File No. C59431

COURT OF APPEAL FOR ONTARIO

BETWEEN

ALEXANDER ZIEBENHAUS, CHRISTOPHER ZIEBENHAUS and VICTOR ZIEBENHAUS, minors by their Litigation Guardian Sylvia Ziebenhaus, GORDON ZIEBENHAUS, FREDERICK ZIEBENHAUS, GISELA ZIEBENHAUS, HILDEGARD WICKERT and the said SYLVIA ZIEBENHAUS personally

Appellants
(Plaintiffs)

-and-

ROBERT BAHLIEDA, DELVIN CHOMIAK, CATHERINE MARINELLI, GORDON SPEARS, YORK CATHOLIC DISTRICT SCHOOL BOARD, and 621198 ONTARIO INC., operating as MOUNT SAINT LOUIS MOONSTONE SKI RESORT INC.

Respondents
(Defendants)

Factum of the Appellants

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FACTUM OF THE APPELLANTS

PART I – THE APPEAL/OVERVIEW STATEMENT

1. This appeal raises a question of first impression in this Court: Does a Superior Court judge have inherent jurisdiction to order that a party be examined by a non-health practitioner? The appeal arises against the backdrop of a comprehensive statutory scheme, found in section 105 of the *Courts of Justice Act*, which limits the right to conduct such examinations to "health practitioners." This Court granted leave to appeal the April 2, 2014, decision of the Divisional Court requiring that the Plaintiff Alexander Ziebenhaus undergo examination by vocational rehabilitation specialist Mr. Graham Pett, who is not a health practitioner. The Divisional Court based its decision to uphold the order for examination on the inherent jurisdiction of the Court. As will be discussed below, the legislative history of section 105, the principles of statutory interpretation and the proper scope of inherent jurisdiction all point to the conclusion that the Divisional Court erred in law in holding that the Court had the jurisdiction to make the order that it did.

PART II – THE FACTS

2. Alexander Ziebenhaus was 12 years old when he was seriously injured during a school ski trip to Mount Saint Louis Moonstone Ski Resort in February 2001. Alexander suffered a brain injury in the accident, and claims damages for future income loss and loss of competitive advantage in the workplace.

Reference: Appeal Book and Compendium, Tab 9, pg. 8, pp. 24

3. As part of his claim for damages, Alexander was examined by a neuropsychologist and psycho-vocational expert, Dr. Margaret Voorneveld. In a report dated September 30, 2010, Dr. Voorneveld stated Alexander's potential to pursue employment was guarded: "In any future vocational goal, Mr. Ziebenhaus will require a high degree of support. While he has the ability to complete his university studies, the ongoing neurocognitive and neurobehavioral deficits will continue to negatively impact on his potential to pursue a career and sustain employment."

Reference: Appeal Book and Compendium, Tab 13, pg. 21, pp. 5

4. On consent, Alexander was seen by defence neuropsychologist Dr. Jean Saint-Cyr. Dr. Saint-Cyr has been a Psychologist since 1993, is a Professor at the University of Toronto and states that he has extensive training in brain research. Dr. Saint-Cyr saw Alexander for two days and administered a battery of over thirty tests. One of the purposes of the examination was to have Dr. Saint-Cyr render an opinion on Alexander's future employment potential. Defence counsel asked Dr. Saint-Cyr: "How will the injury likely affect Mr. Ziebenhaus' employment and his ability to hold down a full time position? Is it likely that he will only be able to hold down a part time job?"

Reference: Appeal Book and Compendium, Tab 12, pg. 32, pp. 2

5. In a report dated February 13, 2012, Dr. Saint-Cyr agreed that Alexander suffered a "moderately severe traumatic brain injury" but stated that he would nevertheless be capable of pursuing a legal career. In response to the question asked by defence counsel, Dr. Saint-Cyr stated: "The consequences of his TBI are that Mr. Ziebenhaus has not been able to fully actualize his academic potential and this will limit his employability in the future. He will probably be able to recover an appropriate career path if he permits medical and psychotherapeutic management, in which case he could successfully complete a law degree or similar professional training. In that scenario, there is no reason to suspect that he would not be able to hold down a full time position." In addition to the examination by Dr. Saint-Cyr, Alexander was seen, on consent, by a neurologist and a future care expert retained by the Respondents.

Reference: Appeal Book and Compendium, Tab 12, pg. 32, pp.3

6. Following receipt of Dr. Saint-Cyr's report, the Respondents requested that Alexander be examined by vocational assessor Mr. Graham Pett. The Appellants declined to consent to the examination. On the resulting motion, it was agreed that the examination by Mr. Pett was not required as a diagnostic aid to the examination of Dr. Saint-Cyr, as Dr. Saint-Cyr had already rendered an opinion on Alexander's vocational capacity. It was also agreed that Mr. Pett was not a "health practitioner" as defined in section 105(1) of the *Courts of Justice Act*. That section provides that a health practitioner "means a person licensed to practice medicine or dentistry in Ontario or any other jurisdiction, a member of the College of Psychologists of Ontario or a person certified or registered as a psychologist by another jurisdiction."

Reference: Appeal Book and Compendium, Tab 5, pp. 12

7. In reasons released June 28, 2012, Edwards J. granted the motion for the examination of Alexander by Mr. Pett. He stated "there is a greater tendency now to order an assessment by a non medical practitioner, where after a review of all of the evidence, the court can come to the conclusion that such an assessment is *reasonably* required and will not result in an *inherent unfairness* to the plaintiff." (Italics in original.) Edwards J. held that the assessment was appropriate given the importance of the issue, and the absence of unfairness to the Appellants. The resulting report may "be of assistance to the trier of fact, as the court will benefit from the testimony of expert witnesses like the vocational assessor who possesses special knowledge as it relates to the potential vocational capacity of the plaintiff."

Reference: Appeal Book and Compendium, Tab 5, pp 15

8. Edwards J. addressed the argument that the Respondents had not led evidence from a health practitioner that the assessment by Mr. Pett was required. He said: "Where a plaintiff advances a past and future wage loss claim of the nature advanced in this case, it can hardly be said that the plaintiff would not have anticipated the potential for a vocational assessment."

Reference: Appeal Book and Compendium, Tab 5, pp 19

9. The Appellants sought leave to appeal the order of Edwards J. In a decision dated February 26, 2013, Mulligan J. granted leave under both branches of Rule 62.02(4), stating: "I am satisfied that there are conflicting authorities on whether or not the court has inherent jurisdiction above and beyond the statutory authority as set out in Rule 33 and s. 105 of the *Courts of Justice Act.* A determination by an appeal court about this issue would help not only the parties to these proceedings but the profession and the judiciary in connection with similar applications...Based on

the divergent streams of authorities that courts have relied on, I am satisfied that this issue is open to very serious debate."

Reference: Appeal Book and Compendium, Tab 7, pp 26

10. The Divisional Court consolidated the appeal with a similar appeal in another action entitled *Jack v. Cripps*. On behalf of the Court, Wilton-Siegel J. opened the reasons by highlighting the importance of the issue: "Each of these appeals of interlocutory orders addresses an important issue - whether a judge of the Superior Court has the authority in the exercise of his or her inherent jurisdiction to order that a party be examined by a non-medical practitioner."

Reference: Appeal Book and Compendium, Tab 3, pp 1

11. At paras. 23-41, Wilton-Siegel J. reviewed the diverging streams of authority on inherent jurisdiction. At para. 43, he stated: "the cases reflect the fact that the health sciences have evolved to encompass a far wider range of assessments than those provided by a 'health practitioner' as defined in section 105 of the *Courts of Justice Act*. These include vocational assessments, functional capacity evaluations and workplace assessments that are provided by non-medical specialists including occupational therapists, rehabilitation therapists, vocational assessors, future care costs experts, life care planners and other specialists. Such assessments and specialties are used in the actual care and treatment of patients in the continuum of care from a trauma hospital through a rehabilitation facility to a long-term care facility or in-home care. It would be contrary to good public policy to exclude their use in a litigation context that addresses the same circumstances."

Reference: Appeal Book and Compendium, Tab 3, pp 43

12. At para. 45, Wilton-Siegel J. went on to state: "The only conclusion that can be drawn from these circumstances is that section 105 does not completely 'occupy the field' in the sense that it makes no provision for physical and mental examinations that are routinely used in the care and treatment of injured persons, and in litigation, that are conducted by persons who are not 'health practitioners' under section 105. Accordingly, there is a gap in the statutory provisions regarding the entitlement of a party defending an action to require a plaintiff to submit to such examinations."

Reference: Appeal Book and Compendium, Tab 3, pp 45

13. Wilton-Siegel J. acknowledged that a Court's inherent jurisdiction is limited where a statute or rule makes provision for the matter at issue. At para. 53, however, he stated that the language in section 105 is "permissive" and "does not state that a court is prevented from ordering an examination on any other basis, including in the exercise of its discretionary authority. It is silent on this possibility. In this sense, section 105 is not exhaustive on its plain meaning. Rule 33 of the *Rules of Civil Procedure* is permissive in the same manner."

Reference: Appeal Book and Compendium, Tab 3, pp 53

14. At para. 55, Wilton-Siegel J. stated: "the court's inherent jurisdiction should be available to address the treatment of the other types of assessments and examinations that are not addressed by section 105, but that are typically undertaken, not only in the context of personal injury litigation but, more fundamentally, in the care and treatment of injured persons in our society. The exercise of the court's inherent jurisdiction in these circumstances is not in conflict with the existing statutory framework. Instead, it addresses a gap in that framework."

Reference: Appeal Book and Compendium, Tab 3, pp 55

15. At para. 58, Wilton-Siegel J. quoted the well-known article of Professor I.H. Jacob, "*The Inherent Jurisdiction of the Court*" as follows: "Moreover, the term 'inherent jurisdiction of the court' is not used in contradistinction to the jurisdiction conferred on the court by statute. The contrast is not between the common law jurisdiction of the court on the one hand and its statutory jurisdiction on the other, for the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision. [Emphasis added.]"

Reference: Appeal Book and Compendium, Tab 3, pp 58

16. Wilton-Siegel J. formulated a test for the granting of such an order: that the examination is necessary to meet the plaintiff's case and on the basis that trial fairness and justice require such a result. At para. 70, he stated: "it is possible that section 105 has 'occupied the field' in respect of physical or mental examinations by a 'health practitioner' for purposes of section 105. However, even assuming this to be the case, there is no conflict with the court's inherent jurisdiction because the court's discretion under section 105 is at least as extensive as the court's inherent jurisdiction."

Reference: Appeal Book and Compendium, Tab 3, pp 70

17. In the result, Wilton-Siegel J. held that the order for examination of Alexander by Mr. Pett was appropriately made given the importance of the issue in the action, and the fact that Dr. Voorneveld conducted more extensive testing than Dr. Saint-Cyr. In the *Jack v. Cripps* action, the order for a functional abilities examination was set aside, on the basis that the defendant in that case already had an unqualified opinion on the plaintiff's functional capacity.

Reference: Appeal Book and Compendium, Tab 3, pp 93, 108

PART III – ISSUES AND ARGUMENT

The Legislative History of s. 105 of the *Courts of Justice Act*

18. The first legislative provision authorizing a medical examination was enacted in 1891 by S.O. 1891, c. 11, section 1. The provision followed upon the decision of the High Court of Justice in *Reily v. City of London*, wherein Street J. held there was no legal authority to make such an order, classifying it as a form of assault. The section stated in relevant part: "In any action brought to recover damages or other compensation for or in respect of bodily injury sustained by any person, a judge…may order that the person in respect of whose injury, damages or compensation is sought shall submit to be examined by a duly qualified medical practitioner who is not a witness on either side…" There was no definition of the phrase "duly qualified medical practitioner."

Reily v. City of London (1891), P.R. 171 (H.C.J.), Book of Authorities of the Appellants, Tab 1

19. Shortly thereafter, in *Clouse v. Coleman*, Falconbridge J. interpreted the phrase "submit to be examined" narrowly, as providing for an examination by sight and touch, but did not extend to permit questioning of the party by the medical practitioner. This Court reviewed the decision. Osler J.A. stated: "If the object of the Act is regarded, a moment's reflection will convince that a personal examination of injuries complained of must have been intended, and not an oral examination of the person injured…In short, the word 'examine' is used in the Act in the sense of inspecting, observing carefully, looking into the state of, as e.g., to examine a building, a record, or a wound; and not in the sense of interrogating or examining a witness for the purpose of eliciting testimony."

Clouse v. Coleman (1895), 16 P.R. 496 (H.C.J.); leave to appeal refused (1895), 16 P.R. 541 (C.A.), Book of Authorities of the Appellants, Tab 2

20. In *H. v. H.*, Middleton J.A. considered the provision for medical examinations, then section 73 of the *Judicature Act*, R.S.O. 1927, c. 88, and confirmed that statutory authority was required in order for a party to be subjected to examination. He stated: "Before this statute was passed, it had been determined in a series of cases that a court had no inherent power or jurisdiction to authorize physical examination. The immunity of the person is a civil right which will only be destroyed or modified by express legislative provision."

H. v. H., [1933] O.W.N. 490 (H.C.J.), Book of Authorities of the Appellants, Tab 3

21. In 1939, Master Barlow held that the provision extended to permit the taking of an x-ray by a medical practitioner: "Since 1895, when Osler J.A. held in *Clouse v. Coleman* that such examination should be by sight and touch medical science has advanced tremendously. Little, if any, of our modern scientific methods of medical examination then existed. The X-Ray has come to be used for an examination of practically every part of the human body. *It is merely an aid to sight.*" (Emphasis in original.)

Hardy v. Cummings, [1940] 1 D.L.R. 774 (Ont. H.C.J., Master), Book of Authorities of the Appellants, Tab 4

22. In *Wolfe v. Essex Terminal Railway Co.*, Urquhart J. reviewed the authorities to that point, and confirmed that statutory authorization for a medical examination was required: "An analysis of the subsection itself seems to make this clear: (1) An action must be one for damages arising from bodily injuries; (2) The person examined must be he in respect of whose injuries the damages are sought; (3) The order is made by the Court or Judge or other person who has the power to determine the amount of such damages. It is evident that the Legislature had in its mind's eye the extent of the injuries suffered by a plaintiff and nothing else, and that but for the amendment there would be no right at all to the medical examination. It is all part of discovery."

Wolfe v. Essex Terminal Railway Co., [1950] 2 D.L.R. 285 (Ont. H.C.J.), Book of Authorities of the Appellants, Tab 5

23. In *Taub v. Noble*, Haines J. criticized *Clouse v. Coleman* limiting the examination to sight and touch, saying it was out of step with modern practices: "Almost 70 years have passed since the decision and with respect, I doubt that any such opinion would be held today. By putting his physical condition in issue through claiming damages for injury, I think it may well be said that the plaintiff has waived any rights he has to deny to the defendant from whom he is claiming damages, the opportunity to ascertain the nature and extent of his injuries by suitable examinations conducted by medical practitioners. To do otherwise puts the plaintiff in a preferred position where his contentions cannot be challenged, and in some cases it may even enable him to perpetrate a fraud."

Taub v. Noble, [1965] 1 O.R. 600 (H.C.J.), Book of Authorities of the Appellants, Tab 6

24. Following upon the decision of Haines J., then section 75 of the *Judicature Act* was amended by S.O. 1966, c. 73, s. 2, to provide that the medical practitioner could ask questions relevant to the examination. Section 75(1) stated: "In any action or proceeding for the recovery of damages or other compensation for or in respect of bodily injury sustained by any person, the Court which, or the judge, or the person who by consent of the parties, or otherwise, has power to fix the amount of the damages or compensation, may order that the person in respect of whose injury damages or compensation are sought submit himself to a physical examination by a duly qualified medical practitioner or by more than one duly qualified medical practitioners, but no medical practitioner who is a witness on either side shall be appointed to make the examination."

25. Section 75(1a) was added and provided that "Any duly qualified medical practitioner may in connection with an examination under subsection 1 ask the person being examined any questions

that may be relevant to the purpose of the examination." Section 75(1b) was also added and provided that "Any answer given or statement made by a person being examined during an examination under subsection 1 that is relevant to the purpose of the examination is admissible in evidence." Section 75(4) stated "In this section, 'duly qualified medical practitioner' includes a person licensed to practice dentistry under *The Dentistry Act*."

26. In *Rysyk v. Booth Fisheries Canadian Co. Ltd.*, this Court held that s. 75 of the *Judicature Act* extended beyond physical examinations, and allowed for the conduct of an examination by a psychiatrist and duly qualified medical practitioner.

> Rysyk v. Booth Fisheries Canadian Co. Ltd., [1971] 1 O.R. 123 (C.A.), Book of Authorities of the Appellants, Tab 7

27. In *Gotch v. Chittenden*, Morand J. permitted an examination by a psychologist where it was found to be a diagnostic aid to the conduct of a neurological examination. The neurologist stated in an affidavit that "I always find that my neurological examination is incomplete in these kinds of circumstances unless I have a psychological examination done at the same time."

> Gotch v. Chittenden, [1972] 2 O.R. 272 (H.C.J.), Book of Authorities of the Appellants, Tab 8

28. Following upon the decision of Morand J., by statutory amendment in 1989, psychologists were added to the defined category of health practitioner entitled to conduct an examination under the *Courts of Justice Act*.

29. The current version of s. 105(1) of the *Courts of Justice Act* states: "In this section, 'health practitioner' means a person licensed to practice medicine or dentistry in Ontario or any other

jurisdiction, a member of the College of Psychologists of Ontario or a person certified or registered as a psychologist by another jurisdiction." Section 105(2) states: "Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners."

30. Rule 33.02(1) of the *Rules of Civil Procedure* similarly refers to health practitioners: "An order under section 105 of the *Courts of Justice Act* may specify the time, place and purpose of the examination and shall name the health practitioner or practitioners by whom it is to be conducted."

31. Section 44(1) of the *Statutory Accident Benefits Schedule*, O. Reg. 34/10, deals with the conduct of insurer examinations in claims for no-fault accident benefits. The provision sets out a far more expansive approach to the definition of practitioner than is contained in s. 105. The provision states: "For the purposes of assisting an insurer to determine if an insured person is or continues to be entitled to a benefit under this Regulation for which application is made, but not more often than is reasonably necessary, an insurer may require an insured person to be examined under this section by one or more persons chosen by the insurer who are regulated health professionals or who have expertise in vocational rehabilitation." Section 3(1) of the *SABS* defines a "regulated health professional" to mean "a member of a regulated health profession." "Regulated health profession" is defined to mean "a profession governed by a College as defined in the *Regulated Health Professions Act, 1991*, or the Ontario College of Social Workers and Social Service Workers under the *Social Work and Social Services Work Act, 1998*." A table to subsection 1(1) of the *Regulated Health Professions Act, 1991*, sets out an expansive list of professionals who would qualify as persons entitled to conduct an examination under the definition in the *SABS*.

32. Section 52(2) of the *Evidence Act*, R.S.O. 1990, c. E. 23, deals with the filing of medical reports in court actions, and also contains an expanded definition of practitioner that differs from that of s. 105. It states: "A report obtained by or prepared for a party to an action and signed by a practitioner and any other report of the practitioner that relates to the action are, with leave of the court and after at least ten days notice has been given to all other parties, admissible in evidence in the action." Section 52(1) states: "In this section, 'practitioner' means (a) a member of a College as defined in subsection 1(1) of the *Regulated Health Professions Act, 1991,* (b) a drugless practitioner registered under the *Drugless Practitioners Act,* (c) a person licensed or registered to practice in another part of Canada under an Act that is similar to an Act referred to in clause (a) or (b)."

33. Section 258.3(1)(d) of the *Insurance Act*, R.S.O. 1990, c. I. 8, deals with the conduct of examinations prior to commencement of litigation and contains a similar definition of practitioner. It states: "An action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of automobile shall not be commenced unless, (d) the plaintiff has, at the defendant's expense, undergone examinations by one or more persons selected by the defendant who are members of Colleges as defined in the *Regulated Health Professions Act, 1991*, if the defendant requests the examinations within 90 days after receiving the notice under clause (b)."

34. This review of the legislative history of s. 105 of the *Courts of Justice Act* demonstrates that: (1) the legislature has considered it necessary to enact a statutory scheme in order to authorize the subjection of a party to medical examination; (2) when deficiencies in the statutory scheme have been identified, the legislature has remedied the problem; (3) the statutory scheme, added to incrementally over more than a century, is a comprehensive one that reflects the intention of the legislature on the subject; (4) the legislature has turned its mind to the subject of examinations by

non-health practitioners in related statutory schemes, without amendment having been made to the definition of "health practitioner" in s. 105.

35. The conclusion to be drawn from this review is that Courts do not have inherent jurisdiction to expand the definition of "health practitioner" where the legislature has chosen not to do so. By making use of inherent jurisdiction in a manner that has the effect of expanding the definition of "health practitioner", Courts are creating a conflict with the intent of s. 105.

The Principles of Statutory Interpretation

36. Principles of statutory interpretation support this conclusion. Several of the principles identified in Professor Sullivan's textbook are relevant. The first concerns the exhaustive effect of statutory definitions. Professor Sullivan states: "When a word is defined by statute, the binding character of the stipulated meaning depends not on shared linguistic convention among lawyers and judges, but on legislative sovereignty. The legislature dictates that for the purpose of interpreting certain legislation the defined term is to be given the stipulated meaning...Statutory definitions may be exhaustive or non-exhaustive. Exhaustive definitions declare the complete meaning of the defined term and completely displace whatever meanings the defined term might otherwise bear in ordinary or technical usage. An exhaustive definition is normally introduced by the verb 'means'." In this case, s. 105(1) introduces the definition of "health practitioner" by saying that it "means a person licensed to practice medicine..."

> Ruth Sullivan, Sullivan on the Construction of Statutes (5th ed.) (LexisNexis, 2008), pp. 61-62, Book of Authorities of the Appellants, Tab 9

37. A second principle is the judicial response to legislative gaps. Professor Sullivan reviews the authorities, and concludes that Courts do not fill what are seen to be legislative gaps: "In both

Shubley and *Stone*, there were good reasons to conclude that the legislation included all that it needed to include to achieve the legislature's purpose – in other words, the gap was more apparent than real. But even when it is clear that a gap in the scheme is real, the result of oversight rather than plan, most courts are unwilling to fill it, as illustrated by the judgment of Ontario's Court of Appeal in *Beattie v. National Frontier Insurance Co.*" In this case, the legislative history of s. 105, and the additions made to the defined category of health practitioners over the years, makes it clear that any gap in the definition of health practitioner is the result of a legislative plan, not oversight.

> Ruth Sullivan, Sullivan on the Construction of Statutes (5th ed.) (LexisNexis, 2008), pp. 179-181, Book of Authorities of the Appellants, Tab 9

38. The decision of the Divisional Court is contrary to this approach. At para. 55 of the reasons for judgment, Wilton-Siegel J. confirms that the Court was making use of inherent jurisdiction to fill what was considered to be a legislative gap: "the court's inherent jurisdiction should be available to address the treatment of the other types of assessments and examinations that are not addressed by section 105, but that are typically undertaken, not only in the context of personal injury litigation but, more fundamentally, in the care and treatment of injured persons in our society. The exercise of the court's inherent jurisdiction in these circumstances is not in conflict with the existing statutory framework. Instead, it addresses a gap in that framework."

39. A third relevant principle of statutory interpretation is implied exclusion. Professor Sullivan states on this point: "An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. As Laskin J.A. succinctly put it, 'legislative exclusion can be

implied when an express reference is expected but absent.' (citing *University Health Network v. Ontario (Minister of Finance)*)...When a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned."

Ruth Sullivan, Sullivan on the Construction of Statutes (5th ed.) (LexisNexis, 2008), pp. 243-244, Book of Authorities of the Appellants, Tab 9

40. In this case, we have the incremental addition of categories of persons to the definition of "health practitioner" by the legislature over the years. We also have the inclusion of different and additional categories of persons to the definition of practitioners in related legislation, but not in s. 105. Those circumstances give reason to believe that, if the legislature had intended to include additional persons to the category of health practitioners in s. 105, it would have referred to them expressly. By adding other categories of practitioners to s. 105 through the use of inherent jurisdiction, the Courts are creating a conflict with the intent of the legislation.

The Diagnostic Aid Test

41. As seen in the decisions of Master Barlow and Morand J. referred to above, Courts have created the diagnostic aid test to complement the operation of s. 105. What this means in practice is that, if a health practitioner gives evidence that an examination by a member of another discipline is needed to assist in arriving at an opinion, the examination will be ordered as a diagnostic aid to the examination of the health practitioner. With the use of the diagnostic aid test, examinations by all manner of practitioners, including those listed by Wilton-Siegel J., have been ordered.

42. For example, an examination by a vocational rehabilitation specialist, the subject matter of this appeal, was ordered as a diagnostic aid in *Vreken v. Fitchett*. The medical practitioner filed an

affidavit describing the proposed examination: "In arriving at a real evaluation of this patient's ability to do his own job or his ability to do other jobs, I would find it essential to have the evaluation of the medical and associated staff of the Behavioural Medicine Program at St. Joseph's Hospital, or of a similar program elsewhere. A combination of interviews and evaluation by psychological testing, physical examination, physiotherapy and occupational therapy, as well as field workers would provide me with a thorough analysis of the patient's particular disability and capabilities." Gray J. accepted the evidence and ordered the examination as a diagnostic aid.

> Vreken v. Fitchett (1984), 45 O.R. (2d) 515 (H.C.J.), pp. 518-520, Book of Authorities of the Appellants, Tab 10

43. An examination by a speech pathologist was considered in *Fernandes v. Melo*. The proposed examiner was not "a legally qualified medical practitioner" as provided for in the *Judicature Act*. Lerner J. commented on the definition, and the significance of the addition of dentists to the category of practitioners: "The specific inclusion of dentists pursuant to s-s. (7) is significant. If it was not intended that s. 78 be strictly construed, it would not have been necessary to enact s.-s. (7). This was introduced by 1951, c. 40, s. 2, as s. 74(4)." Nevertheless, Lerner J. held the proposed examination could have been ordered as a diagnostic aid had a proper evidentiary basis been contained in the affidavits.

> Fernandes v. Melo (1974), 6 O.R. (2d) 185 (H.C.J.), pp. 186-188, Book of Authorities of the Appellants, Tab 11

44. In *Tarmohamed v. Scarborough (City)*, Reid J. held that then s. 118 of the *Courts of Justice Act* ought not to be extended to permit examinations by non-health practitioners, unless required as a diagnostic aid: "The section does not extend to other medical or professional groups. The courts rely heavily on the opinions of medical practitioners licensed to practise in Ontario. Thus, an order may

be made for an examination by a person outside that category, but only on the recommendation of a person within it. In my opinion that is how s. 118 should continue to be constrained."

Tarmohamed v. Scarborough (City) (1989) 68 O.R. (2d) 116 (H.C.J.), p. 118, Book of Authorities of the Appellants, Tab 12

45. In *Campbell v. Cotton*, Master Dash followed the decisions in *Vreken* and *Tarmohamed*, and stressed the importance of the evidentiary record in support of a proposed examination: "I therefore conclude that a 'request' or 'recommendation' by a health practitioner that a vocational assessment be conducted is insufficient to grant the court jurisdiction to order such an examination, unless the health practitioner clearly requires such examination in aid of his own diagnosis or assessment, and that such examination is demonstrated to be necessary to allow the health practitioner to prepare his own assessment."

Campbell v. Cotton (2002), 17 C.P.C. (5th) 108 (Ont. Master), p. 111, Book of Authorities of the Appellants, Tab 13

46. In *Grant v. Keane*, Master Beaudoin (as he then was) ordered that the plaintiff undergo a functional capacity evaluation and job site analysis where her medical condition worsened after examinations for discovery: "Notwithstanding there were amendments to section 105 of the *Courts of Justice Act* in 1989 to include psychologists, these independent medical examinations do not include physiotherapists, kinesiologists, ergonomic consultants and similar professionals. As a result, it is only where a recognized health practitioner states that he or she requires the input of these others that the courts will direct that this type of an examination take place."

Grant v. Keane (2002), 18 C.P.C. (5th) 258 (Ont. Master), p. 265, Book of Authorities of the Appellants, Tab 14

47. In *Bernier v. Assan*, Shaughnessy J. ordered that a functional abilities evaluation be carried out by a kinesiologist as a diagnostic aid to a psychologist's examination. The psychologist had stated in an affidavit that he was "not personally qualified" to administer the vocational testing, which he said was essential to determine the extent of the plaintiff's vocational limitations.

> Bernier v. Assan (2006), 27 C.P.C. (6th) 376 (Ont. S.C.J.), paras. 48-49, Book of Authorities of the Appellants, Tab 15

48. In *Scissons v. Lajoie*, Master Beaudoin declined to order a vocational rehabilitation assessment where there were deficiencies in the affidavit material. In his reasons, Master Beaudoin set out a helpful statement of principles which the Appellants submit reflect a balanced approach to motions in this area. The decision was upheld by Roccamo J.:

> "It has been suggested by counsel that the principles that I previously listed in *Grant v. Keane* must be restated to reflect the developments in the case law. I do so now:
>
> - An assessment by persons who are not 'health practitioners' may be ordered where such an assessment is necessary to the diagnosis of a health practitioner as defined by s. 105 of the *Courts of Justice Act*.
> - The word 'diagnosis' referred to in the various authorities should be given a liberal interpretation.
> - In exercising the discretion in considering a request pursuant to Section 105 and Rule 33 the test to be applied by the Court is one of 'fairness' but 'fairness' by itself is not sufficient.
> - There needs to be a proper evidentiary basis for determining the health practitioner's necessity for such an assessment. While an affidavit from the qualified 'health practitioner' is preferred, other credible evidence may satisfy the test if it provides a sufficient context to evaluate the necessity for the additional diagnostic testing.
> - The health practitioner should first examine the plaintiff and consider the results of that examination before making a request for adjunctive tests. At the very least, the health practitioner must comment on the relevant reports produced including any tests relied upon by the parties.

- Encouraging physicians to ask for the tests should not be promoted. In the absence of an affidavit from the 'health practitioner' defence counsel should be prepared to reveal their correspondence with the physician making the request.
- Such an assessment needs to be directed to an important issue in the case.
- The Defendant must adduce evidence that such an assessment will ensure a fair trial or other just result.
- The Defendant must set out in detail the nature of the tests to be performed including the identity of the assessors, the duration and the physical requirements of any tests.
- The assessment must not be unnecessarily intrusive to the plaintiff. The onus is on the plaintiff to adduce such evidence."

Scissons v. Lajoie, (2008), 56 C.P.C. (6th) 56 (Ont. Master), p. 62; aff'd 56 C.P.C. (6th) 63 (Ont. S.C.J.), Book of Authorities of the Appellants, Tab 16

49. In *Nutley v. Kuper*, Pierce J. referred with approval to this summary, and declined to order a functional capacity assessment where there was no evidence the examination was required as a diagnostic aid: "This case lacks a proper evidentiary basis to order a functional abilities evaluation. The examining physician, Dr. Clarke, has made no request for such an examination in aid of his diagnosis. I cannot help but conclude therefore that the proposed assessment is of no moment to his examination. It would be unfair to the plaintiff to order the assessment when there is no evidence it will be useful to Dr. Clarke. The courts ought not to embark on a cookie cutter approach to ordering adjunct examinations simply because the defence requests them."

Nutley v. Kuper (2009), 66 C.P.C. (6th) 7 (Ont. S.C.J.), p. 13, Book of Authorities of the Appellants, Tab 17

50. In *Featherstone v. Essex (County)*, Leitch R.S.J. undertook a review of the authorities and declined to order an in home occupational therapy assessment where there was an insufficient evidentiary basis for the proposed examination.

Featherstone v. Essex (County) (2009), 76 C.P.C. (6th) 195 (Ont. S.C.J.), Book of

Authorities of the Appellants, Tab 18

51. This review demonstrates that Courts do indeed have the authority to order examinations by a wide range of practitioners, where there is an evidentiary basis to conclude that the proposed examination will serve as a diagnostic aid to the examination of a health practitioner.

The Scope of Inherent Jurisdiction

52. Inherent jurisdiction undoubtedly plays an important part in our legal system. It has been described by Professor Jacob as "the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

I.H. Jacob, The Inherent Jurisdiction of the Court (1970), Current Legal Problems 23, p. 51, Book of Authorities of the Appellants, Tab 19

53. The scope of the doctrine, however, is not unlimited and has always been subject to the effect of statutory provisions. For example, in *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd*, Dickson J. (as he then was) stated: "in my opinion the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will."

Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475, p. 480, Book of Authorities of the Appellants, Tab 20

54. More recently, Karakatsanis J. declined to make use of inherent jurisdiction to set the rates of counsel appointed as *amicus curiae*. In *Ontario v. Criminal Lawyers' Association of Ontario*, she

stated: "The scope of a superior court's inherent power, or of powers possessed by statutory courts by necessary implication, must respect the constitutional roles and institutional capacities of the legislature, the executive and the judiciary…the inherent jurisdiction of superior courts provides powers that are essential to the administration of justice and the maintenance of the rule of law and the Constitution. It includes those residual powers required to permit the courts to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner - subject to any statutory provisions."

> Ontario v. Criminal Lawyers' Association of Ontario, [2013] 3 S.C.R. 3, paras. 5, 26, Book of Authorities of the Appellants, Tab 21

55. In the context of the *Rules of Civil Procedure*, this Court addressed the scope of inherent jurisdiction in respect of a stay pending appeal provided for in Rule 63. In *Peel v. Great Atlantic and Pacific Co. of Canada*, the Court stated: "With respect to the inherent jurisdiction of the court, we have some doubt that, when the field is occupied by a rule, in this case Rule 63 (which contains rules governing the matter of a stay pending appeal to this court), it can properly be held that the court has inherent jurisdiction."

> Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada Ltd. (1991), 74 O.R. (2d) 161 (C.A.), p. 163, Book of Authorities of the Appellants, Tab 22

56. In *Toronto-Dominion Bank v. Szilagyi Farms Ltd.*, Morden J.A. in Chambers held that the Court had no inherent jurisdiction to make an order for security for costs of an appeal where the Rules "occupied the field."

> Toronto-Dominion Bank v. Szilagyi Farms Ltd. (1989), 65 O.R. (2d) 433 (C.A.), p. 438, Book of Authorities of the Appellants, Tab 23

57. In *Waxman v. Waxman*, Newbould J., relying on *Szilagyi Farms*, held there was no inherent jurisdiction to order the examination of a non-party where the legal test under the Rules could not be met. He stated: "Rules 31.03 and 31.10 are designed to deal with the issues of an examination of an adverse party, a second employee of a corporation or a third party and, if the rules cannot be met, there is no inherent jurisdiction in a court to conclude that the order can be made in any event under some general discretion…In my view, the rules committee has occupied the field and made a code dealing with the right of a party to obtain pre-trial discovery under rules 31.01 and 30.10, and the court has no inherent jurisdiction to make an order contrary to those rules under some residual discretion. If there is a problem with the rule, it is for the rules committee to consider."

> Waxman v. Waxman, 2011 ONSC 4707 (S.C.J. - Commercial List), paras. 28-29, Book of Authorities of the Appellants, Tab 24

58. In this case, given the comprehensive statutory scheme, there can be little doubt that s. 105 "occupies the field" in respect of examinations by health practitioners. Wilton-Siegel J. expressed differing views on this point in the reasons for judgment. He stated at para. 45 that s. 105 "does not completely occupy the field" and that there is "a gap in the statutory provisions." At para. 53, he stated that s. 105 "is not exhaustive." However, at para. 70, he conceded "it is possible that section 105 has 'occupied the field' in respect of physical or mental examinations by a person who is not a 'health practitioner' for the purposes of section 105 of the *Courts of Justice Act*."

59. The legislative history and the principles of statutory interpretation referred to above demonstrate that s. 105 and Rule 33 were indeed intended to "occupy the field" in this area. If the statutory test cannot be met because a proposed examiner is not a "health practitioner", and the examination is not required as a diagnostic aid, it is not for the Court to expand the definition of health practitioner by the use of inherent jurisdiction.

60. At para. 70, Wilton-Siegel J. says that, even if s. 105 occupies the field, "there is no conflict with the court's inherent jurisdiction because the court's discretion under section 105 is at least as extensive as the court's inherent jurisdiction." With respect, this statement misses the point. The point is not the manner in which the Court exercises its discretion under s. 105, but rather that the legislature has set out, as a threshold matter, a category of persons defined as "health practitioners" entitled to conduct an examination. If the effect of making use of inherent jurisdiction is to permit an examination by a person outside of the defined category, this creates a conflict with s. 105. A proposed examiner either is or is not a "health practitioner." Discretion has nothing to do with it.

An Alternative/Parallel Scheme to s. 105 and the Diagnostic Aid Test is Unnecessary

61. As seen above, the Courts have created the diagnostic aid test as an adjunct to the carefully tailored statutory provisions and Rules on medical examinations. In doing so, the Courts have addressed concerns about creating a level playing field, and ensuring that defendants can properly challenge a plaintiff's claim. The simple requirement under the diagnostic aid test is that there be an adequate evidentiary basis to conclude that the proposed examination is required as a diagnostic aid to the examination of a health practitioner. This system has worked for decades. There is no need to create an alternative or parallel scheme through the use of inherent jurisdiction.

62. If the legislature intended to expand the category of practitioners permitted to conduct examinations under s. 105, it could have done so, as has been done in the *SABS*, the *Evidence Act* and the *Insurance Act*. Until the legislature amends the definition of health practitioner, it is not for the Courts to achieve that result by the use of inherent jurisdiction.

The Motion for a Vocational Examination Should Have Been Dismissed

63. The Respondents failed to put forward a proper evidentiary foundation in support of the proposed examination of Alexander Ziebenhaus by Mr. Pett. The affidavit in support of the motion was from a law clerk in the offices of defence counsel. There was no indication in the affidavit that the examination by Mr. Pett was required as a diagnostic aid. In fact, the affidavit did not include as an exhibit or even mention, the report of Dr. Saint-Cyr. Dr. Saint-Cyr examined Alexander over the course of two days and administered a battery of tests designed to determine, in part, Alexander's vocational potential. Dr. Saint-Cyr delivered a comprehensive report that included an opinion on the effect of Alexander's injuries on his vocational potential. Given these circumstances, it is submitted the examination by Mr. Pett ought not to have been ordered.

Conclusion

64. In s. 105 of the *Courts of Justice Act*, the legislature has enacted a statutory scheme intended to govern the conduct of medical examinations in Court actions. By its enactment of a defined category of "health practitioners" entitled to conduct such examinations, the legislature has similarly expressed an intention to exclude other practitioners. Given these circumstances, it is not appropriate for Courts to use inherent jurisdiction in a manner that re-writes the statutory definition.

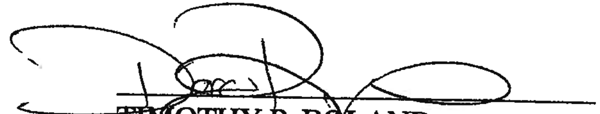
PART IV – ORDER REQUESTED

65. It is respectfully requested that: (a) the order of the Divisional Court dated April 2, 2014, be set aside; (b) the motion brought by the Respondents for examination of Alexander Ziebenhaus by Graham Pett be dismissed; and (c) the Appellants be awarded costs of the appeal herein, the appeal before the Divisional Court, the motion for leave to appeal and the motion before Edwards J.

CERTIFICATE

The Appellants certify that: (a) an order under Rule 61.09(2) is not required; (b) the Appellants' lawyers estimate that two hours will be required for oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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SCHEDULE A – LIST OF AUTHORITIES

1. Reily v. City of London (1891), P.R. 171 (H.C.J.)

2. Clouse v. Coleman (1895), 16 P.R. 496 (H.C.J.); leave to appeal refused (1895), 16 P.R. 541 (C.A.)

3. H. v. H., [1933] O.W.N. 490 (H.C.J.)

4. Hardy v. Cummings, [1940] 1 D.L.R. 774 (Ont. H.C.J., Master)

5. Wolfe v. Essex Terminal Railway Co., [1950] 2 D.L.R. 285 (Ont. H.C.J.)

6. Taub v. Noble, [1965] 1 O.R. 600 (H.C.J.)

7. Rysyk v. Booth Fisheries Canadian Co. Ltd., [1971] 1 O.R. 123 (C.A.)

8. Gotch v. Chittenden, [1972] 2 O.R. 272 (H.C.J.)

9. Ruth Sullivan, Sullivan on the Construction of Statutes (5th ed.) (LexisNexis, 2008)

10. Vreken v. Fitchett (1984), 45 O.R. (2d) 515 (H.C.J.), pp. 518-520.

11. Fernandes v. Melo (1974), 6 O.R. (2d) 185 (H.C.J.), pp. 186-188.

12. Tarmohamed v. Scarborough (City) (1989) 68 O.R. (2d) 116 (H.C.J.)

13. Campbell v. Cotton (2002), 17 C.P.C. (5th) 108 (Ont. Master)

14. Grant v. Keane (2002), 18 C.P.C. (5th) 258 (Ont. Master)

15. Bernier v. Assan (2006), 27 C.P.C. (6th) 376 (Ont. S.C.J.)

16. Scissons v. Lajoie (2008), 56 C.P.C. (6th) 56 (Ont. Master), aff'd 56 C.P.C. (6th) 63 (S.C.J.)

17. Nutley v. Kuper (2009), 66 C.P.C. (6th) 7 (Ont. S.C.J.)

18. Featherstone v. Essex (County) (2009), 76 C.P.C. (6th) 195 (Ont. S.C.J.)

19. I.H. Jacob, The Inherent Jurisdiction of the Court (1970), Current Legal Problems 23

20. Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475

21. Ontario v. Criminal Lawyers' Association of Ontario, [2013] 3 S.C.R. 3

22. Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada Ltd. (1991), 74 O.R. (2d) 161 (C.A.)

23. Toronto-Dominion Bank v. Szilagyi Farms Ltd. (1989), 65 O.R. (2d) 433 (C.A.)

24. Waxman v. Waxman, 2011 ONSC 4707 (S.C.J. - Commercial List)

SCHEDULE B – LIST OF AUTHORITIES

Courts of Justice Act R.S.O. 1990 C. 43

Superior Court of Justice

11. (1) The Ontario Court (General Division) is continued as a superior court of record under the name Superior Court of Justice in English and Cour supérieure de justice in French. 1996, c. 25, s. 9 (3).

Idem

(2) The Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario. R.S.O. 1990, c. C.43, s. 11 (2); 1996, c. 25, s. 9 (17).

Physical or mental examination
Definition

105. (1) In this section,

"health practitioner" means a person licensed to practise medicine or dentistry in Ontario or any other jurisdiction, a member of the College of Psychologists of Ontario or a person certified or registered as a psychologist by another jurisdiction. R.S.O. 1990, c. C.43, s. 105 (1); 1998, c. 18, Sched. G, s. 48.

Order

(2) Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners.

Idem

(3) Where the question of a party's physical or mental condition is first raised by another party, an order under this section shall not be made unless the allegation is relevant to a material issue in the proceeding and there is good reason to believe that there is substance to the allegation.

Further examinations

(4) The court may, on motion, order further physical or mental examinations.

Examiner may ask questions

(5) Where an order is made under this section, the party examined shall answer the questions of the examining health practitioner relevant to the examination and the answers given are admissible in evidence. R.S.O. 1990, c. C.43, s. 105 (2-5).

Rules of Civil Procedure R.R.O. 1990 194

RULE 33 MEDICAL EXAMINATION OF PARTIES

MOTION FOR MEDICAL EXAMINATION

33.01 A motion by an adverse party for an order under section 105 of the *Courts of Justice Act* for the physical or mental examination of a party whose physical or mental condition is in question in a proceeding shall be made on notice to every other party. R.R.O. 1990, Reg. 194, r. 33.01.

ORDER FOR EXAMINATION

Contents of Order

33.02 (1) An order under section 105 of the *Courts of Justice Act* may specify the time, place and purpose of the examination and shall name the health practitioner or practitioners by whom it is to be conducted. R.R.O. 1990, Reg. 194, r. 33.02 (1).

Further Examinations

(2) The court may order a second examination or further examinations on such terms respecting costs and other matters as are just. R.R.O. 1990, Reg. 194, r. 33.02 (2).

DISPUTE AS TO SCOPE OF EXAMINATION

33.03 The court may on motion determine any dispute relating to the scope of an examination. R.R.O. 1990, Reg. 194, r. 33.03.

PROVISION OF INFORMATION TO PARTY OBTAINING ORDER

Interpretation

33.04 (1) Subrule 30.01 (1) (meaning of "document", "power") applies to subrule (2). R.R.O. 1990, Reg. 194, r. 33.04 (1).

Party to be Examined must Provide Information

(2) The party to be examined shall, unless the court orders otherwise, provide to the party obtaining the order, at least seven days before the examination, a copy of,

(a) any report made by a health practitioner who has treated or examined the party to be examined in respect of the mental or

physical condition in question, other than a practitioner whose report was made in preparation for contemplated or pending litigation and for no other purpose, and whom the party to be examined undertakes not to call as a witness at the hearing; and

(b) any hospital record or other medical document relating to the mental or physical condition in question that is in the possession, control or power of the party other than a document made in preparation for contemplated or pending litigation and for no other purpose, and in respect of which the party to be examined undertakes not to call evidence at the hearing. R.R.O. 1990, Reg. 194, r. 33.04 (2).

WHO MAY ATTEND ON EXAMINATION

33.05 No person other than the person being examined, the examining health practitioner and such assistants as the practitioner requires for the purpose of the examination shall be present at the examination, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 33.05.

MEDICAL REPORTS

Preparation of Report

33.06 (1) After conducting an examination, the examining health practitioner shall prepare a written report setting out his or her observations, the results of any tests made and his or her conclusions, diagnosis and prognosis and shall forthwith provide the report to the party who obtained the order. R.R.O. 1990, Reg. 194, r. 33.06 (1).

Service of Report

(2) The party who obtained the order shall forthwith serve the report on every other party. R.R.O. 1990, Reg. 194, r. 33.06 (2).

PENALTY FOR FAILURE TO COMPLY

33.07 A party who fails to comply with section 105 of the *Courts of Justice Act* or an order made under that section or with rule 33.04 is liable, if a plaintiff or applicant, to have the proceeding dismissed or, if a defendant or respondent, to have the statement of defence or affidavit in response to the application struck out. R.R.O. 1990, Reg. 194, r. 33.07.

EXAMINATION BY CONSENT

33.08 Rules 33.01 to 33.07 apply to a physical or mental examination conducted on the consent in writing of the parties, except to the extent that they are waived by the consent. R.R.O. 1990, Reg. 194, r. 33.08.

Evidence Act, R.S.O. 1990 C. E23

Reports and evidence of practitioners
Definition

52. (1) In this section,

"practitioner" means,

(a) a member of a College as defined in subsection 1 (1) of the *Regulated Health Professions Act, 1991,*

(b) a drugless practitioner registered under the *Drugless Practitioners Act,*

(c) a person licensed or registered to practise in another part of Canada under an Act that is similar to an Act referred to in clause (a) or (b). R.S.O. 1990, c. E.23, s. 52 (1); 1998, c. 18, Sched. G, s. 50.

Medical reports

(2) A report obtained by or prepared for a party to an action and signed by a practitioner and any other report of the practitioner that relates to the action are, with leave of the court and after at least ten days notice has been given to all other parties, admissible in evidence in the action. R.S.O. 1990, c. E.23, s. 52 (2).

Insurance Act R.S.O. 1990 C I.8

Notice and disclosure before action

258.3 (1) An action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile shall not be commenced unless,

(a) the plaintiff has applied for statutory accident benefits;

(b) the plaintiff served written notice of the intention to commence the action on the defendant within 120 days after the incident or within such longer period as a court in which the action may be commenced may authorize, on motion made before or after the expiry of the 120-day period;

(c) the plaintiff provided the defendant with the information prescribed by the regulations within the time period prescribed by the regulations;

(d) the plaintiff has, at the defendant's expense, undergone examinations by one or more persons selected by the defendant who are members of Colleges as defined in the *Regulated Health Professions Act, 1991*, if the defendant requests the examinations within 90 days after receiving the notice under clause (b);

(e) the plaintiff has provided the defendant with a statutory declaration describing the circumstances surrounding the incident and the nature of the claim being made, if the statutory declaration is requested by the defendant; and

(f) the plaintiff has provided the defendant with evidence of the plaintiff's identity, if evidence of the plaintiff's identity is requested by the defendant.

Statutory Accident Benefits Schedule, O.Reg 34/10

Examination required by insurer
44. (1) For the purposes of assisting an insurer to determine if an insured person is or continues to be entitled to a benefit under this Regulation for which an application is made, but not more often than is reasonably necessary, an insurer may require an insured person to be examined under this section by one or more persons chosen by the insurer who are regulated health professionals or who have expertise in vocational rehabilitation.

Regulated Health Professions Act, 1991 S.O. 1991 c.18

1. (1) In this Act,

...

"health profession" means a health profession set out in Schedule 1; ("profession de la santé")

References to health professionals
44. A reference in an Act or regulation to a person described in Column 1 of the Table shall be deemed to be a reference to a person described opposite in Column 2. 1991, c. 18, s. 44.

TABLE

	Column 1	Column 2
1.	person registered as a chiropodist under the *Chiropody Act*	member of the College of Chiropodists of Ontario
2.	person registered as a dental technician under the *Dental Technicians Act*	member of the College of Dental Technologists of Ontario
3.	person licensed as a denture therapist under the *Denture Therapists Act*	member of the College of Denturists of Ontario
4.	person registered as a chiropractor under the *Drugless Practitioners Act*	member of the College of Chiropractors of Ontario
5.	person registered as a masseur under the *Drugless Practitioners Act*	member of the College of Massage Therapists of Ontario
6.	Repealed. See: Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* – December 31, 2011.	
7.	person registered as a physiotherapist under the *Drugless Practitioners Act*	member of the College of Physiotherapists of Ontario
Note: On a day to be named by proclamation of the Lieutenant Governor, the Table is amended by the Statutes of Ontario, 2007, chapter 10, Schedule P, subsection 20 (2) by adding the following item:		
7.1	person registered under the *Drugless Practitioners Act*	member of the College of Naturopaths of Ontario
See: 2007, c. 10, Sched. P, ss. 20 (2), 21 (2).		
8.	person registered as a dental hygienist under Part II of the *Health Disciplines Act*	member of the College of Dental Hygienists of Ontario
9.	person licensed under Part II of the *Health Disciplines Act*	member of the Royal College of Dental Surgeons of Ontario
10.	person licensed under Part III of the *Health Disciplines Act*	member of the College of Physicians and Surgeons of Ontario

11.	person who is the holder of a certificate issued under Part IV of the *Health Disciplines Act*	member of the College of Nurses of Ontario
12.	person licensed under Part V of the *Health Disciplines Act*	member of the College of Optometrists of Ontario
13.	person licensed under Part VI of the *Health Disciplines Act*	member of the Ontario College of Pharmacists
14.	Person registered under the *Ophthalmic Dispensers Act*	member of the College of Opticians of Ontario
15.	person registered under the *Psychologists Registration Act*	member of the College of Psychologists of Ontario
16.	person registered under the *Radiological Technicians Act*	member of the College of Medical Radiation Technologists of Ontario

ALEXANDER ZIEBENHAUS et al. v MOUNT ST. LOUIS MOONSTONE SKI RESORT LTD. et al.

Appellants (Plaintiffs) Respondents (Defendants)

Court of Appeal File No. C59431

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at NEWMARKET

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