The following summary of the contents of each paragraph is helpful:

- *para. 11* — pleads the fact of Ms. Forget's complaint to the College of August 23, 1993 concerning Dr. Sutherland's allegedly improper conduct;
- *para. 12* — contains details of the alleged improper conduct found in Ms. Forget's 23 page statement that accompanied her complaint;
- *para. 15* — pleads that Ms. Forget's allegations against Dr. Sutherland in her disciplinary complaint to the College and her previous civil claim against him were part of a fraudulent scheme;

- *para. 16* — pleads that Dr. Sutherland denied the allegations against him which Ms. Forget placed before the College and repeated in her civil action against him;
- *para. 19* — pleads that in an affidavit dated September 5, 1995, Ms. Forget recanted the allegations which she had leveled against Dr. Sutherland, and gives particulars of the affidavit's contents; and
- *para. 20* — pleads that on September 5, 1995 Ms. Forget, through her lawyer, informed the College that she had recanted all allegations which she had leveled against Dr. Sutherland, and that her complaint to the College was withdrawn on October 23, 1995.

[58] The respondent moved to strike out the above paragraphs of Dr. Sutherland's statement of defence. The motion was brought pursuant to rule 21.01(1)(*b*) of the Rules of Civil Procedure which permits the court to strike out a pleading on the ground that it "discloses no reasonable cause of action or defence". No evidence is admissible on a rule 21.01(1)(*b*) motion, although a party is entitled to rely on documents referred to in the pleadings that form an integral part of the claim or defence: *Montreal Trust Co. of Canada v. Toronto-Dominion Bank* (1992), 40 C.P.C. (3d) 389 (Ont. Ct. (Gen. Div.)). Accordingly, it was appropriate for the court to consider Ms. Forget's complaint and statement to the College, and her affidavit.

[59] It was the position of the respondent that paragraphs 11, 12, 15, 16, 19 and 20 of the statement of defence disclose no reasonable defence "as they *plead alleged facts which are inadmissible as evidence* pursuant to s. 36(3) of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, and are therefore frivolous, vexatious, scandalous and an abuse of process". (Emphasis added.) As I discuss subsequently, this ground appears to rely, in addition to rule 21.01(1)(*b*), on rules 25.11(*b*) and (*c*) which permit the court to strike out part of a pleading on the ground that it is "scandalous, frivolous or vexatious" or that it is "an abuse of the process of the court".

[60] Subject to certain exceptions, s. 36(1) of the Act imposes a confidentiality obligation on persons employed, retained or appointed to administer the Act, and certain other Acts, in respect to

all information that comes to the person's knowledge in the course of his or her duties. Section 36(2) provides that no person described in subsection (1) shall be compelled to give testimony in a civil proceeding with regard to matters that come to his or her knowledge in the course of his or her duties. Section 36(3) provides as follows:

> 36(3) No record of a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act, no report, document or thing prepared for* or statement given at such a proceeding and no order or decision made in such a proceeding *is admissible in a civil proceeding* other than a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulations Act* or a proceeding relating to an order under section 11.1 or 11.2 of the *Ontario Drug Benefit Act.* [Emphasis added.]

For the purposes of the appeal, the parties agreed that a disciplinary proceeding before the College is a proceeding within the meaning of s. 36(3).

REASONS OF SANDERSON J.

[61] Sanderson J. allowed the motion, in part, and struck out paragraphs 11, 12, 19 and 20 of the statement of defence and counterclaim and parts of paragraphs 15 and 16 in which reference is made to the respondent's complaint to the College concerning the appellant. In doing so, the motions judge accepted the submission of counsel for the respondent that the appellant was precluded from pleading the facts that the respondent had made a complaint to the College, filed a statement with the College and swore an affidavit recanting the allegations against the appellant contained in the complaint and the statement on the ground that the complaint, the statement and the affidavit will be incapable of proof at the trial of this action by virtue of s. 36(3) of the Act. She held:

> *Documents to which s. 36(3) refers* are inadmissible as evidence in this case. They may not be produced or proved even on a voluntary basis. [Emphasis added.]

[62] After referring to three decisions of the General Division which applied s. 36(3) in a similar manner, Sanderson J. concluded:

> I find that the wording of s. 36(3) of the *Regulated Health Professions Act* is clear and unambiguous. *Allegations of fact in a pleading which are incapable of proof must be struck. Every pleader is at liberty to allege any fact which would be allowed to be proved, but only such facts.* See *Duryea v. Kaufman* (1910), 21 O.L.R. 161 at 168; *Brydon v. Brydon,* [1951] O.W.N. 369 at 370; *Air India Disaster Claimants v. Air India* (1987), 62 O.R. (2d) 130 at 135. Certain *allegations* in the Statement of Defence and

> Counterclaim *are incapable of proof and cannot disclose a reasonable defence*. [Emphasis added.]

REASONS OF THE DIVISIONAL COURT

[63] Dr. Sutherland's appeal to the Divisional Court was dismissed. Writing for the court, Rosenberg J., at p. 179, considered Ms. Forget's affidavit recanting the allegations of Dr. Sutherland's alleged misconduct contained in her complaint and statement to the College to be "at the heart" of the appeal. He considered the issue to be whether s. 36(3) of the Act precluded Dr. Sutherland from making reference to the affidavit in his statement of defence and counterclaim. Rosenberg J. stated Dr. Sutherland's position at p. 179: "If it was not *solely* prepared for the purpose of the disciplinary proceedings, then *it may be referred to* in the pleadings in this civil proceeding". (Emphasis added.)

[64] Rosenberg J. referred to the well known principles that apply to a motion under rule 21.01(1)(*b*) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence. Since, on such a motion, the only issue is the sufficiency in law of the pleading attacked, the court must accept the facts alleged in the pleading as proven. For that reason, rule 21.01(2)(*b*) precludes the admissibility of evidence. A pleading will not be struck out unless it is "plain and obvious" that it discloses no cause of action or defence. See *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321.

[65] Rosenberg J., at p. 181, had no difficulty in concluding on the basis of the facts pleaded in Dr. Sutherland's statement of defence and counterclaim and Ms. Forget's affidavit that the affidavit "was 'prepared for' the Health discipline proceeding within the meaning of s. 36(3) of the [Act]". In reaching this conclusion, Rosenberg J.:

- interpreted "proceeding" in s. 36(3) as "cover[ing] the complaint and discipline proceedings referred to in paragraphs 25 to 70 of the *Health Professions Procedural Code*" (the "Code") found in Schedule 2 to the Act. (p. 182);
- adopted the view of Gans J. in *B. (J.L.) v. Dr. B. (E.J.)* (1997), 13 C.P.C. (4th) 206 (Ont. Ct. (Gen. Div.)), at 209, that the public policy underlying s. 36(3) of the Act is to encourage the reporting of alleged acts of sexual abuse. (p. 183);

- found that s. 36(3) "protects against the production of such documents in order to preserve the integrity of disciplinary proceedings, ensure the confidentiality of complaints and encourage the reporting of alleged acts of sexual abuse" and that it "is not this Court's role to seek to step behind that provision" (p. 183);
- made reference to a number of trial judgments which have considered s. 36(3) and have "uniformly held that documents prepared for [a proceeding under the Act] are inadmissible in civil proceedings" (pp. 183-184); and
- rejected the submission of Dr. Sutherland's counsel that s. 36(3) should not be applied when to do so would enable a person to make a false complaint against a health professional with impunity, holding that the "prohibition in s. 36(1) is absolute" (p. 184).

[66] Rosenberg J., at p. 183, also referred to the submission of Dr. Sutherland's counsel that s. 36(3) applies only when the document issued has been prepared *solely* for the purpose of a proceeding under the Act. However, he did not pursue this issue in his analysis.

ANALYSIS

[67] In my opinion, Dr. Sutherland's statement of defence and counterclaim appear to be entirely without objection. Indeed, the pleading was evidently prepared carefully and sets forth the facts relied on in support of the defence and counterclaim in an intelligent form. In my view, whether considered from the perspective of either a rule 21.01(1)(*b*) or a rule 25.11(*b*) or (*c*) motion, the courts below have applied each rule too widely. Rule 21.01(*b*) is intended to test the substantive adequacy of a pleading, while rules 25.11(*b*) and (*c*) are intended to test the formal adequacy of a pleading from the standpoint of its intelligibility, free from irrelevant, prejudicial allegations. As I will explain, the reason why portions of the pleading were struck out involved a confusion on the part of the courts below between pleading and proof, which resulted in the motions court judge assuming the role of a trial judge in determining the admissibility of relevant evidence.

[68] Moreover, Rosenberg J. made a finding of fact which he was precluded from making by the very nature of a rule 21.01(1)(*b*) motion that requires the court to assume that the facts as pleaded are

true in determining whether the facts state a reasonable cause of action or defence. It was unnecessary for him to make any finding of fact to decide whether the pleading was substantively adequate, or whether it was scandalous under rule 25.11(*b*). His finding that Ms. Forget's affidavit was prepared for the purpose of a disciplinary proceeding against Dr. Sutherland was the foundation for his conclusion that the affidavit would be inadmissible at the trial of this action. This was a finding that was critical, if not determinative, of Dr. Sutherland's defence and counterclaim. Apart entirely from the propriety of the court making an evidentiary ruling, the finding of fact was made in the absence of any evidence and solely on the basis of the face of the pleadings and the affidavit itself, and undoubtedly involved a controversial factual issue that constitutes a condition precedent to the exclusion of evidence under s. 36(3). As I will discuss, it is the role of the trial judge to rule on the admissibility of evidence.

[69] It would be odd, to say the least, if the Rules of Civil Procedure, which oblige Dr. Sutherland to plead any matter on which he intends to rely to defeat Ms. Forget's claim (rule 25.07(4)), and the material facts on which he relies in support of his defence (rule 25.06(1)), as well as the full particulars of the fraud which he has alleged (rule 25.06(8)), were to be rendered ineffective by a statutory provision which is intended to preclude the admissibility of certain documentary evidence in a civil proceeding. As well, it would be odd if the impugned portions of the pleading that form the foundation of Dr. Sutherland's defence and counterclaim, should be treated as scandalous, frivolous or vexatious, or likely to prejudice or delay the fair trial of the action (rules 25.11(*b*) and (*c*)) through the application, at the pleading stage of the proceedings, of a provision that speaks to the admissibility of evidence in a civil trial. It appears that Sutherland J. and Rosenberg J. interpreted s. 36(3) as if it was a rule of civil procedure pertaining to pleading, rather than as a provision that regulates the admissibility of a class of documentary evidence in a civil proceeding.

[70] Clearly, under rule 21.01(1)(*b*) there can be no reason to strike out the impugned portions of Dr. Sutherland's pleading. There can be no doubt that they disclose a reasonable defence to Ms. Forget's claim and a reasonable cause of action by way of counterclaim.

[71] At a time before the term "embarrassing" had been replaced in the Rules of Civil Procedure by "scandalous", Riddell J. provided what has become the classic test in applying rule 25.11(*b*). In *Duryea v. Kaufman* (1910), 21 O.L.R. 161 at 168 he stated:

> No pleading can be said to be embarrassing if it allege only facts which may be proved — the opposite party may be perplexed, astonished, startled, confused, troubled, annoyed, taken aback, and worried by such a pleading — but in the legal sense he cannot be "embarrassed." But no pleading should set out a fact which would not be allowed to be proved — that is embarrassing. . . . Even if a pleading set out a fact that is not necessary to be proved, still, if it can be proved, the pleading will not be embarrassing. Anything which can have any effect at all in determining the rights of the parties can be proved, and consequently can be pleaded — but the Court will not allow any fact to be alleged which is wholly immaterial and can have no effect upon the result.

[72] The principle is that nothing can be scandalous that is relevant to the claim or to the defence made out in a pleading. If relevant and properly pleaded, the fact alleged may be the subject of proof at trial. This is the test that applies at the pleading stage. Whether admissible evidence will be available for the proof of the fact is another question entirely. It may be that at trial s. 36(3) of the Act will preclude Dr. Sutherland from introducing certain documentary evidence to prove the facts that he is entitled to plead. However, this does not mean that he is precluded from pleading such facts. Evidence may be available to prove the facts that does not offend s. 36(3).

[73] Under rule 25.11(*b*) Dr. Sutherland's pleadings should not have been struck out as scandalous as all of the facts pleaded are relevant to his defence and counterclaim. Nor could the pleadings be struck out under rule 25.11(*c*) as an abuse of the process of the court.

[74] Thus, Dr. Sutherland's pleading, in every way, is an acceptable pleading. It alleges relevant facts which are particularized and which disclose both a reasonable defence and counterclaim. In my view, applying the principles of substantive adequacy and formal adequacy, there was no reason for the decision reached by the motions judge and the Divisional Court.

[75] As I have indicated, it appears that the motions judge and the Divisional Court confused pleading and proof. This is best illustrated by reference to paragraph 15 of the statement of defence and counterclaim in which it is pleaded that Ms. Forget swore a statement in which she recanted all, or substantially all, of the allegations

she had leveled against Dr. Sutherland. There can be no fact more relevant to Dr. Sutherland's defence and counterclaim. Yet he was precluded from pleading that fact by the motions judge, with the result that he was prevented from proving it at trial. Sanderson J. precluded him from pleading it on the basis that s. 36(3) precluded him from proving it, presumably because the sworn statement was a "document . . . prepared for" the discipline proceeding that Ms. Forget had launched with the College. Relying on *Duryea, supra*, she said: "Allegations of fact in a pleading which are incapable of proof must be struck. Every pleader is at liberty to allege any fact which would be allowed to be proved, but only such facts." Not only does this conclusion assume that the only way in which Dr. Sutherland could prove that Ms. Forget swore a statement recanting the allegation is by proof of the sworn statement, it also, with respect, exhibits a misunderstanding of *Duryea*. In stating that "no pleading should set out a fact which would not be allowed to be proved", Riddell J. was concerned only with the relevance of a fact pleaded to an issue raised by the pleadings, and not with the admissibility at trial of evidence introduced to prove the fact. His comments were directed to the entitlement of a party to plead relevant facts, and not to the evidence by which the facts are to be proved. As a general rule, any fact which is open to a party to prove at the trial as relevant to an issue in the proceeding is a material fact, and may be pleaded: *Redmond v. Stacey* (1917), 13 O.W.N. 79 (Master), affirmed 13 O.W.N. 179 (H.C.). See, also, *Millington v. Loring* (1880), 6 Q.B.D. 190 (C.A.), *per* Lord Selborne L.C. at 194-195.

[76] Riddell J.'s decision in *Duryea, supra*, was approved and adopted by this court in *Brydon v. Brydon*, [1951] O.W.N. 369, which was also applied by the motions judge. In *Brydon* the issue was whether all, or part, of a statement of claim should be struck out on the grounds that it pleaded evidence, rather than material facts, and that it was embarrassing. Hope J.A. quoted, with approval, the first part of the reasons of Riddell J. in *Duryea* which I have quoted. In addition, Hope J.A. stated at pp. 370-371:

> As was stated by Riddell J. in *Duryea v. Kaufman* (1910), 21 O.L.R. 161 at 168:
>
> > "Nor are the rules of pleading in our Courts a thing of darkness and mystery, difficult to be grasped by the ordinary mind, and based upon arbitrary or whimsical principles. These principles are clear and simple

> and plain common sense. The pleadings must disclose what it to be tried; every pleader is at liberty to allege any fact which would be allowed to be proved, but only such facts."

> The test is not whether the fact is a major or a minor fact or a chief or an ancillary one, but rather whether the fact pleaded is relevant to the trial of the issue. As further stated by Riddell J. in the same case, citing *Rock v. Purssell* (1887), 84 L.T. Jo. 45: "Anything which can have any effect at all in determining the rights of the parties can be proved, and consequently can be pleaded — but the Court will not allow any fact to be alleged which is wholly immaterial and can have no effect upon the result."

[77] In addition to applying *Duryea, supra*, and *Brydon, supra*, in concluding that portions of Dr. Sutherland's pleading should be struck out, the motions judge relied on *Air India Flight 182 Disaster Claimants v. Air India* (1987), 62 O.R. (2d) 130, 44 D.L.R. (4th) 317 (H.C.J.). The issue in that case was whether certain portions of a statement of claim should be struck out because the principle of Crown immunity rendered certain defendants immune from suit as agents of the Crown. In my view, it has no application to the issue in this appeal.

[78] Thus, rather than assisting the respondent, *Duryea, supra*, and *Brydon, supra*, assist the appellant. They support Dr. Sutherland's right to plead that Ms. Forget swore an affidavit in which she recanted the allegations she had leveled against him with the College. I have no doubt that at trial Dr. Sutherland will be permitted to prove, as a fact, that Ms. Forget swore the affidavit. However, whether he will be permitted to prove the affidavit and introduce it as independent evidence will be for the trial judge to determine through the interpretation and application of s. 36(3) of the Act.

[79] However, this is not to say that the court can never strike out all, or part of, a pleading on the ground that a party is prohibited from proving a fact at trial. An example of such a case is *Roman Corp. v. Hudson's Bay Oil & Gas Co.*, [1971] 2 O.R. 418, 18 D.L.R. (3d) 134 (H.C.J.); affirmed [1972] 1 O.R. 444, 23 D.L.R. (3d) 292 (C.A.); affirmed [1973] S.C.R. 820, 36 D.L.R. (3d) 413, where several paragraphs in the statement of claim, based on statements made in the House of Commons, were struck out. The statements were privileged, with the result that no evidence could be introduced at trial concerning them. Without those paragraphs the statement of claim disclosed no cause of action

against certain defendants, with the result that the action against them was dismissed.

[80] In my view, it is for the trial judge to rule upon the admissibility of the evidence presented by Dr. Sutherland as proof of the facts alleged in the impugned portions of the pleading. Such facts are presumptively admissible at trial unless Ms. Forget is able to satisfy the requirements of s. 36(3) of the Act. Indeed, by the operation of rule 21.01(1)(*b*) the court must accept the facts alleged in the pleading as proven. In this appeal, this simple proposition has become enmeshed in the question of whether a statutory provision concerning the admissibility of evidence in a civil trial can limit the defendant's obligation to plead material facts, and not the evidence by which those facts are to be proved. It may be that the trial judge will rule that evidence introduced to prove the facts runs foul of s. 36(3). Generally speaking, it is for the trial judge to rule on the admissibility of evidence, and not the court on an interlocutory motion.

[81] I do not take it as inevitable, with the advantage that a trial judge has, that he or she will rule that Ms. Forget's affidavit is in admissible under s. 36(3). Moreover, it may be that Dr. Sutherland will be able to prove the facts on which he relies to support his defence and counterclaim by evidence that does not offend s. 36(3), which excludes only a limited class of documentary evidence. However, if the order of the Divisional Court is permitted to stand, and Dr. Sutherland's pleading of the facts to support his defence is excised, he will be precluded from making full answer and defence to the respondent's claim. The caution against exercising the power to strike out pleadings except in the clearest of cases expressed seventy-five years ago by Meredith C.J.C.P. in *Sentinel-Review Co. Ltd. v. Robinson* (1926), 60 O.L.R. 93 at 97, [1927] 2 D.L.R. 60 (H.C.), is as valid now as it was then: "There is always some danger of a pruner cutting off a fruitful bough mistaking it for an unfruitful one."

[82] Furthermore, to uphold the decision of the Divisional Court would create a dangerous precedent. The result of the decision is that whenever a party holds the belief that the evidence on which an opposing party *may* rely to prove a fact that he or she has pleaded *may* be inadmissible, that party can bring an interlocutory motion at the pleading stage, totally out of context with the evidence before the trial judge, to obtain a ruling on the admissibility of the evidence.

This would enable a party, in the guise of a pleading motion, to obtain a ruling from a master, or a motions judge, that encroaches upon the traditional role of the trial judge.

[83] Should additional support for this view be required, I would refer, once again, to *Sentinel-Review*, *supra*. In that case, Meredith C.J.C.P. reversed the order of the Master who had struck out certain paragraphs of a statement of defence in a libel action as embarrassing on the ground that the defendant would be unable to adduce certain evidence to prove the facts. Meredith C.J.C.P. had this to say at p. 98:

> It is a matter for the Judge at the trial to determine whether, as a defence to the action, or in mitigation of damages, the facts set out in the words struck out of the statement of defence are admissible in evidence at the trial of the action; and care should be taken that his rights and duties should not be interfered with; and it may be that he shall consider them as part of the surrounding circumstances that may be adduced in cross-examination or in chief, apart from mitigation. . . . It should be out of the question tying, or attempting to tie, the trial Judge's hands, in that or in any other way, by an officer or Judge at chambers, and the more so without any allegation of embarrassment or suggestion of prejudice in leaving all matters to be dealt with at the trial.

At p. 100, referring to *Godman v. Times Publishing Co.*, [1926] 2 K.B. 273 (C.A.), he cited with approval the following passage from the reasons for judgment of Bankes L.J.:

> Bankes, L.J., speaking of the allegations as to the two other vessels, said (p. 282): "Whether they are to be admitted in evidence or not is a matter to be decided by the Judge at the trial when the question comes up for decision; it can hardly be decided by a Master or a Judge in chambers on an application to strike out particulars;" and he added (p. 283) that, in his opinion, "it would be an injustice to the appellants if they were at this stage to be shut out from alleging in the particulars of their plea of justification the facts and matters contained in the paragraphs which have been struck out by the learned Master and the learned Judge."

[84] As I have indicated, I do not believe that it is appropriate for the court, at this stage of the proceedings, to apply s. 36(3) of the Act to the evidence which Dr. Sutherland might wish to introduce at trial to support the defence and counterclaim contained in his pleading. However, I believe that some guidance can be provided for the trial judge, if Ms. Forget objects to evidence introduced by Dr. Sutherland on the ground that it is excluded by s. 36(3). It will be necessary for the trial judge to determine a number of preliminary questions of fact that constitute conditions precedent to the exclusion of evidence under that provision.

[85] As I view s. 36(3) in the context of this appeal, the provision does not exclude all evidence relating to a "proceeding under the Act". What is declared inadmissible in a civil proceeding is a "record, document or thing prepared for" a "proceeding under the Act". Thus, the fact that a written complaint was made to the College may be capable of proof without the need to tender the written complaint as independent evidence of the fact that the complaint was made. However, in the context of this appeal, if Dr. Sutherland attempts to tender the written complaint as evidence, the trial judge must exclude it if it is found to come within the meaning of s. 36(3). It follows, therefore, that to obtain a ruling excluding the written complaint Ms. Forget must establish, and the trial judge must find, the following preliminary facts to bring the written complaint within the exclusion created by s. 36(3):

- as it is not a defined term in either the Act or the Code, what constitutes a "proceeding under the Act";
- that there was in this case a" proceeding under the Act"; and
- that the complaint was a "report, document, or thing prepared for" such a proceeding.

[86] A similar analysis would apply to Ms. Forget's sworn statement. As the decisions below indicate, an important factual issue is whether it was prepared for a "proceeding under the Act". In this regard I would observe that as Ms. Forget withdrew her complaint against Dr. Sutherland, it appears that there may not have been a proceeding under the Act. This, of course, would be for the trial judge to determine.

[87] This is a familiar procedure encountered by trial judges when the admission or exclusion of evidence is conditional upon the establishing of a preliminary question of fact. An example, taken from criminal law, is the onus on the Crown to prove that a confession made by an accused person was made voluntarily, as an essential condition to its admissibility. Another example, common to both criminal and civil trials, is the establishment of statutory requirements for the introduction of business records. Drawing on this familiar procedure, and the inappropriateness of the court deciding the admissibility of evidence on an interlocutory motion, it is for the trial judge to rule on the interpretation and application of s. 36(3) of the Act when, and if, objection is taken to evidence that may offend

s. 36(3). As such evidence may not be introduced at trial, I find it preferable to provide some guidelines for the trial judge rather than to engage further in an interpretation of s. 36(3) of the Act.

[88] Although I do not intend to deal further with the interpretation of s. 36(3), I feel bound to make a brief observation with respect to a submission made by counsel for Dr. Sutherland. Although he did not put it in these terms, what I take from Mr. Manes' submission is that although the public policy reason underlying s. 36(3) may be to encourage the making of complaints of sexual abuse against health professionals by affording a limited degree of confidentiality to the complainant, there is a compelling public policy reason that requires that the confidentiality privilege be removed in circumstances where to enforce it would result in an injustice. The appellant submitted that to interpret s. 36(3) in the same way as the motions judge and the Divisional Court defeats the very purpose of s. 36(3). Such an interpretation is to encourage the making of false complaints by permitting the complainant to shelter under s. 36(3). Moreover, to hold that s. 36(3) is absolute can produce the result that it protects fraud, rather than preventing it.

[89] This submission suggests that there are two conflicting or competing principles of fundamental justice in this appeal that require definition. The first is the right of Dr. Sutherland to make full answer and defence to Ms. Forget's claim. The second is the limited right to privacy provided to Ms. Forget by s. 36(3). It seems to me that the right to defend a civil action should include the right of access to evidence without which the search for truth inherent in the trial process would be frustrated. Public interest in the administration of justice is promoted through full access of litigants to relevant information. The right to defend is implicated where, as in this case, information contained in a document has potential probative value that is very high and its production is necessary in the interests of justice, and where the interests of justice would outweigh any prejudice that would result if s. 36(3) were found not to apply. These considerations, necessarily, are to be balanced with the purpose intended to be served by s. 36(3) of the Act. A helpful discussion of these principles, albeit in a different context, can be found in the reasons of McLachlin and Iacobucci JJ. in *R. v. Mills*, [1999] 3 S.C.R. 668, 180 D.L.R. (4th) 1 and in *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, 143 D.L.R. (4th) 1.

RESULT

[90] For the foregoing reasons, I would allow the appeal, set aside the order of the Divisional Court affirming the judgment of Sanderson J. and dismiss the respondent's motion. The appellant is awarded his costs of the motion, his motion for leave to appeal to the Divisional Court, his appeal to the Divisional Court, his motion for leave to appeal to this court and his appeal to this court.

Appeal dismissed.

ENDNOTES

1 S.O. 1991, c. 18.

2 R.R.O. 1990, Reg. 194.

3 She struck out all of paragraphs 11, 12, 19 and 20 and parts of paragraphs 15 and 16 of Dr. Sutherland's statement of defence and counterclaim.

4 See Schedule 1 of the RHPA.

5 By s. 4 of the RHPA and Schedule 2 of the RHPA.

6 Ruth Sullivan, ed., *Driedger on the Construction of Statutes*, 3d ed. (Markham, Ont.: Butterworths, 1994) at p. 7 and see also *Macartney v. Warner*, [2000] O.J. No. 30 (QL) (C.A.) [now reported 183 D.L.R. (4th) 345].

7 Formally known as Health Professions Legislation Review, *Striking a New Balance: A Blueprint for the Regulation of Ontario's Health Professions* (Toronto: Ministry of Health, Ontario, 1989).

8 The Schwartz Report, *supra*, at p. 102.

9 See *Morguard Properties Ltd. v. Winnipeg (City)* (1983), 3 D.L.R. (4th) 1 (S.C.C.) at 4-5, criticized by Sullivan, *supra*, at p. 427.

10 See G. Watson and C. Perkins, eds., *Holmested and Watson, Ontario Civil Procedure*, (looseleaf updated to 1993) Vol. II, Rule 25, s. 18.

Re Van Mol et al. and Ashmore

[Indexed as: Van Mol (Guardian ad Litem of) v. Ashmore]

Court File No. CA022042 Vancouver Registry

British Columbia Court of Appeal
Lambert and Huddart JJ.A.

Judgment rendered: June 26, 2000

Appeal — New trial — Trial judge declining to assess damages — Appellate court referring case back for assessment of damages — Plaintiff seeking clarification of appellate court order — Fresh evidence available regarding