CITATION: Gill v. Maciver, 2022 ONSC 1279
COURT FILE NO.: CV-20-652918-0000
DATE: 20220224

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)
	)
Dr. Kulvinder Kaur Gill and Dr. Ashvinder Kaur Lamba	) *Rocco Galati, for the Plaintiffs*
Plaintiffs	)
– and –	)
	)
Dr. Angus Maciver, Dr. Nadia Alam, André Picard, Dr. Michelle Cohen, Dr. Alex Nataros, Dr. Ilan Schwartz, Dr. Andrew Fraser, Dr. Marco Prado, Timothy Caulfield, Dr. Sajjad Fazel, Alheli Picazo, Bruce Arthur, Dr. Terry Polevoy, Dr. John Van Aerde, Dr. Andrew Boozary, Dr. Abdu Sharkawy, Dr. David Jacobs, Tristan Bronca, Carly Weeks, The Pointer, The Hamilton Spectator, Société-Radio Canada, the Medical Post	) *Howard Winkler and Eryn Pond*, for the Defendant Dr. Angus Maciver) *Julian Porter,* for the Defendant Nadia Alam) *Jaan Lilles and Katie Glowach*, for the Defendants Dr. David Jacobs, Dr. Alex Nataros, Dr. Abdu Sharkawy, Dr. Nadia Alam and Dr. Michelle Cohen) *Susan Toth,* for the Defendant Dr. John Van Aerde
Defendants	) *Andrea Gonsalves and Caitlin Milne*, for the Defendant Dr. Andrew Fraser) *Alex Pettingill,* for the Defendants Dr. Ilan Schwartz, Dr. Marco Prado, Timothy Caulfield and Dr. Sajjad Fazel) *Timothy Flannery*, for the Defendant Dr. Terry Polevoy) *Daniel Iny and Melanie Anderson,* for the Defendant Dr. Andrew Boozary) *Meredith Hayward and Michael Binetti*, for the Defendants Tristan Bronca and The Medical Post

) *Brian Radnoff and David Seifer*, for the
) Defendant The Pointer Group Incorporated
)
) *Andrew MacDonald, Carlos Martins and*
) *Emma Romano,* for the Defendants André
) Picard and Carly Weeks
)
) *George Pakozdi,* for the Defendant Alheli
) Picazo
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) *Emma Carver,* for the Defendant Bruce
) Arthur
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) **HEARD:** September 27, 28 and 29, 2021

REASONS FOR DECISION

Stewart J.

Nature of the Motions

[1] The Plaintiffs have initiated proceedings as against these more than 20 Defendants and claim damages in the aggregate of approximately $12,000,000.00 for defamation and other purported causes of action.

[2] The Defendants have brought these several motions pursuant to s. 137.1 of the *Courts of Justice Act* ("CJA"), R.S.O 1990, c C.43. Section 137.1 allows for the dismissal by judicial order of a proceeding that limits debate on matters of public interest. These motions are more commonly referred to as "anti-SLAPP" motions. A SLAAP refers to a strategic lawsuit against public participation, a characterization which the Defendants argue aptly attaches to the proceedings brought against them.

[3] The Plaintiffs argue that the motions do not satisfy the test for dismissal at this early stage and therefore submit that the relief requested by the Defendants should not be granted.

[4] The most relevant portions of Section 137.1 of the CJA provide as follows:

> **Dismissal of proceeding that limits debate**
>
> **Purposes**

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. 2015, c. 23, s.3.

Definition, "expression"

(2) In this section,

"expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 2015, c. 23, s. 3.

Order to dismiss

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. 2015, c. 23, s. 3.

No dismissal

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. 2015, c. 23, s. 3.

[5] It is not disputed that the tort of defamation is governed by a well-established test requiring that three criteria be met:

> (a) that the words complained of were published, meaning that they were communicated to at least one person other than the plaintiff;
>
> (b) the words complained of referred to the plaintiff; and
>
> (c) the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person.

[6] Even if the definition of defamation is met, a defendant may have several defences to rely on to escape liability. These include justification, fair comment, qualified privilege and responsible journalism (see: *Grant v. Torstar Corp*., 2009 SCC 61).

[7] In order to properly consider the issues raised by a motion brought pursuant to s. 137.1 evidence may be filed by the parties to provide background and context to an impugned statement as well as to establish the chances of success of the claims and any available defences.

[8] Subsections 137.1(3) and (4) of the CJA set out a two-part test for a motion to dismiss an action on this basis. First, the defendant has the onus of showing that the plaintiff's proceeding arises from an expression that "relates to a matter of public interest". If the defendant meets that threshold, the court must dismiss the action unless the plaintiff satisfies the court that there are grounds to believe the proceeding has substantial merit, that there are grounds to believe that the defendant has no valid defence, and that the harm suffered by the plaintiff is sufficiently serious such that the public interest in allowing the proceeding to continue outweighs the public interest in protecting that expression.

[9] It is instructive to repeat that, once it has been established by the Defendants that the impugned communication relates to a matter of public interest, the burden on these motions rests on the Plaintiffs to establish that there is substantial merit to each of their claims.

[10] The three factors that comprise the plaintiff`s onus to meet the second branch of the test are conjunctive. If the plaintiff fails to meet the onus on any one of those three requirements, the action must be dismissed.

[11] The Supreme Court of Canada has considered the test for dismissal under s. 137.1 and has expressed views on issues related to the approach to be applied thereunder in two recent decisions: *1704604 Ontario Ltd. V. Pointes Protection Association*, 2020 SCC 22 and *Bent v. Platnick*, 2020 SCC 23.

[12] In *Pointes Protection*, "substantial merit" was defined as a real prospect of success. The requirement was further refined in *Bent v. Platnick* as demonstrating a prospect of success that need not be demonstrably likely, but one that weighs more in favour of the plaintiff.

[13] Substantial merit has been described as a more demanding standard than that applicable on a motion to strike a claim pursuant to Rule 21 of the *Rules of Civil Procedure* for failure to disclose a cause of action. Accordingly, more than merely some chance of success is required. In *Bent v. Platnick*, was stated (at para. 49):

> …for an underlying proceeding to have "substantial merit", it must have a real prospect of success — in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff. In context with "grounds to believe", this means that the motion judge needs to be satisfied that there is a basis in the record and the law — taking into account the stage of the proceeding — for drawing such a conclusion. This requires that the claim be legally tenable and supported by evidence that is reasonably capable of belief.

[14] In *Bent v. Platnick*, the Court went on to state (at paras 87 and 88):

> In *Pointes Protection*, this Court clarifies the fact that unlike s. 137.1(3), which requires a showing on a balance of probabilities, s. 137.1(4)(a) expressly contemplates a "grounds to believe" standard instead: para.35. This requires a basis in the record and the law – taking into account the stage of the litigation – for finding that the underlying proceeding has substantial merit and that there is no valid defence.
>
> I elaborate here that, in effect, this means that any basis in the record and the law will be sufficient. By definition, "a basis" will exist if there is a single basis in the record and the law to support a finding of substantial merit and the absence of a valid defence. That basis must of course be legally tenable and reasonably capable of belief. But the "crux of the inquiry" is found, after all, in s. 137.1(4)(b), which also serves as a "robust backstop" for protecting freedom of expression.

[15] The "crux of the inquiry" therefore is the balancing exercise required by s. 137.1(4)(b) which involves a weighing of the seriousness of the harm to the Plaintiffs as a result of the expressions of the Defendants and the public interest in permitting the proceeding to continue, versus the public interest in protecting the expression.

[16] Having considered the submissions made on behalf of the parties, having applied the provisions of the legislation referred to above which govern the determination of the issues in light of the principles and considerations articulated by the Supreme Court of Canada in the authorities noted above, for the reasons that follow I find that an application of the test under s. 137.1 to each claim, including the allegations of "negligence" and "conspiracy" (which are nothing but dressed-up and unsubstantiated variations of the central claims of alleged defamation), must result in a dismissal of all claims.

[17] I also conclude that these claims are precisely ones that are of the kind that s. 137.1 is designed to discourage and screen out.

The Plaintiffs

[18] The Plaintiff Dr. Kulvinder Kaur Gill ("Dr. Gill") is a medical doctor practising at an allergy, asthma and clinical immunology clinic with locations in Brampton and Milton, Ontario. Dr. Gill has been a member of the Ontario Medical Association ("OMA") Governing Council and transparency of the OMA and the harm of escalating cuts to frontline health care. She is a founding member and leader of Concerned Ontario Doctors ("COD") which operates in part as a platform for the expression of her views.

[19] The undisputed evidence on the motion plainly shows that Dr. Gill is not afraid to voice unpopular views or to court controversy.

[20] Dr. Gill also is a frequent commentator on issues related to the Covid-19 pandemic and does so frequently on her Twitter account which has attracted more than 63,000 "followers".

[21] Accordingly, in addition to her campaign of attack on the OMA and its leadership, Dr. Gill has been an outspoken critic of prevailing public health advice on how to prevent or slow Covid-19 infection from spreading throughout the community, using social media platforms including Twitter to disseminate her controversial views. In doing so, Dr Gill has suggested that the risks posed by the Covid-19 virus are exaggerated, vaccines are unnecessary, lockdowns are illogical, and hydroxychloroquine is an effective treatment for infection caused by the virus.

[22] Dr. Gill has been formally and publicly cautioned by the College of Physicians and Surgeons of Ontario against using her position as a physician to bolster her dissemination of such misleading information which contradicts the positions advocated by public health authorities in Ontario and Canada. The prohibition contained in the *Regulated Health Professions Act* against use in a civil proceeding of documents or details of the College's investigation requires that no further mention or consideration of same enter into the deliberations required by these motions.

[23] The Plaintiff Dr. Ashvinder Kaur Lamba ("Dr. Lamba") is a medical doctor practising as a physician at a long-term care home and a retirement home in Etobicoke, Ontario and is an addiction physician in Thornhill, Ontario. She also has a family practice in Brampton. Dr. Lamba is a former OMA delegate and member of the OMA Governing Council and is now Secretary of the Board of COD.

[24] Dr. Lamba is to some extent a secondary protagonist with respect to the advancement of these claims which, in large part, arise out of matters in which Dr. Gill is the central figure. Dr. Lamba did not swear or file an affidavit in response to these motions. She asserts her claims only as against two of the Defendants and only with respect to allegations relating to statements said to have been made concerning her OMA activities and positions.

[25] The multi-million dollar claims for damages made by both Plaintiffs are for reputational damage only, although each Plaintiff continues to be active in their professional organization and affairs and to practise medicine unimpeded in Ontario. As will be referred to below, the Plaintiffs have advanced very little basis for demonstrating that they or their reputations have been damaged as a result of the statements or conduct of any of the Defendants.

The Defendants

[26] The Defendant Dr. Angus McIver ("Dr. McIver") is an elderly physician who holds no leadership position in the OMA. He has a primary Twitter account ("@smootholdfart") with 1206 followers, and a now-deleted secondary Twitter account ("@vitomaciver") which had been used mainly for posting photos of his dog.

[27] The Defendant Dr. Nadia Alam ("Dr. Alam") is a medical doctor practising as a family physician and anaesthetist in Ontario and is a Board Director of the Halton Hills Family Health Team. Dr. Alam has been and remains active in the OMA. From 2017-2020 she was a member of the Board of Directors of the OMA and was OMA President during 2018-2019. Dr. Alam is represented by two separate counsel in connection who separately address the two categories of allegations the Plaintiffs have made against her.

[28] The Defendant Dr. David Jacobs ("Dr. Jacobs") is a physician specializing in diagnostic radiology in Toronto. Dr. Jacobs is a leader in his specialty associations and professional governing bodies.

[29] The Defendant Dr. Alex Nataros ("Dr. Nataros") is a family physician practising medicine in British Columbia. Dr. Nataros is a recipient of the Leadership and Advocacy Award of the College of Family Physicians of Canada.

[30] The Defendant Dr. Michelle Cohen ("Dr. Cohen") is a family physician in Brighton, Ontario who is a public advocate on health policy issues, having published articles in various newspapers and periodicals on health policy topics.

[31] The Defendant Dr. John Van Aerde ("Dr. Van Aerde") is a specialist in paediatric medicine. Although now retired from clinical practice, Dr. Van Aerde remains active in various medical associations, medical education institutions as well as the Canadian Medical Association.

[32] The Defendant Dr Andrew Fraser ("Dr. Fraser") is a tenured professor at the University of Toronto Donnelly Centre for Cellular and Biomedical Research. He conducts research on genetic models of development and disease, and has significant training and experience in pathology and statistical analysis.

[33] The Defendant Dr. Ilan Schwartz ("Dr. Schwartz") is a physician with a subspecialty in infectious diseases, employed by the University of Alberta and the Alberta Health Services. Dr. Schwartz was involved in clinical trials of the use of hydroxychloroquine that were among the many such research investigations that showed it to be an ineffective treatment for Covid-19 infection.

[34] The Defendant Dr. Marco Prado ("Dr. Prado") is a professor at Western University with an established expertise in biochemistry and immunology.

[35] The Defendant Timothy Caulfield ("Caulfield") is a health policy and health sciences professor at the University of Alberta's Faculty of Law and School of Public Health whose research has dealt with misinformation in the context of health care and Covid-19.

[36] The Defendant Dr. Sajjad Fazel ("Dr. Fazel") is a post-doctoral associate at the University of Calgary and also holds a Masters Degree in Public Health.

[37] The Defendant Dr. Terry Polevoy ("Dr. Polevoy") is a retired family physician who is an active leader within various medical associations, including associations of physicians in his area of practice and provincial associations. Dr. Polevoy is active on social media, primarily through his Twitter account where he frequently shares information, opinions and news stories on a variety of subjects including politics and health care.

[38] The Defendant Dr. Andrew Boozary ("Dr. Boozary") is a physician in Toronto and the Executive Director of Population Health and Social Medicine at the University Health Network.

[39] The Defendant Dr. Abdu Sharkawy ("Dr. Sharkawy") is a physician with a specialization in infectious diseases and internal medicine. He routinely speaks in public and using his Twitter account to educate members of the public on health and medicine matters.

[40] The Defendant The Medical Post publishes both a print magazine and an online newspaper for Canadian physicians. The online newspaper is published daily and is only available to registered users or subscribers.

[41] The Defendant Tristan Bronca has worked with the Medical Post and has become familiar with the scientific literature on hydroxychloroquine showing it is not an effective treatment for covid-19.

[42] The Defendant The Pointer Group Incorporated ("The Pointer") is a paid subscription-bases digital-only media platform that provides locally-focused news in the Peel and Greater Toronto Regions.

[43] The Defendant André Picard ("Picard") is the Staff Senior Health Columnist for The Globe and Mail where he has worked since 1987. Picard reports and writes on health and health care issues. He is the author of six books on health-related subjects and speaks publicly on frequent occasions on such matters, also using a Twitter account for that purpose.

[44] The Defendant Carly Weeks is a Health Reporter for The Globe and Mail where she has been a staff writer since 2007. She writes and often speaks publicly on health-related topics and additionally uses a Twitter account for that purpose.

[45] The Defendant Alheli Picazo ("Picazo") is a freelance writer who primarily covers the topics of politics and health. She uses Twitter for this purpose and often tweets about the Covid-19 pandemic and related issues.

[46] The Defendant Bruce Arthur ("Arthur") is a columnist at the Toronto Star. He uses his Twitter account to express personal views and concerns on a variety of topics, including the Covid-19 pandemic.

[47] The Plaintiffs have discontinued their action as against the Defendants The Hamilton Spectator and Societe-Radio Canada.

Preliminary Observations

[48] As can be seen from the above descriptions of the Defendants, the Plaintiffs have brought these proceedings against more than 20 individual physicians, academics, medical and scientific experts, and journalists as well as against publications that have and continue to provide valuable information to the public about Covid-19.

[49] In the motions before the Court, the Defendants seek to avail themselves of a provision enacted by the legislature that is intended to operate as a shield against anyone seeking to stifle debate on issues that are of interest to the public. The ultimate issue before me is whether these claims are such that they should be dismissed on that basis at this early stage.

[50] The provision under which the Defendants move for orders dismissing the claims against them is not the first or the only available recourse by which a proceeding may be terminated or curtailed by the courts when appropriate. For instance, Rules 2.1.01, 20 and 21 establish bases upon which proceedings may be dismissed or adjudicated upon short of any full trial. No one has an absolute and unfettered right to pursue any civil claims through to full trial and judgment without confronting a possible roadblock that may bring the proceedings to a halt.

[51] One may well wonder about the motives of these full-time physicians who remain active in what might fairly be described as the politics of their professional associations in bringing proceedings seeking staggering money judgments against such a broad array of persons whom they claim to perceive as having injured their reputations. The sheer variety of their targets and the magnitude of their claims set them up to be examined pursuant to s. 137.1.

[52] Because there are so many claims made in these proceedings against so many Defendants, and so many arguments and defences advanced by them, applying the test on each of the motions brought on their behalf is a daunting task. However, it does appear that the claims can be grouped generally into 2 categories: those that arise out of statements made by some Defendants in the context of an OMA dispute, and those that arise out of or were provoked by the controversial views expressed by Dr. Gill about pandemic-related matters.

[53] In dealing with the substance of these various motions, I may repeat the same positions taken by various parties, or make liberal reference to those parts of the written submissions that have been filed on behalf of some parties as well as the rationales for those arguments as advanced.

[54] In several instances, some Defendants have sought to avail themselves of more than one available defence. As will be seen below, I consider it unnecessary to determine to any full extent or comment upon the defences of justification that have been asserted because I consider that the

additional defences of fair comment, responsible journalism and/or qualified privilege offer full defences to the claims and therefore no entry into what may be (at its highest) an arbitration of matters of scientific debate is necessary. By declining to do so, I do not purport to suggest that the opinions of the Plaintiffs are of equal persuasive merit to those views expressed by the Defendants, but only that a thorough evaluation of them for the purposes of these motions is not strictly required.

[55] As a general observation, counsel for the Plaintiffs has urged the Court to agree that it must adopt a fairly narrow approach to the s. 137.1 analysis referred to herein, must avoid drawing any inferences, and must not arrive at any conclusions based on a qualitative assessment of the evidence tendered by the parties.

[56] In my opinion, to adopt an overly-rigid and narrow approach to the analysis of the material filed in this case would be to ignore the stated purpose of the legislation as well as the "crux of the inquiry" and "robust backstop" descriptions employed by the Supreme Court of Canada to describe the balancing process that is designed to protect, in appropriate cases, freedom of expression on matters of public interest from the chilling prospect of litigation.

[57] Having said that, the material filed by the parties is such that it requires very little or nothing by the way of credibility assessments to dispose of the motions. Rather, the expressions or conduct of the Defendants that are the subject of the action are basically not in dispute. The critical task is to determine if they are protected when the analysis established by s. 137.1 is applied. Having carefully considered the evidence and arguments put forward by the Plaintiffs, I nevertheless am of the opinion that the expressions complained of attract the protection that a s. 137.1 analysis permits.

[58] For greater clarity, I view all of the expressions or statements complained of by the Plaintiffs to have been made on matters of public interest. The test required by s. 137.1 has been applied to each in order to determine the appropriate result. In each case, I should be taken to have accepted and adopted fully the submissions advanced on behalf of each of the Defendants.

The OMA Dispute Claims

A. Dr. MacIver

[59] Section 137.1 places an initial burden, which is purposefully not an onerous one, on a defendant to satisfy the motion judge that the proceeding arises from an expression that relates to a matter of public interest. At this first stage of the s. 137.1 analysis, it is not legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest. The only question is whether the expression pertains to any matter of public interest, defined broadly.

[60] The expression in the action brought against Dr. Maciver concerns tweets published by him on his Twitter feed in September 2018. In its entire context, Dr. Maciver's expression pertains to the public debate about the OMA sparked by the Plaintiffs and their physician advocacy organization COD on Twitter and their blocking of physicians who do not agree with their views.

[61] When Dr. Maciver published his tweets, the Plaintiffs through COD had been engaged in ongoing, serious and inflammatory attacks on the OMA and its leadership on Twitter and on other platforms. These attacks included allegations of fraud and corruption. Dr. Maciver wanted to respond to the Plaintiffs' Twitter attacks directly on their Twitter feeds that was the site of the public conversation but could not do so because the Plaintiffs had blocked him and others from engaging with them on Twitter.

[62] Frustrated by the Plaintiffs' blocking of him, Dr. Maciver tweeted the words complained of on his own Twitter feed. In his initial tweet, which is the primary subject of this litigation as against him, Dr. Maciver used some rather offensive name-calling towards the Plaintiffs. He deleted this tweet within days after posting it.

[63] The following facts provide context to Dr. Maciver's expression:

> (a) Prior to and at the time of the publication of the words complained of, there was significant interest in Ontario and, in particular, within the Ontario medical community concerning the contract negotiations between the Government of Ontario and the OMA, on behalf of Ontario physicians.
>
> (b) Since its formation, COD has taken positions critical of and has attacked the OMA and its leadership. The Plaintiffs, as leaders of COD, have a "lack of confidence in the integrity, fairness, accountability and transparency of the OMA." Dr. Maciver is one of the many OMA physicians who strongly oppose COD's and the Plaintiffs' ongoing attacks on the OMA.
>
> (c) In October 2017, Dr. Maciver replied to a COD tweet, expressing his ongoing disappointment in COD "continuing to fragment the profession in Ontario." Soon after his fairly benign expression of disappointment, the Plaintiffs blocked him from posting on their Twitter account.
>
> (d) The Plaintiffs also have blocked the Twitter accounts of other physicians who appeared to dissent from their political views concerning the OMA.
>
> (e) Prior to the publication of the words complained of, the Plaintiffs used Twitter to criticize the OMA and its leadership. These criticisms included allegations of fraud and corruption. Some examples of this are as follows:
>
> • OMA=toxic culture of misogyny, bullying & intimidation
>
> • None of them are held to account for their lies, unethical conduct, and bullying & intimidation of frontline MDs
>
> • Corrupt OMA's hypocrisy on Full Display
>
> • We will be fully united once we truly revamp the OMA. But that can only happen once it's dismantled, the vermin scurries out…

> • The following is the epitome (so far) of the egregiousness of this organization and its so called "leaders" - how disgusting can they get?
>
> • Instead, corrupt OMA's implementing draconian Code of Conduct to silence MDs
>
> • …undemocratic OMA passed Part 1 of 2 Part Code of Conduct to silence MDs from exposing unethical conduct
>
> • LAME DUCK OMA…Incoming OMA Pres Nadia Alam was NEVER elected by membership
>
> • Of course, the corrupt OMA rewards its unethical "leaders" with accolades and rewards. One word: karma.
>
> • Unbelievable hypocrisy on display
>
> • The corrupt OMA is taking extreme measures to muzzle your doctors…

[64] Leading up to the publication of his impugned tweets in September 2018, Dr. Maciver became increasingly frustrated by the Plaintiffs' attacks on the OMA and, in particular, their attacks on the honesty and integrity of its leadership. Dr. Maciver believed the Plaintiffs' attacks were very serious charges which called for debate and response on the main forum in which they were being made, i.e. the Plaintiffs' Twitter feeds. Because the Plaintiffs had blocked Dr. Maciver, he could not respond directly to them.

[65] On September 4, 2018, Dr. Maciver lost his temper over the Plaintiffs' ongoing conduct and what he viewed as the inflammatory positions they were taking on behalf of COD. Dr. Maciver reacted on his @smootholdfart account about being blocked by the Plaintiffs on Twitter. He made further tweets from his @vitomaciver account the same day and on September 8, 2018. From the outset, the primary focus of the Plaintiffs' complaint and this action against Dr. Maciver concerns the words "corksoakers" and "twats" published in the initial @smootholdfart tweet.

[66] In its entire context, Dr. Maciver's expression pertains to the public debate about the OMA sparked by the Plaintiffs and COD on Twitter and their blocking on Twitter of physicians who dissent from their inflammatory views.

[67] I am of the opinion that the impugned communications authored by Dr. Maciver were on a matter of public interest.

[68] In terms of referencing the Plaintiffs in the initial @smootholdfart Tweet, Dr. Maciver understood Dr. Gill and Dr. Lamba to be the public faces of COD on Twitter. This is the only reason he referenced them.

[69] The law is clear that people have no legal duty to "always be calm, cool, kind, gentle and polite." It has long been recognized by courts that "there is a distinction between actionable defamation and mere obscenities, insults and other verbal abuse" and "[t]he courts cannot award damages in favour of the victims of empty threats, insulting words or rudeness" (see: *Langille et al v. McGrath*, 2000 CanLII 46809).

[70] The law tolerates such speech not only as an expression of free speech in a free society but also as a safeguard against our court system being flooded with litigation.

[71] It is clear from the words complained of and the overall context in which they were published on Twitter that Dr. Maciver was communicating his disapproval of the conduct of the Plaintiffs. The offensive language used by him is pure name-calling, and not defamation.

[72] Although some of the language used by Dr. Maciver on Twitter may have been unprofessional and ill-advised, the words complained of are not defamatory and therefore not actionable. There is an important distinction in the law of defamation between words that are actionable for being defamatory and words that merely contain insults and are not actionable. Freedom of speech would be seriously curtailed if insulting comments, which have caused no harm to reputation, were actionable for being defamatory (see: *Diop v. Transdev Dublin Light Rail*, 2019 IEHA 849).

[73] On multiple occasions, Dr. Maciver has apologized to the Plaintiffs both publicly and privately and shown contrition for the heated language he used on Twitter. The fact of Dr. Maciver's apologies was also made known within the physician community on Twitter.

[74] On September 7, 2018, the Plaintiffs published a Facebook post to COD's many followers which referred to Dr. Maciver's "vulgarity" and repeated the allegedly offending language. In the post, the Plaintiffs wrongfully claimed that Dr. Maciver called them "cock sucking cunts" and further incorrectly told their readers that Dr. Maciver made his tweets as a leader of the OMA.

[75] Any reputational harm to the Plaintiffs purportedly caused by Dr. Maciver's expression is evidently of very low magnitude, if any has actually occurred.

[76] Dr. Gill offered no evidence of any harm arising from Dr. Maciver's briefly published expression, other than vague, unparticularized statements. In fact, it is her own evidence that she remains "a highly regarded member of [her] profession." Dr. Lamba has not seen fit to tender evidence on this motion to describe the alleged harm that she claims to have suffered.

[77] Even if for the purposes of this motion the words complained of are found to be defamatory of the Plaintiffs and that some general damages to their reputation are therefore to be presumed, then the record before me supports a conclusion that any damages suffered are likely to be assessed as merely nominal and insufficient to warrant continuation of this proceeding.

[78] An application of the s. 137(4)(b) "crux of the matter" analysis therefore requires a dismissal of the Plaintiffs' claims against Dr. Maciver. For the reasons he asserts, the public

interest in protecting Dr. Maciver's right to speak out on a matter of public interest outweighs any considerations that might otherwise favour allowing the action against him to continue.

[79] Accordingly, the relief requested by Dr. Maciver is hereby allowed and the action against him is dismissed.

B. Dr. Alam and the Medical Post

[80] In 2018 Dr. Alam was President of the OMA. The Plaintiffs objected to what they described as Dr. MacIvor's vulgarity and demanded via Facebook that the OMA and Dr. Alam censure him.

[81] Dr. Alam was then called upon to comment on this situation by members of the OMA as well. As such, Dr. Alam has raised a very strong defence that her response was written on an occasion of qualified privilege in furtherance of her duties to communicate to OMA membership and to respond to what may fairly be described as an attack upon her and the OMA by the Plaintiffs.

[82] The basic elements of the attack by the Plaintiffs may be seen in a statement published by the Plaintiffs on their Facebook page which states, in part:

> We are your Ontario Doctors
>
> September 7, 2018
>
> #METOOMEDICINE & THE TOXIC ONTARIO MEDICAL ASSOCIATION– PART 1
>
> A glimpse of OMA's toxicity. This is what we and frontline MDs are subjected to in private by the Ontario Medical Association (OMA) "leaders" and staff. Now one of the OMA's "leaders" feels so empowered that he now publicly makes his racist, sexist and misogynistic comments on Twitter. Slang for "cock sucking cunts".
>
> This vulgarity is from Dr. Angus Maciver: The OMA's "distinguished leader" who was awarded "OMA Life Member Award" for his ongoing 20 years on the corrupt OMA Council, currently as President of the Perth County Medical Society and previously as the Chair of the OMA Section of General Surgery. He is also a "leader" of the Ontario Association of General Surgeons, a former Royal College of Canada examiner and former University of Western Ontario Schulich School of Medicine faculty.
>
> This is the "new", "reformed" and "progressive" OMA. OMA; its leaders never practice what they preach and either repeatedly engage in, encourage or turn a blind eye to such disgusting behaviours. This is the toxic and pervasive culture at OMA's corrupt core.

> … This is the toxic and pervasive culture at the OMA's corrupt core. In the past 72 hrs, not a single OMA "leader", medical "leadership" organization or "feminist" advocacy "leader" has condemned this OMA "leader". Silence of acceptance has followed Maciver's vulgarity. It is unacceptable that still in 2018, it is not the vulgarity of comments or actions that evoke condemnation, but rather the privileged status of the harasser that evoke silence, and even worse, further empowerment of the harasser by those who witnessed it.
>
> The OMA is a toxic and self-serving organization that is corrupt to its core.…
>
> As a young, visible minority, female Canadian frontline MDs, fighting the corrupt establishment that is the OMA has felt akin to battling Goliath. But we are empowered by the truth and driven by knowing we are fighting for the future of Ontario's healthcare and for you: our patients and our colleagues.
>
> … We demand action from the Ontario Government NOW: a prompt, full independent forensic review of the corrupt OMA.
> -Dr Kulvinder Gill, President – Concerned Ontario Doctors
>
> -Dr. Ashvinder Lamba, Board Director – Concerned Ontario Doctors
>
> #exposcoma #carenotcuts #onpoli #onhealth #cdnhealth #healthcare #cdnpol #sexism #racism #misogyny FordNation Christine Elliott Robin Martin Effie Triantafilopoulos Ontario PC Party Andrea Horwath Ontario NDP

[83] On September 8, 2018, after the Plaintiffs posted their statement on Facebook, some OMA members formed the mistaken belief that Dr. Maciver had been speaking on behalf of the OMA or that he was an OMA staff member when he posted the tweet referred to.

[84] Dr. Alam consulted with senior management and staff of the OMA and it was agreed that she should contact Dr. Maciver in order to encourage him to apologize for what he had reportedly said, and Dr. Alam did so. Dr. Maciver advised that he had tried and would continue trying to resolve the dispute.

[85] On September 9, 2018, Drs. Gill and Lamba posted a further statement on Facebook, a partial transcript of which is as follows:

> We are Your Ontario Doctors
>
> September 9, 2018
>
> #Metoomedicine & the toxic Ontario medical association– part 2
>
> … We have never spoken to or interacted with OMA's decorated leader, Dr. Angus Maciver, in our personal or professional lives. We have never

interacted with him ever on any social media platform. But he has now forced himself into our lives. Six days ago, this OMA leader felt so empowered that he directly attacked the only two young, female, visible minority MDs on the entire Board of Concerned Ontario Doctors, using slang to call us "cock sucking cunts" on Twitter as other OMA leaders enabled and encouraged him. There was no apology. There were no condemnations from any of the OMA leaders or any of the many medical leadership organizations he is affiliated with. All these medical "leaders" condoned his toxic behavior and vulgarity with their silence. The OMA normalized it.

… What is most disturbing is that all of the OMA "leaders" remained silent publicly. Not a single OMA leader condemned their decorated leader for his overtly vulgar misogyny. Not one.

… The most disturbing was that after 6 days of silence, the OMA President Nadia Alam's response is to defend and empower him, validate his lies and attack us (see Picture 3 in comments below). The corrupt OMA, that MDs are forced to be members of and pay millions to for it to protect our "best" interests, defends the harasser and his professional misconduct. The OMA President Nadia Alam's first statement on Twitter came this morning (see Picture 4 in comments below), 6 days after the OMA leader's misogyny and only following mounting public pressure. Again Alam does not condemn him. she defends and empowers him, validates his lies and attacks us. This is failed leadership.

This is the same OMA President who just months ago, on International Women's Day, said she was "grateful that brave women speak up to change culture from the ground up like #metoo" (see Picture 5 in comments below). Now Alam is attacking those "brave women" because it is the toxic and corrupt OMA that she is defending.

The OMA President Alam's empowerment of the harasser comes as a selfproclaimed "feminist" & #metoo "advocate". Her response is deemed by the corrupt OMA to be the only word and is supposed to close the chapter. But it won't. Because #TimesUP. MDs have had enough of OMA's toxicity.

… As we have said before (Part 1: goo.gl/GFJ485), the OMA is a deeply corrupt, authoritarian, abusive and toxic organization. It is the biggest threat to the future of healthcare in ON and Canada. Ford's government must immediately undertake a fully independent forensic review of the OMA.

-Dr Kulvinder Gill, President – Concerned Ontario Doctors

-Dr. Ashvinder Lamba, Board Director – Concerned Ontario Doctors

> #exposcoma #carenotcuts #onpoli #onhealth #cdnhealth #healthcare #cdnpol #sexism #racism #misogyny FordNation Christine Elliott Robin Martin Effie Triantafilopoulos Ontario PC Party Andrea Horwath Ontario NDP

[86] On Sunday September 23, 2018, Dr. Alam received an e-mail from Drs. Lamba and Gill sent to her official OMA e-mail address and to her personal e-mail account. The text of that e-mail reads as follows:

> Drs. Kulvinder Gill and Ashvinder Lamba are giving the Ontario Medical Association (OMA) and its President Dr. Nadia Alam one last opportunity to tell the truth and condemn Dr. Angus Maciver for his vulgar misogyny and harassment against them. Do the right thing. Otherwise, your lies will be exposed.

[87] Section 25 of the *Libel and Slander Act* allows qualified privilege to apply on a matter of public interest between two or more people who have a direct interest in the matter, even if the communication is witnessed or reported on by media or other people.

[88] Parenthetically, on November 7, 2018 the Plaintiffs filed complaints against Dr. Alam with the College of Physicians and Surgeons of Ontario and in 2019 with the Human Rights Tribunal of Ontario concerning these same grievances.

[89] Once the Plaintiffs demanded that Dr. Alam respond publicly and accused her and the OMA of being corrupt the words of Dr. Alam complained of became a matter of public interest such as to satisfy s. 137.1(3) of the CJA and additionally were ones of special importance.

[90] I agree that a defence of qualified privilege is therefore available to Dr. Alam and applies here.

[91] Qualified privilege exists where a person making a communication has "an interest or duty (legal, social, moral, or personal) to publish the information in issue to the person to whom it is published" and the recipient has a "corresponding interest or duty to receive it". This privilege attaches to the circumstance, and not the communication. Where the occasion itself is found to be covered by qualified privilege, then a defendant may publish remarks that are perhaps untrue and defamatory (unless the dominant motive was malice) without liability therefor.

[92] There has not been any evidence of malice led by the Plaintiffs to defeat the qualified privilege defence asserted by Dr. Alam.

[93] Dr. Alam therefore has satisfied the test of having a valid defence. In their Statement of Claim, the Plaintiffs also allege that Dr. Alam was in breach of her "duty of care" to them and was negligent in her conduct. There can be no recognized duty of care in these circumstances of such strong criticism of Dr. Alam that would limit her ability to respond proportionately as was done here. These additional claims that have been alleged are, in reality, mere restatements of the claims for defamation and are likewise dismissed.

[94] The Plaintiffs also allege that a quotation attributed to Dr. Alam that was published in the Medical Post was defamatory. Specifically, Dr. Alam's quote in the article was as follows:

> "I spoke to Dr. McIver [sic]. By then he had already apologized to the physicians on Twitter and over email. He is blocked by them so unclear if it got through. He agreed, there is no place for this type of language between colleagues. Ever."

[95] On its face, I find that there is nothing defamatory about the impugned statement, a strong defence. The full article in which this statement appears is contained at paragraphs 10 and 11 of the Factum filed on behalf of the Medical Post. Seeing Dr. Alam's statement in context will simply undermine any possible assertion that it is defamatory.

[96] The Plaintiffs failed to serve a libel notice or commence an action within the requirements of s. 5 of the *Libel and Slander Act* which constitutes an absolute bar to this action against the Medical Post, a similarly strong defence.

[97] As noted above, the third and final step of the section 137.1 analysis is the heart of the test. This section requires a balancing of the public interest in allowing a harmed plaintiff to pursue litigation against the public interest in protecting expressions. This step has been described as a "robust backstop" that allows judges to dismiss claims even if they are technically meritorious. Even where a plaintiff can show their proceeding has substantial merit and the defendant has no valid defence, it may still be in the public interest to prioritize protecting the expression over allowing a plaintiff to pursue a cause of action despite the harm it caused. To make this determination, the harm to the plaintiff as a result of the expression is weighed against the public interest in protecting that expression.

[98] To overcome this hurdle, the Plaintiffs must show 1) the existence of harm, 2) that the harm is linked to the expression, and 3) if harm is established and linked, that this linked harm is sufficiently serious to make it preferable to allow the proceeding to continue, rather than protecting the expression.

[99] Harm includes both monetary and non-monetary damages. While the Plaintiffs do not need to establish the full details of the harm, nor to have it be monetized, they do have to provide evidence of the existence of the harm, or evidence from which a judge can draw an inference of likelihood in respect of the existence of the harm, as well as the relevant causal link. Bald assertions will not be sufficient.

[100] As already noted, the Plaintiffs have not produced any evidence of harm suffered or to be suffered by them as a result of the words of which they complain.

[101] Dr. Alam's statements in issue and the Medical Post article are of sufficient importance to satisfy the balancing test as set out in s. 137.1(4)(b). Dr. Alam's speech and the information in the article were necessary and valuable. An application of the balancing test results in a determination strongly in favour of these Defendants. As a result, the claims against Dr. Alam and, to the extent it is also a target of these claims, against the Medical Post must be dismissed.

The Covid-19 Claims

[102] The Covid-19 claims arising out of statements made by the Defendants other than Dr. Maciver appear to be advance only by Dr. Gill. She has been very vocal in her criticism of how government officials and agencies and organizations like the World Health Organization ("WHO") have responded to the ongoing worldwide pandemic.

[103] The bulk of the communications in this category occurred on the lively and rather unbridled platform of Twitter, and comprise what may be accurately described as a Twitter Storm.

A. André Picard and Carly Weeks

[104] In early August 2020 Dr. Gill posted tweets in which she expressed her views on how society should respond to the pandemic. In the first, Dr. Gill said "we don't need a vaccine" for Covid-19, stating that those who had not figured this out were "not paying attention". In the second, she stated that society could "safely return to normal life now" with what she referred to as "#Humanity's existing effective defences against #COVID19", identified by her as "The Truth", "T-cell Immunity" and hydroxychloroquine ("HCQ").

[105] Andre Picard, the Staff Senior Health Columnist for The Globe and Mail, tweeted on his Twitter account that he found it "quite shocking" that Dr. Gill would publicly state such opinions that were so contrary to the prevailing consensus among medical professionals, scientists, and public health officials.

[106] Dr. Gill then attacked Picard by posting a tweet implying that he had no right to comment because of his lack of medical training and insinuating that he was advancing the so-called "political WHO narrative", apparently improperly influenced by his association with a charity established in memory of the late former Prime Minister Pierre Trudeau.

[107] The other three tweets by Picard and the single tweet by Weeks complained of were posted in the flurry of Twitter activity that followed Dr. Gill's attack on Picard. These included tweets about the controversial use of HCQ to treat Covid-19, and others attacking Picard or expressing support for him.

[108] Dr. Gill alleges that the tweets are defamatory of her. In addition, she appears to allege that Picard and Weeks engaged in some form of conspiracy to injure her.

[109] When Picard became aware of Dr. Gill's tweets, he was concerned that any prominent Ontario physician would publicly state views that were so contrary to the consensus among physicians, scientists and public officials on subjects on which he had reported extensively. He was concerned that Dr. Gill's statements had the potential to misinform or mislead people.

[110] In addition to the numerous tweets attacking Picard for his statement, several tweets were posted supporting him. Among the tweets posted on August 6, 2020 was one by the Defendant Tristan Bronca:

> "The country's top health journalist (accurately) points out that this doctor maybe shouldn't be pushing a drug that is now primarily pushed by conspiracy theorists. She responds with a conspiracy-minded smear about how he's in bed with the WHO. Remarkable work."

[111] At 5:55pm on August 6, 2020, Picard responded to Bronca's tweet by posting the second of his tweets that Dr. Gill complains of:

> "Add the subsequent avalanche of tweets from an army of hydroxychloroquine bots and unhinged conspiracy theorists and you have a concise summary of my day."

[112] As the discussion continued, at some point a "hashtag" was created that read "#IStandWithPicard". Twitter users include a hashtag symbol (#) before a relevant keyword or phrase to categorize or aggregate tweets and allow others to find them more easily.

[113] Users who posted tweets that included #IStandWithPicard did so to voice their support for Picard in response to the many tweets attacking him. Among them was a tweet from Picard's colleague at The Globe and Mail, Weeks.

[114] On the evening of August 6, 2020, Weeks saw that the #IStandWithPicard hashtag was trending on Twitter because Picard was being attacked by many users.

[115] After reading Picard's comments, Weeks agreed with Picard's reaction of "shock." Based on her research, reading and reporting about COVID-19, Weeks knew that there was a wealth of scientific literature and research regarding the lack of efficacy of HCQ against Covid-19, the difficulty of achieving herd immunity and the necessity of a safe and effective vaccine that contradicted Dr. Gill's opinions.

[116] Weeks sought to express her agreement with Picard's opinion about Dr. Gill's tweets and to show support for him in light of the negative comments that had been directed at him. She also sought to promote the dissemination of accurate information concerning COVID-19. Weeks was concerned that Dr. Gill's statements had the potential to misinform or mislead people.

[117] On the evening of August 6, 2020 Weeks responded to one of Picard's tweets by posting what is essentially the only expression by her, one for which she is being sued by the Plaintiffs for millions of dollars in damages:

> "André is one of the finest health communicators – anywhere – and has done more to help the public understand #COVID19 than anyone in the country. Grateful, as usual, for his no-nonsense takes and the fact he doesn't hesitate to call out BS when he sees it. #IStandWithPicard"

[118] At 8:37 a.m. on August 7, 2020, Picard posted the third of his tweets about which Dr. Gill complains, in which he reiterated his concern that a Canadian pediatrician had publicly stated that a coronavirus vaccine was not necessary:

> "While I appreciate all the kindness, and am flattered to have my own hash tag #IStandWithPicard, I would prefer that people focus not on trolls but on my initial concern, that a Canadian pediatrician is saying we don't need a #coronavirus vaccine. #Covid19 #antivax @cpso_ca"

[119] Picard tagged the Twitter account of the College of Physicians and Surgeons of Ontario because there was an ongoing public discussion about whether and how social media use by physicians during the pandemic should be regulated, a topic of evidently great public interest.

[120] Later on the morning of August 7, 2020, Dr. Jim Woodgett, a research scientist, posted a thread on Twitter in which he advocated for the dissemination and open-minded exchange of quality information and warned against drawing attention to misinformation. Dr. Woodgett suggested that Twitter users replace #IStandWithPicard with #IStandWithScience in their tweets. Among the tweets in Dr. Woodgett's thread was one that stated:

> "I'm sure André appreciates the support, but (apologies to him) he doesn't need it and the hashtag serves to direct people to the source of the issue. On the contrary, antivaccine and pro-HCQ advocates have everything to gain by attracting attention. This fuels their cause."

[121] In reply to this tweet on August 7, 2020, Picard posted the fourth and final of his tweets about which Dr. Gill complains, advocating for the dissemination of good science instead of engaging in pointless Twitter exchanges:

> "Thank you for this thoughtful thread. I wholeheartedly agree with this point in particular. We should use our energy to promote good science, not interacting with bots, trolls and politically-driven anti-science, #antivax (what's the polite word?) dogmatists. #Covid19 #scicomm."

[122] In my opinion, all of the expressions complained of made by Picard and Weeks are on matters of intense public interest.

[123] Those same expressions are in the nature of fair comment on statements made by Dr. Gill on a similar platform and therefore attract that defence. The Plaintiffs have not discharged their burden of showing that his defence to all their claims has no chance of success.

[124] Applying the public interest balancing test, I conclude that the need to protect the freedom of these Defendants to express such views far outweighs the considerations that might apply to any factors in favour of allowing the claims of Dr. Gill against Picard and Weeks, including the unsubstantiated claims of conspiracy, to continue. Accordingly, all claims against Picard and Weeks are dismissed.

B. Tristan Bronca

[125] On August 6, 2020, Bronca read the tweet by Picard mentioned above on Twitter:

> It's quite shocking to see a Canadian physician leader @dockaurG saying we don't need a #coronavirus vaccine, we just need t-cell immunity, hydroxychloroquine and "the Truth". #Covid19.

[126] There were two tweets by Dr. Gill visible in Picard's tweet. Her August 4, 2020 tweet stated:

> "If you have not figured out that we don't need a vaccine, you are not paying attention. #Factsnotfear".

[127] The second tweet of Dr. Gill stated:

> #Humanity's existing effective defences against #COVID19 to safely return to normal life now:
>
> -The Truth
> -T-cell Immunity
> -Hydroxychloroquine

[128] Bronca believed that Dr. Gill's statements ran counter to all the public health advice and scientific opinion Bronca was aware of at the time. Dr. Gill's tweet concerned him, especially given her job as a physician. Bronca was aware of other social media communications and tweets by Dr. Gill that were of the same vein.

[129] Bronca also saw Dr. Gill's response attacking Picard on August 6, 2020:

> It is quite shocking that a journalist with absolutely no medical training is attacking a MD for stating scientific facts. Not surprising given @picardonhealth is a Pierre Trudeau Foundation Mentor & on its Trudeau "#COVID19 Impact Committee" to drive the political WHO narrative.

[130] Bronca believed that Dr. Gill's attack on Picard had made him the target of many negative comments and criticism on Twitter. Bronca took a screenshot of the tweets of Picard and Dr. Gill and added his own opinion in his tweet, which stated:

> "The country's top health journalist (accurately) points out that this doctor maybe shouldn't be pushing a drug that is now primarily pushed by conspiracy theorists. She responds with a conspiracyminded smear about how he's in bed with the WHO. Remarkable work.

[131] The "country's top health journalist" refers to Picard. "This doctor" refers to Dr. Gill. The drug referred to in the Bronca Tweet is hydroxychloroquine.

[132] Through his work with Medical Post, Bronca had been immersed in reports of the studies and analysis being done relating to the efficacy of hydroxychloroquine as a treatment for Covid-19. Bronca had also spoken with medical experts who were well versed on the scientific literature

on the topic of hydroxychloroquine who did not believe it was an effective treatment for Covid-19. By August 6, 2020, Bronca understood that the majority of the scientific evidence showed that hydroxychloroquine was not an effective treatment for Covid-19.

[133] Bronca's tweet addresses Dr. Gill's attack on Picard and her accusation that he is driving "the political WHO narrative". Bronca understood that "WHO" refers to the World Health Organization. He understood the word "narrative", as used by Dr. Gill, is a common buzzword used by some to characterize the allegedly nefarious activities of global or high-powered organizations and the alleged lies they tell to cover up or disguise these activities.

[134] Bronca thought that Dr. Gill's attack on Picard suggested that he was an active part of those allegedly nefarious activities and lies. Bronca had seen no evidence that Picard was so involved. It appeared to him that by using the language she did, Dr. Gill was attempting to smear Picard and subject him to negative comments and online hate.

[135] Bronca's tweet on August 6, 2020, questions surrounding the development of effective treatments for Covid-19, and the development of vaccines for the prevention of Covid-19 were matters of great public interest to both the medical profession and the public at large. Bronca believes he should be able to publicly express his concerns about statements that run counter to public health advice and scientific opinion without the risk of lengthy and costly litigation for doing so.

[136] The Bronca tweet falls within the statutory definition of expression, which is expansive. Dr. Gill's claim against Bronca clearly "arises from" the Bronca tweet. In August 2020, and for many months prior to and after, the issue of treatments for and vaccinations for Covid-19 were matters of great public interest due to the global Covid-19 pandemic. The Bronca tweet, which responded to what he fairly considered to be misleading information regarding hydroxychloroquine as treatment for Covid-19, related to a matter of public interest.

[137] In my view, the Bronca tweet constitutes fair comment on a matter of public interest. This defence has been described as one that:

> "Protects obstinate, or foolish, or offensive statements of opinion, or inference, or judgment, provided certain conditions are satisfied. The word "fair" refers to limits to what any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts."

[138] The Bronca tweet was based on facts. As of August 6, 2020 the majority of the scientific evidence showed that hydroxychloroquine was not an effective treatment for Covid-19. In addition, the use of hydroxychloroquine in the treatment of Covid-19 had been promoted by Alex Jones and on websites like the Gateway Pundit, both of which had a history of promoting conspiracy theories. With respect to the second sentence of the Bronca tweet, it is a fact that Dr. Gill accused Picard of "driv[ing] the political WHO narrative" in her August 6, 2020 response to Picard.

[139] The Bronca tweet was also recognizable as comment by any reasonable reader of the tweet.

[140] Accordingly, there are grounds to believe that Bronca's defence of fair comment has a real prospect of success. The Plaintiffs have not discharged their onus to show otherwise.

[141] In the weighing of the interests pursuant to s. 137(4)(b), the Plaintiffs cannot satisfy the requirement that the harm suffered by them as a result of Bronca's expression is sufficiently serious such that the public interest in permitting the action to continue outweighs the public interest in protecting that expression. Indeed, the public interest in the protection of the right of Bronca to speak about such matters of intense public interest strongly favours dismissal of these claims.

[142] Accordingly, all claims against Bronca are dismissed.

C. Dr. Jacobs, Dr. Cohen, Dr. Nataros, Dr. Alam and Dr. Sharkawy

[143] The Plaintiffs have claimed against these five Defendants in defamation on the basis of their various Twitter posts, and provision by them of commentary in articles published by the Canadian Broadcasting Corporation, as follows:

> (a) That a single tweet by Dr. Sharkawy, posted August 6, 2020 in response to the Picard tweet is defamatory of Dr. Gill;
>
> (b) That three tweets by Dr. Jacobs dated August 7, 10 and 12, 2020 are defamatory of Dr. Gill;
>
> (c) Against Dr. Cohen on the basis of a series of tweets posted between August 6, 2020 and August 11, 2020, and comments made by Dr. Cohen in CBC's August 10, 2020 article "Ontario doctor subject of complaints after COVID-19 tweets", and in CBC's video news story "Complaints Filed against Ontario doctor after COVID-I 9 tweets" dated August 10, 2020;
>
> (d) Against Dr. Nataros on the basis of a series of tweets posted between August 6, 2020 to October 21, 2020, and comments made by Dr. Nataros in CBC's August 10, 2020 article "Ontario doctor subject of complaints after COVID-19 tweets", and in CBC's video news story "Complaints Filed against Ontario doctor after COVID-I 9 tweets" dated August 10, 2020;
>
> (e) That a tweet posted by Dr. Alam on August 6, 2020 in response to the Picard tweet is defamatory of Dr. Gill.

[144] The Plaintiffs have asserted several causes of action as against these Defendants broadly as a whole, with little to no particularization of alleged individual involvement. The Plaintiffs plead these Defendants are liable in negligence, conspiracy, and "breach of the doctor Defendants' professional obligations".

[145] The Plaintiffs' claims of conspiracy are deficiently pleaded bare assertions. The pleadings are bald, overly speculative, or simply restated legal principles rather than pleaded material facts. The Plaintiffs' pleading fails to set out any alleged "agreement" with particularity, lumps these

Defendants all together, and gives no particulars of damages. In my view, it is clear from the pleadings the conspiracy claim will fail.

[146] Further, the Plaintiffs have failed to meet their burden to adduce any evidence reasonably capable of belief to establish grounds to believe a conspiracy of this nature could have substantial merit or, for that matter, any merit at all.

[147] The Plaintiffs also broadly assert a negligence claim as against these Defendants. The general law of negligence requires that a claim in negligence be based on a duty of care owed to them by these Defendants. The Plaintiffs assert that a special duty of exists "as set out in protocol" when a physician makes representations or remarks about a fellow doctor to the public. No such duty of care between or among physicians exists such that a cause of action may arise.

[148] The Plaintiffs also assert that these Defendants are liable to the Plaintiffs in "breach of the doctor Defendants' professional obligations". The Plaintiffs have provided no basis in the record or law to support a breach of professional obligation gives rise to an independent cause of action. The Plaintiffs thereby fail in their burden to establish that there are grounds to believe the proceeding has substantial merit.

[149] The Plaintiffs' claim against Dr. Sharkawy pertains to a single tweet made on August 6, 2020, which is alleged to be defamatory to Dr. Gill.

[150] In response to the Picard tweet, on August 6, 2020 Dr. Sharkawy tweeted the following:

> @dockaurG Curious.,.who exactly are the "Concerned Doctors of Ontario" and do they espouse your views? The rest of us Ontario MDs are quite "concerned" that you are spreading very dangerous misinformation that will cost lives #Accountability.

[151] Dr. Sharkawy embedded the Picard tweet, and by extension, the two embedded tweets of Dr. Gill embedded in the Picard tweet.

[152] The Plaintiffs have the onus of showing that that none of the defences raised by Dr. Sharkawy are legally tenable or supported by evidence that is reasonably capable of belief such that they can be said to have no real prospect of success. Dr. Sharkawy relies on the defences of fair comment and justification. In my view the Sharkawy tweet meets all the requirements of the defence of fair comment. Dr. Sharkawy was responding to the fact Dr. Gill had publicly posted certain tweets regarding COVID-19 public health measures in the midst of the global COVID-19 pandemic, to the effect that COVID-19 vaccines were not necessary, and HCQ was an appropriate treatment for COVID-19. Dr. Sharkawy's statement that "[t]he rest of us Ontario MDs are quite concerned" was fair comment or at least presents a strong defence of fair comment.

[153] The Sharkawy tweet further satisfies the requirement that any person could honestly express that opinion on the proved facts. The public health guidance at the time, and to this day, is contrary to the views expressed by Dr. Gill in her August 4 tweet (about vaccines) and August 6 tweet (about HCQ) that Dr. Sharkawy commented his concerns about. Any reasonable person

could form the same concerns and opinion on the proved facts in light of the conflict with generally accepted public health guidance.

[154] The Plaintiffs allege Dr. Jacobs' August 7, 2020 tweet is defamatory. Dr. Jacobs's August 7, 2020 tweet responds to two prior tweets of Dr. Gill, which are attached to Dr. Jacobs tweet as a screenshot. Dr. Jacobs August 7, 2020 tweet reads as follows:

> No, we're not living through a scandal. We're living through one of the deadliest pandemics in the last century. What is most shocking is a medical doctor pushing conspiracy theories.
>
> This needs to stop. #Cdnpoli #COVID19 #IStandWithPicard
>
> #vaccine #coronavirus
>
> [Attached screenshot of Dr. Gill's July 3 tweet]
>
> We're living thru one of deadliest #BigPharma scandals in history. Most shocking/frightening—majority oblivious. #HCQWorks as prophylaxis & early treatment in #COVID19. HCQ doesn't work for greedy BigPharma, politicians abusing power, corrupted WHO/CCP, bought out media/academics
>
> [The July 3 tweet attached a June 30, 2020 tweet by Dr. Gill, which was also attached to Dr. Jacobs August 7, 2020 tweet]
>
> Irrational fear is driven by politicians abusing power, media misinformation, unethical academics, BigPharma COIs & corrupted WHO co-opted by CCP. Science & medicine have been hijacked & are being exploited for power & greed...

[155] There are no grounds to believe the Jacobs tweet is capable of bearing the defamatory meaning alleged in paragraph 151, including such imputations as to "call into question Dr. Gill's mental stability" or "suggest that she was/is endangering the lives of her patients".

[156] Further, the Plaintiffs cannot meet their burden under s. 137.1(4)(a)(ii) to show that there are grounds to believe Dr. Jacobs has no valid defence of fair comment. Dr. Jacobs further relies on the defence of fair comment. The Jacobs August 7 tweet satisfies the test for the defence of fair comment in that it is based on fact (Dr. Gill's tweets, the facts on which his comment was based, were included in the Jacobs August 7 Tweet), recognizable as comment (Dr. Jacobs' statement would be properly construed by the reasonable reader as reflecting his conclusion or inference arising from Dr. Gill's embedded tweets), could honestly be made by any person (Dr. Jacobs inference that Dr. Gill was pushing conspiracy theories has a clear linkage to the facts of Dr. Gill's statements that "HCQ doesn't work for greedy BigPharma, politicians abusing power, corrupted WHO/CCP, bought outmedia/academics" which by definition is a conspiracy theory).

[157] The Plaintiffs further allege Dr. Jacobs' August 10, 2020 tweet, which attached and quoted from the August 10, 2020 Canadian Broadcasting Corporation article about Dr. Gill entitled "Ontario doctor subject of complaints after COVID-19 tweets" is defamatory. The body of Dr. Jacobs' August 10, 2020 tweet contains only the title of the article, and a direct quote from the article "It's important that physicians recognize the influence they may have on social media, particularly when it comes to public health", included in the article from a spokesperson of the College of Physicians and Surgeons of Ontario. Dr. Jacobs replied to the tweet "The fact that so many people on this thread still believe that the current research supports the use of hydroxychloroquine, when the opposite is true, is exactly why it is so important for physicians to be responsible in what they say on social media".

[158] Further, there are no grounds to believe that Dr. Jacobs' August 10, 2020 tweet is defamatory in that it would lower Dr. Gill's reputation in the eyes of a reasonable person. An excerpt of a quote from the CPSO, coupled with a statement that it is important for physicians to be responsible on social media is incapable of bearing the defamatory meaning alleged. The Plaintiffs cannot establish that there are grounds to believe that the defence of fair comment will not succeed.

[159] Dr. Jacobs' August 10, 2020 tweet satisfies all elements of the defence of fair comment: (i) Public Interest: it was made on a matter of public interest, addressing physician influence on social media with respect to public health; (ii) Based on Facts: The August 10, 2020 tweet attached the CBC article, providing the full requisite factual backdrop; (iii) Recognisable as Comment: Dr. Jacobs' statement that the fact that many believed HCQ was an effective treatment for COVID-19 reflected why it was so important for physicians to be responsible on social media is clearly recognizable to the "reasonable reader" as comment. Any reasonable reader would understand that Dr. Jacobs shared the CBC article, then provided his opinion and conclusion regarding the article as comment below; (iv) Could honestly be made by any person: Dr. Jacobs' comment in the August 10, 2020 tweet is in agreement with the statement of the CPSO spokesperson mentioned in the article, demonstrating two commentors could honestly come to the same conclusion on the same known facts. (v) Absence of Malice: Dr. Jacobs posted his comment in good-faith, without malice. There are no grounds to believe the fair comment defence has no real prospect of success.

[160] The Plaintiffs further claim that a tweet made by Dr. Jacobs on August 12, 2020 is defamatory of Dr. Gill. The Plaintiffs cannot establish there are grounds to believe this claim has substantial merit. For a statement to be defamatory it must refer to the Plaintiff. Dr. Jacobs' August 12, 2020 Tweet does not refer to the Plaintiff, nor did the attached article. No connection was drawn to Dr. Gill in the tweet thread.

[161] Dr. Jacobs further asserts a defence of qualified privilege with respect to all three tweets that the Plaintiffs allege to be defamatory. As a physician, Dr. Jacobs has a moral and professional duty to: educate the public to ensure that medical knowledge is appropriately conveyed to facilitate health promotion and disease prevention; interpret information given out by health authorities during emergencies; and to participate in setting the standards of his profession. The public has an interest in receiving that information. There are no grounds to believe that this defence of qualified privilege has no real prospect of success in these circumstances. Indeed, it is a strong defence.

[162] Some of the impugned expressions of Dr. Nataros are alleged to be defamatory on the basis that they accuse Dr. Gill of spreading "misinformation", including his contribution to the August 10, 2020 CBC News Video, in which he states.

> This is a threat to me and my practice and my professional integrity here in British Colombia. It is a threat to my 15,000 patients to have a Canadian licensed physician promoting misinformation that is harmful.

[163] Further impugned expressions of Dr. Nataros appear to relate to allegations that his statements either encourage the public to lodge a complaint against Dr. Gill, or relate to statements Dr. Nataros made referencing the fact he had felt an obligation to report Dr. Gill to the CPSO. A further Impugned Expression relates to a statement that the "unanimous consensus of #MedTwitter is clear this @doekaurGMD ain't a leader among peers."

[164] There are no grounds to believe that the defence of fair comment relied upon by Dr. Nataros has no real prospect of success. Dr. Nataros made these comments: (i) On a matter of public interest: his expressions are addressing the physician regulation and the public health response to the COVID-19 pandemic; (ii) Based on Fact: The existence of the COVID-19 pandemic was broadly known and Dr. Nataros either responds to a Twitter thread, attaches his letter of complaint to the CPSO or the August 10, 2020 CBC Article to the expressions, providing the requisite factual backdrop; (iii) Recognizable as Comment: Dr. Nataros' statements are all recognizable as his opinion. The statement that he "took responsibility for a Colleague's misconduct", expresses his opinion of Dr. Gill's conduct, not a factual statement that there had been a finding of misconduct, (iv) could honestly be made by any person: Given the publicly available health information available at the time, any person could reasonably express the same opinion; (v) Absence of Malice: Dr. Nataros' only motivation in posting the impugned expressions was his concern for patients and the impact of misinformation on the public health response to the COVID-19 pandemic.

[165] Several of Dr. Cohen's tweets and expressions between August 6, 2020 and August 10, 2020 are alleged to be defamatory of Dr. Gill. The Plaintiffs cannot meet their burden to show that there are grounds to believe these expressions are defamatory and thus that the claim has any real chance of success, or there are grounds to believe Dr. Cohen has no valid defences.

[166] Certain of the impugned expressions of Dr. Cohen's which are alleged to be defamatory of Dr. Gill pertain to statements around Dr. Gill "blocking" people on Twitter. The Plaintiffs cannot meet their burden to show these statements are defamatory. There is no basis to discern that "blocking" someone on Twitter would tend to lower Dr. Gill's reputation in the eyes of a reasonable person. Dr. Cohen's statements use wording such as "blocked nearly every other Ontario Doctor on Twitter" which the reasonable reader would understand to not be a literal statement that nearly every doctor was blocked, but a hyperbolic statement, the sting of which is that Dr. Gill has blocked many Ontario physicians. As such, there are no grounds to believe that Dr. Cohen's defence of fair comment has no real prospect of success with respect to these expressions.

[167] Dr. Cohen also further relies on the defence of qualified privilege with respect to all impugned expressions. As a physician, Dr. Cohen believed she has a moral and professional duty to educate the public to ensure that medical knowledge is appropriately conveyed to facilitate health promotion and disease preventions, interpret information given out by health authorities during emergencies, and to participate in setting the standards of her profession. The public has an interest in receiving that information. There are no grounds to believe that this defence has no real prospect of success.

[168] The words of Dr. Alam's August 6, 2020 tweet on their face are not defamatory. Dr. Alam expresses her view that the medical evidence on the use of HCQ is "shaky", and that a COVID-19 vaccine is needed. While Dr. Alam's view may differ from that of Dr. Gill, a difference of professional opinion does not constitute defamation. There is nothing in Dr. Alam's tweet that would tend to lower either Plaintiff's reputation in the eyes of a reasonable person. The Plaintiffs cannot establish there are grounds to believe the defamation action as against Dr. Alam for the August 6, 2020 tweet has substantial merit, as the words are simply not capable of bearing a defamatory meaning.

[169] The Plaintiffs also cannot establish there are grounds to believe that Dr. Alam has no valid defence. There are no grounds to believe that her defence of fair comment has little prospect of success. Dr. Alam's August 6, 2020 tweet satisfies the test for fair comment: (i) Is made on a matter of public interest: the tweet is addressing the public health response and treatment options with respect to the COVID-19 pandemic; (ii) Based on Fact: The factual underpinning of the Picard Tweet is attached to Dr. Alam's tweet, and the existence of the COVID-19 pandemic was broadly known; (iii) Recognizable as Comment: Dr. Alam's statement that evidence of HCQ is "shaky" and that the need for a COVID-19 vaccine is real reflect Dr. Alam's opinion; (iv) Could honestly be made by any person: Given the publicly available health information available at the time, any person could reasonable person could express the same opinion; and (v) Absence of Malice: The evidence supports that Dr. Alam was not motivated by malice, but by her good-faith belief that an appropriate vaccine is vital to combat the COVID-19 virus.

[170] The burden of proof is on the Plaintiffs to show on a balance of probabilities that that (a) they likely have suffered or will suffer harm; (b) that such harm is as a result of the expression established under s. 137.1(3); and, (c) that the corresponding public interest in allowing the underlying proceeding to continue outweighs the deleterious effects on expression and public participation.

[171] Although a fully developed damages brief may not be necessary on a s. 137.1 motion, in this case there is simply a complete dearth of any evidence on the motion to show harm, or linking these Defendants' expressions to any of the undefined damages that are claimed by the Plaintiffs.

[172] The Plaintiffs' claims of harm are completely undifferentiated. The Plaintiffs fail to even allege specific claims of damage with respect to each individual Defendant or expression, let alone provide any evidence of a causal link of harm or damage arising from each expression.

[173] This is particularly problematic in the context of this case, as even if the Plaintiffs were able to establish harm, there are many potential causes of the harm that the Plaintiffs claim to have suffered. Evidence of a causal link of harm arising from the impugned expression is required.

[174] Evidence of a causal link between the expression and the harm is especially important, in the circumstances of the present motion, where there may be sources other than these Defendants' expressions that may have caused the Plaintiffs harm, including self-inflicted harm by the Plaintiffs themselves as a result of the professional and public criticism received for controversial statements and media appearances.

[175] These allegations appear to be part of a larger tactical campaign in opposition to COVID-19 public health measures, designed to benefit from the publicity of the claim to promote public health and policy views and to silence those who express views contrary to those of the Plaintiffs.

[176] The public interest of protecting the expression of these Defendants significantly outweighs any public interest in permitting the proceeding to continue. There are numerous relevant factors at the weighing stage which weigh heavily in favour of protecting their expressions.

[177] These Defendants were not motivated by any malice or ill-will towards the Plaintiffs. Rather, the defendant Physicians' expressions were motivated by good-faith efforts to protect the public from misinformation, and provide the public with health information in the context of an unprecedented global pandemic:

> (a) Dr. Sharkawy expressed concern that misinformation espoused to the public could result in Canadians choosing not to get vaccinated for COVID-19 or using unapproved treatments for COVID-19 that were not medically accepted. His expression was motivated by a moral duty as a physician to express his views to the public out of concern for public safety;
>
> (b) Dr. Jacobs's expressions were motivated by an intention to inform his followers of appropriate approved treatments for COVID-19, and a belief that properly informing the public could save lives. Dr. Jacobs emphasized the importance that the public receive a clear and consistent message when it comes to public health messaging, as harm to patients can arise when a physician provides an opinion that does not align with information from public health or government;
>
> (c) Dr. Cohen's expressions were motivated by concern about the public health impacts of Dr. Gill's tweets with respect to the need for COVID-19 vaccinations and the use of hydroxychloroquine. Dr. Cohen felt a duty as a physician to offer her views in the public interest.
>
> (d) Dr. Nataros felt a duty as a physician to offer his views to the public and address misinformation about COVID-19. Dr. Nataros' expressions were motivated by concern for public safety arising from the spread of misinformation on COVID-19 treatments and the efficacy of vaccines.

[178] The expressions of these Defendants in seeking to address misinformation are intimately tied to the search for truth, a core value underlying freedom of expression. The expression of these Defendants is therefore to be afforded a high weight in the s. 137.1(4)(b) weighing exercise.

[179] If this proceeding were allowed to continue, its chilling effects would have an impact well beyond the parties to this case. There is a real risk that the effects of this proceeding will stifle the speech of the Defendants, and deter other physicians, journalist, scientists, and other members of the public from engaging in public discussion and discourse about potential misinformation on matters of public health in the future. The public has a clear interest in discussion and discourse about matters of public health.

[180] Even on a generous interpretation of the limited evidence adduced by the Plaintiffs, the harm likely to be or already suffered by the Plaintiffs lies at the very low end of the spectrum as does the public interest in allowing the proceeding to continue. The balancing test produces a result that favours that urged by these Defendants.

[181] Accordingly, all claims as against these Defendants should be dismissed.

D. Dr. Van Aerde

[182] On August 4, 2020, Dr. Gill tweeted:

> "If you have not yet figured out that we don't need a vaccine, you are not paying attention. #FactsNotFear".

[183] Dr. Gill suggests in her Affidavit that this tweet was taken "out of context and distorted", and it was made in response to an announcement made "moments prior" by Dr. Theresa Tam at a press conference. She states this was a "singular 'vaccine Tweet'". And yet, she also posted "[w]e don't need a #SARSCoV2 vaccine" on July 8, 2020, a full month before Dr. Tam's press conference. Her clearly stated public position against COVID-19 vaccines is not affected by context.

[184] In another tweet, dated August 6, 2020, which was removed from Twitter for violating its rules, Dr. Gill stated:

> "#Humanity's existing effective defences against #COVID19 to safely return to normal life now includes: -Truth, -T-cell Immunity, Hydroxychloroquine."

[185] On August 6, 2020, Dr. Van Aerde, shocked by the anti-vaccine rhetoric of a fellow pediatrician, made the following expressions on Twitter and Facebook (collectively, the "Expressions"):

> "Requesting @Twitter and @TwitterSupport remove account @dockaurg for misinformation against vaccination and in favour of hydroxychloroquine and misrepresenting Canadian physicians."

> "Another Twitter account hacked? I am sorry if that is the case, But here is another of your tweets attached with unprofessional lies. As a colleague Pediatrician I have to admit that you are dangerous to children. How do you come up with this? Why Don't you quote evidence?"
>
> "I was blocked too… after I called out the untruths and supported Andre Picard. Some of us have requested Twitter to remove her account. She was trained in Western as Pediatrician. She has tweeted before on bogus treatments, lots of trolls followers. There is a call for her unprofessionalism to be looked at by cspo. Somebody mentioned she is part of our FB community, and I suggest for her to be removed for lack of professionalism and scholarship as per CANMEDS2105."

[186] Dr. Gill "blocked" Dr. Van Aerde shortly after these tweets were posted. Blocking on Twitter prevented Dr. Van Aerde from viewing and responding to Dr. Gill's tweets from his own Twitter account.

[187] There is no dispute that Dr. Van Aerde is the author of the expressions and that those expressions are captured by the statutory definition of expression under s. 137.1(2).

[188] Dr. Van Aerde's expressions relate directly to the COVID-19 global pandemic and information and disinformation about COVID-19. The expressions respond to Dr. Gill's propositions that "we don't need a vaccine", and all we need is "…-Truth, -T-cell Immunity, Hydroxychloroquine".

[189] No issue falls more squarely into the definition of a matter of public interest than a global pandemic. The public has a genuine stake in the matter of debates about pandemics and COVID-19 health treatments.

[190] To the extent that the content of the expressions made by Dr. Van Aerde are comments, rather than statements of fact, then there are reasonable grounds to believe that fair comment is a valid defence for him.

[191] The expressions are based on factual evidence that vaccines are a critical tool to end the pandemic and supported by multiple health agencies and organizations. Any person could honestly express that opinion on those facts. At least 22 other people did, nine of whom are Canadian physicians, as evidenced by this litigation.

[192] Dr. Van Aerde's expressions are very likely also protected by a defence of qualified privilege. The occasion here that triggers qualified privilege is the need to respond to an influential physician using her Twitter platform to spread misinformation in the middle of a pandemic. Misinformation about treatments and vaccines could have serious and widespread health consequences. Dr. Van Aerde had a professional, social, and moral duty to respond to Dr. Gill's statements and challenge her views.

[193] The Plaintiff has failed to adduce any evidence of a conspiracy. She provides no evidence in her affidavit of a conspiracy. The Statement of Claim makes bald allegations that, because Dr. Van Aerde was on the same Facebook group as other defendants, there is necessarily some conspiracy between them to harm Dr. Gill. She argues that the Defendants, "like a pack of hyenas" coordinated an attack on her without any evidence to support her claim.

[194] Dr. Gill also includes negligence as a cause of action in her claim but Dr. Gill's only evidence of negligence is adopting of allegations in her Statement of Claim as sworn facts. A cause of action in negligence is not properly set out in her pleadings. Dr. Gill is really claiming negligence because she was defamed. If she was defamed, the proper cause of action is defamation, which is her only plausible cause of action.

[195] The final step involves weighing the harm suffered against the interest in protecting the expression made. Dr. Van Aerde was somewhat harsh in his comments but not gratuitously so and the focus is not on whether the expression should have been more polite. Dr. Gill has suffered no harm as a result of the expressions of Dr. Van Aerde. The imposition of subjective and moralistic limits on debates, and in particular on those of scientists amidst a pandemic, is not in the public interest. When the final comparative weighing step of the test is applied, I consider that the correct result is that all claims against Dr. Van Aerde be dismissed.

E. Dr. Fraser

[196] On October 1, 2020, Dr Gill "quote-tweeted" (re-posted, with commentary), her own earlier tweet from September 17, 2020, which read:

> Why is there fear re meaningless "cases"? Up to 90% false+ d/t high PCR cycle thresholds on ppl who are not infectious. Even among the small % of actual true positives: it is good news b/c ICU adms & deaths are at all-time lows. These healthy ppl are contributing to herd immunity

[197] Dr Gill's October 1 tweet added the following additional commentary:

> This cannot be stressed enough. Rising "cases" amongst young & healthy ppl, without equal rise in ICU adms or deaths directly as a result of the virus, is very encouraging news: it means we are building natural community/herd immunity which will protect elderly & high-risk groups

[198] Dr. Fraser saw Dr. Gill's October 1 tweet and understood it to suggest that Ontario was developing natural herd immunity to COVID-19—a proposition that he considered to be dangerous misinformation about the risk of COVID-19 transmission that could lull Ontarians into abandoning public health measures at a time when infections were on the rise. Dr. Fraser was concerned that Dr. Gill's tweet would undermine public health efforts that aimed to reduce the spread of COVID-19 by encouraging the use of masks and social distancing, and reducing contacts.

[199] Dr. Fraser's understanding at the time, based on his review of infection rates in Ontario, was that nowhere near the percentage of the population required to achieve herd immunity had been infected and recovered from COVID-19 as of October 1, 2020. He was concerned that members of the public would read Dr. Gill's tweet and understand that precautions were no longer necessary because the population had achieved, or had nearly achieved, herd immunity. He feared this could cause people to disregard public health guidelines and expose themselves to a higher risk of infection. He was particularly concerned that individuals who read the tweet would be more likely to accept her statement as truthful and authoritative because Dr. Gill's Twitter profile highlights her physician credentials.

[200] Dr. Fraser had been closely following reporting of the nascent "second wave" of COVID-19 infections developing in Europe and had observed that Ontario appeared to be lagging a couple of weeks behind but following a similar trend. Of course, a "second wave" of infections in Ontario did ultimately occur, reaching its peak later that fall.

[201] Based on these concerns, Dr. Fraser posted a small number of tweets in response to Dr. Gill's October 1 tweet, and in response to her followers who engaged with him subsequently, in an effort to push back against what he considered to be misinformation that could have dangerous repercussions if left unchallenged. As a publicly funded scientist, Dr. Fraser felt that he had a responsibility to voice his concerns so that Dr. Gill's followers and others who saw her tweet would be aware that her views did not represent the consensus in the scientific community.

[202] Almost immediately after Dr. Fraser published his first tweet, Dr. Gill blocked him from her Twitter page, making it impossible for him to engage with her. She also "quotetweeted" Dr. Fraser's tweet and referred to Dr. Fraser using the same language about which she complains in this action.

[203] The impugned tweets relate to the COVID-19 pandemic, and the dangers of misinformation regarding the risk of transmission and the need for public health measures in response to the pandemic. That is a matter of significant public interest. One can scarcely imagine a topic of greater public interest.

[204] The first impugned tweet, which Dr. Fraser posted on October 1, 2020 in response to Dr. Gill's tweet, reads:

> Can you please stop with this herd immunity garbage? What proportion of the population is seropositive at this stage in your opinion? 80%? Or below 5%? This is simply lunatic stuff. I can't believe you are qualified as an MD.

[205] Applying the proper approach to determining meanings, the tweet means that the Ontario population had not reached herd immunity to COVID-19 as of October 1, 2020 and there was no reasonable basis to suggest that Ontario had reached or was close to reaching herd immunity. It was therefore irresponsible for Dr. Gill to tell the public that Ontario had reached or was close to reaching herd immunity.

[206] The reference to "lunatic stuff" is understood reasonably as a reference to the suggestion that Ontario had reached herd immunity—it does not convey the meaning that Dr. Gill is a lunatic. If it were to be understood as referring to Dr. Gill, it is mere vulgar abuse, an insult that might hurt Dr. Gill's feelings but that is not actionable and would not harm her reputation in the eyes of a right-thinking person.

[207] The second impugned tweet was a response Dr. Fraser posted to a tweet from Martin Kulldorff, which defended Dr. Gill after Dr. Fraser's first tweet. Dr. Fraser wrote:

> Let's at least agree that there is a substantial history here of Kulvinder pushing fact-free COVID myths.
>
> I also had anonymous threats to my personal email account for pointing out her skews and misrepresentations. Not the behaviour of a reasonable person I would say.

[208] The tweet meant and was understood to mean that prior to her October 1 tweet, Dr. Gill had made claims about COVID-19 that were not grounded in fact. The mention of "anonymous threats to my personal email account" and "Not the behaviour of a reasonable person" meant and were understood to mean that an anonymous supporter of Dr. Gill had made threats to Dr. Fraser's personal email account because Dr. Fraser had pointed out Dr. Gill's misrepresentations of fact. That supporter's conduct was not the behaviour of a reasonable person. That comment was not objectively understood to refer to Dr. Gill herself.

[209] Dr. Fraser posted the third and fourth impugned tweets in response to one of Dr. Gill's supporters, who had criticised one of his tweets. The tweets read:

> Dr. Gill was previously reprimanded for spreading untruths about COVID. She was pushing HCQ and suggested vaccine was unnecessary. She suggests that the low deaths SO FAR in Ontario's 2ND wave is due to herd immunity...nonsensical as I said. I stand by my condemnation of her views
>
> And:
>
> the reason I pushed back hard against her fact-free tweets is that this is the second time she is spreading harmful and dangerous views. Last time she was forced to retract her tweets. It is disgraceful that an MD continues to push illogical and wrong views during a pandemic.

[210] These tweets mean and were understood to mean that Dr. Fraser understood Dr. Gill had been admonished previously for making inaccurate statements about hydroxychloroquine as a COVID treatment and that vaccines are not needed and that she was forced to retract those tweets and Dr. Gill is again giving the public inaccurate and potentially harmful information about COVID, this time relating to herd immunity. Further, it is unreasonable to suggest that the low deaths in Ontario's second wave as of October 4 are due to herd immunity.

[211] Finally, the fifth impugned tweet was a comment Dr. Fraser made in response to a tweet by the Defendant, Marco Prado. It reads:

> Thank you Marco! I feel it is our responsibility as academics to try to push back against dangerous and wrong views that encourage complacency and a false sense of security during this pandemic. If this was the first time Dr. Gill had done this, it could be a mistake. It wasn't.

[212] This tweet meant and was understood to mean that academics have a responsibility during the pandemic to speak out when others express views that may lead members of the public to stop taking appropriate precautions and increasing their risk of contracting COVID- 19. Further, Dr. Gill's comments cannot be overlooked as a mistake because on Dr. Fraser's understanding it is not the first time she has published comments during the pandemic that are not based on fact and may have dangerous implications.

[213] Even if Dr. Gill were to satisfy the substantial merit requirement, she cannot meet her burden of demonstrating that Dr. Fraser has no valid defence to the claim. Dr. Gill must show there are grounds to believe that Dr. Fraser's defences have no real prospect of success. She must show that none of the defences are legally tenable or supported by evidence that is reasonably capable of belief. There must be a basis in the record and the law, taking into account the stage of the proceeding, to support a finding that the defences do not tend to weigh more favour of Dr. Fraser. Dr. Gill has not met that burden.

[214] The comments expressed in the impugned tweets have a nexus to the underlying facts. A person could honestly have made the same comments Dr. Fraser did based on the facts Dr. Fraser knew and as summarised above. Moreover, Dr. Fraser honestly believed in the comments he expressed. He believed that Dr. Gill's tweet suggested Ontario had reached, or was close to reaching herd immunity; that Ontario was in fact not close to COVID-19 herd immunity; and that it was unreasonable and dangerous for a physician to suggest otherwise to the public because it could result in individuals refusing to follow public health measures to reduce the transmission of the virus. Dr. Fraser honestly believed, based on the CBC article, that Dr. Gill had previously posted a tweet containing inaccurate information about COVID-19 and that the tweet had been taken down from Twitter for violating its rules—a public rebuke or reprimand.

[215] Dr. Fraser's unchallenged evidence is that he did not act out of any malice or ill-will toward Dr. Gill. Dr. Fraser did not and does not know Dr. Gill and had never interacted with her before his initial tweet in response to her October 1, 2020 tweet. He did not intend to cause any harm to Dr. Gill but his predominant motive was to ensure the public was not swayed by inaccurate, misinformation during a significant public health crisis. His only intention was to provide an opposing informed perspective regarding the appropriate interpretation of public health information relating to COVID-19 for the benefit of Dr. Gill's Twitter followers and for anyone else who became aware of Dr. Gill's October 1, 2020 tweet.

[216] Dr. Gill's and Dr. Fraser's tweets were public communications related to the appropriate public health response to a pandemic. At the time, Dr. Fraser perceived that members of the

Canadian public were genuinely confused about the risk of transmission of COVID-19 and what precautions were necessary to reduce the risk of transmission of this potentially deadly disease. There is a compelling social interest in attaching privilege to communications such as Dr. Fraser's impugned tweets, which respond to and debate statements made on a public forum relating to pressing matters of public health.

[217] To the extent Dr. Gill has suffered any harm, she has not shown any causal link to Dr. Fraser's impugned tweets. There are many potential causes of the harm Dr. Gill claims to have suffered. Dr. Gill herself is the most obvious cause of damage to her reputation. Other potential causes include the comments and criticisms of others. When Dr. Fraser published the impugned tweets, Dr. Gill was already the subject of criticism on social media for spreading misinformation about COVID-19.

[218] There is great public interest in protecting Dr. Fraser's expressions which are of substantial importance. He spoke up against what he considered to be misinformation that could lead individuals to ignore public health recommendations and measures designed to mitigate the risk of COVID-19 pandemic. A public health emergency in which informed, knowledgeable experts are stifled from commenting publicly to combat misinformation is a significant threat to the general public interest.

[219] When the ultimate balancing test is applied, the interests and factors that might favour allowing this action against Dr. Fraser to continue are easily and far outweighed by the public interest in protecting speech of this nature. Accordingly, all claims against Dr. Fraser are dismissed.

E. Dr. Schwartz, Timothy Caulfield, Dr. Prato and Dr. Fazel

[220] On August 6, 2020, Professor Caulfield responded to a tweet posted by André Picard on the same date in which Picard indicated he was shocked to see Dr. Gill tweeting that we do not need a coronavirus vaccine, but rather that we just need T-cell immunity, HCQ, and the truth:

> Incredible. A leading MD spreading #misinformation about vaccines & value of lockdown? Pushing disproven #Hydroxychloroquine?
>
> She has already blocked me (preemptive?), so can't see all. Will @cpso_ca explore? She's involved (leads?) "Concerned Ontario Doctors".

[221] Following his above tweet, Professor Caulfield then copied and pasted the following two tweets from Dr. Gill (the "#FactsNotFear tweets"), over which he included the letters "WTF":

> There is absolutely no medical or scientific reason for this prolonged, harmful, and illogical lockdown. #FactsNotFear

[222] On August 6, 2020, Professor Caulfield responded to a tweet by Dr. Michelle Cohen regarding the spread of misinformation on social media by tweeting "Go Team".

[223] On August 6, 2020, Dr. Fazel responded to the #FactsNotFear tweets as follows:

> I'll just put this here. #VaccinesWork #vaccination #VaccinesforALL
> [infographic from the Public Health Agency of Canada titled: "Vaccines Work", outlining the efficacy of vaccines for whopping cough, measles, chickenpox, mumps, diphtheria, and polio]

[224] On August 6, 2020, Dr. Fazel responded to a tweet by Professor Caulfield of the same date regarding a leading physician spreading misinformation:

> Just like any other profession, unfortunately, even in medicine you have a few rotten apples. This is why it's crucial to improve evidence-based literacy in the community.

[225] On August 6, 2020, Dr. Fazel responded to a post by Dr. Gill by tweeting:

> There is a difference between having opposing views that are backed by evidence and spreading misinformation.

[226] On July 22, 2020, Dr. Schwartz quoted a tweet regarding a comment by Dr. Anthony Fauci on vaccine antibodies and T-cells, and he added the following:

> Apparently "T-Cell Immunity" is the new rallying cry for anti-science plague enthusiasts who argue that many more people are immune than measured in serosurveys (which measure antibodies).
>
> [thinking emoji] I'd listen to Dr. Fauci [world emoji]'s pre-eminent immunologist on this one

[227] Dr. Schwartz subsequently added to that tweet:

> Case in point:
> [re-tweet of Dr. Gill's tweet: T-cell immunity, T-cell immunity, T-cell immunity…]

[228] On August 6, 2020, Dr. Schwartz responded to a tweet by Mr. Picard which re-posted a tweet that expressed disdain for Picard and support for Dr. Gill, and added a comment that "the trolls [were] out in full force":

> Yes, her army of despicables also attacked me last week when I called her out for her anti-science stance.

[229] On August 6, 2020, Dr. Schwartz responded to a tweet from Dr. Jo Kennelly, the late wife of Dr. Frank Plummer, in which Dr. Kennelly indicated that vaccine cell creation and T-cell natural immunity were not mutually exclusive in Dr. Plummer's eyes:

> Except it pains me that she uses his good name in vain to support her anti-science opinions.

[230] On August 10, 2020, Dr. Schwartz re-tweeted an article from CBC of the same date, titled "Ontario doctor subject of complaints after COVID-19 tweet".

[231] On August 10, 2020, Dr. Schwartz tweeted:

> This pediatrician has consistently espoused misinformation & conspiracy theories at a time when trust in our profession is critically important. She accuses all who call her out of bigotry & corruption & hides behind summer student experience in a respected lab.

[232] On October 4, 2020 Dr. Prado responded to a tweet posted by Dr. Andrew Fraser in which Dr. Fraser reported that he received threats from supporters of Dr. Gill to his personal email after challenging Dr. Gill's tweets. Regarding the supporters that threatened Dr. Fraser, Dr. Prado wrote:

> I have no patience with conspiracy theory defenders. My family lives in Brazil. Many people they know had major issues because of COVID and were in the hospital. Some died. You are right, stay strong and keep pushing for scientific facts Andy!

[233] Dr. Gill claims against these four Defendants in defamation and conspiracy. She also claims against Dr. Schwartz, Dr. Fazel, and Dr. Prado in negligence.

[234] Dr. Gill cannot prove the substantial merit element as she does not have viable causes of action in defamation, negligence, or conspiracy. Dr. Gill cannot prove the "no valid defence" element as the defences of fair comment and qualified privilege advance by these Defendants have sufficient validity. Dr. Gill cannot prove that any damages she may have suffered are sufficiently serious for the interest in permitting the proceeding to continue to outweigh the public interest in protecting the impugned expressions, and therefore she cannot overcome the public interest hurdle.

[235] Given that the proceeding arises from expressions made by these Defendants that relate to matters of public interest, the onus shifts to the Plaintiffs to show that there are grounds to believe that the proceeding has substantial merit and that these Defendants have no valid defence.

[236] None of the impugned statements of these Defendants are capable of giving rise to the defamatory meanings alleged. Further, those meanings would not have arisen in the minds of reasonable readers. In the "Twitter-sphere" the exchanges would simply be seen as a disagreement between medical professionals in terms that would not be interpreted as defamatory.

[237] In the circumstances, Dr. Gill cannot show that there are reasonable grounds to support a finding that these Defendants owed her a duty of care in these circumstances.

[238] There are no grounds to believe the conspiracy claim has substantial merit. The statement of claim is deficient and does not disclose a reasonable cause of action as it relates to the claim of

conspiracy against the moving parties. Moreover, Dr. Gill has put forward insufficient evidence to support such a claim.

[239] Dr. Gill cannot satisfy the court that there are grounds to believe that her claims of defamation, negligence, or conspiracy are legally tenable and supported by evidence reasonably capable of belief such that they have a real prospect of success.

[240] For the reasons set out in their detailed Factum at paragraphs 66 through 91, I agree with these Defendants that the Plaintiffs have not shown that their defences of fair comment and qualified privilege lack the necessary prospects of success to permit the action to proceed.

[241] When the balancing test is applied to the claims against these Defendants I consider that the comparative interests and considerations are very heavily in favour of the position advanced of these Defendants. Accordingly, all claims made against them are dismissed.

G. Dr. Polevoy

[242] Dr. Polevoy is a retired physician now living in the Region of Waterloo, Ontario. He has been an advocate for good patient care and public health for many years. Dr. Polevoy is also an active physician leader with a long history of leadership in specialty associations, and provincial associations.

[243] Dr. Polevoy uses his Twitter account as a platform to express his view on a number of topics, including to communicate with the public on health and medicine.

[244] The Plaintiffs have claimed damages for alleged defamation on the basis of series of tweets posted between August 6, 2020 and October 21, 2020 similar in nature to those of the other physician Defendants.

[245] Dr. Polevoy has adopted the arguments and submissions advanced on behalf of the other Defendant physicians with respect to the nature of his tweets and the available defences to him of fair comment and qualified privilege. In my opinion they apply equally to his tweeted expressions. Further, any communication expressing any complaint or concern about the Plaintiffs that he made to the College of Physicians and Surgeons of Ontario which is the governing body for physicians in the province must be considered to have occurred on an occasion of qualified privilege. Qualified privilege is a strong defence to any claims made by the Plaintiffs of defamation.

[246] A consideration of the factors that must be weighed when applying the ultimate balancing test on this motion likewise favours the interest in protecting his right to express himself on matters of public interest. As a result, all claims against Dr. Polevoy in this action are dismissed.

H. Dr. Boozary

[247] The only allegations in the Statement of Claim regarding Dr. Boozary are that he published three statements on his public Twitter profile in August 2020 which contain allegedly defamatory remarks concerning Dr. Gill.

[248] The following tweets are the allegedly defamatory tweets posted by Dr. Boozary:

(a) On August 6, 2020:

> The war on science is real in Canada- maybe ugliest when it comes from our own MD's. All indebted for the strength/integrity of science/health journalism as counter force up north.
>
> [attaches Dr. Kulvinder Kaur MDs tweet: if you have not yet figured out that we don't need a vaccine, you are not paying attention #FactsNotFear].

(b) On August 7, 2020:

> #IstandWithPicard – we all do. Hate only seems to fuel the bots will just continue to send love/strength to Andre/seven nation army of science at the front line. Trust in science and each other going to get us thru

(c) On August 9, 2020:

> Being blocked by @dockaurG a badge of honour sure but unsettling/win for misinformation that there's still an MD platform of >20k followers amplifying anti-science/anti-vax harm.

[249] Dr. Boozary has an interest and is actively involved in the public health response to COVID-19 as a primary care doctor, as an assistant professor at the Dalla Lana School of Public Health, and as a co-lead for the Toronto Region's COVID-19 Homelessness and Shelter Response. Through these roles and in the media, Dr. Boozary has been actively involved in public education. Dr. Boozary has also tweeted throughout the pandemic about emerging scientific research, his view on health policy responses, and how he believes we should be coming together to protect those who are most vulnerable.

[250] The proceeding against Dr. Boozary arises from an expression made by Dr. Boozary that relates to a matter of public interest. Dr. Boozary's tweets are expressions. All of Dr. Boozary's tweets relate to the COVID-19 pandemic – particularly about the importance of sharing health science information during the crisis – which is a topic of obvious public interest. At this stage, the court is not assessing the quality of the expression, and so it is not legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest … The question is only whether the expression pertains to any matter of public interest, defined broadly. This is not an onerous burden, and is clearly met in this case.

[251] Dr. Boozary's August 6 tweet does not make any defamatory statement about Dr. Gill. Dr. Gill tweeted "we don't need a vaccine", which was counter to prevailing scientific opinion that a vaccine is necessary to reduce mortality and prevent the ongoing spread of COVID-19. Dr.

Boozary stated in the August 6 tweet in response, copying Dr. Gill's tweet, "The war on science is real in Canada- maybe ugliest when it comes from our own MD's."

[252] Dr. Boozary's tweet does not injure Dr. Gill's reputation. Dr. Gill's own expression has an impact on her reputation in that people reading it may either agree or disagree and people may feel strongly either way. Dr. Gill has also continued to openly broadcast her opinions on the public health response to COVID-19, even where those opinions are contrary to prevailing scientific opinion, and is thus maintaining the reputation that she has created. Dr. Boozary's election to share his own view on the matter, to his much smaller audience, would not affect Dr. Gill's reputation. Those who agree with Dr. Gill might actually support the idea that she is involved in a "war on science" in that they disagree with the prevailing scientific opinion of the importance of vaccines in fighting COVID-19. In short, Dr. Boozary's comments in the August 6 tweet did nothing to lower the reputation of Dr. Gill and are not defamatory.

[253] Dr. Boozary's August 7 tweet is also not defamatory. The words of the Tweet do not refer to Dr. Gill. The Tweet is about hateful "bots", which by definition are unidentified Twitter users, and attempts to offer support to André Picard and scientists at the front line in the pandemic. A reasonable person could not interpret the August 7 tweet to have lowered Dr. Gill's reputation in any way.

[254] Finally, the August 9 tweet also is not defamatory. In the tweet, Dr. Boozary did not claim that Dr. Gill is anti-science or anti-vaccine, but rather that she used her large platform to amplify messages that are anti-science and anti-vaccine. He stated his opinion that it was concerning for a medical doctor with so many followers to be amplifying medical information which he considered to be contrary to scientific evidence. The August 9 tweet does not lower Dr. Gill's reputation as anyone familiar with Dr. Gill's Twitter account would be aware of the content she shares and could recognize that Dr. Boozary was stating his own views about that content, not falsely alleging anything against Dr. Gill.

[255] Even if Dr. Boozary's tweets were somehow defamatory, then the defence of fair comment applies to them. Thus, the Plaintiffs are unable to meet their burden of showing there are grounds to believe that Dr. Boozary's defence has no real prospect of success.

[256] All three of Dr. Boozary's tweets clearly meet the first criteria as they relate to the dissemination of scientific information regarding the COVID-19 pandemic, which is a matter of obvious public interest. The specific issues that Dr. Boozary was tweeting about within the broader rubric of the pandemic – namely, concerns about a medical doctor denying the need for a vaccine and support for health science reporting – are of particular concern during this global crisis.

[257] Turning to the other criteria for establishing fair comment for the August 6 tweet, these criteria are met. Dr. Boozary's comment relates to the fact that Dr. Gill tweeted that "we don't need a vaccine"; he embedded Dr. Gill's full tweet as evidence of this fact. The August 6 tweet is recognizable as a comment because "the war on science is real" is a conclusion or observation which is generally incapable of proof. Further, it is a matter of Dr. Boozary's opinion to say it is "ugliest" when this comes from a medical doctor. Any person could honestly hold these views,

given the prevailing scientific position that we do need a vaccine to combat COVID-19 and the important role of doctors in assuaging vaccine hesitancy.

[258] The other criteria are also met for the August 7 tweet. This tweet does not make any comment about Dr. Gill. Dr. Boozary makes three comments in this tweet: (1) he supports Picard and others on the "front line" in science; (2) we need to trust in science and each other; and (3) hate fuels the "bots". The first two comments are statements of support that require no factual basis.

[259] With respect to the third comment, Dr. Boozary's evidence in cross-examination was that he understood the term "bots" to refer to accounts that have no obvious human identity or accountability and are spreading vitriol against individuals not in relation to the subject matter of their tweets but against them personally, such as death threats.

[260] The August 7 tweet is a matter of comment and opinion, and a person could honestly express the same opinions on the facts.

[261] Finally, the August 9 tweet also meets the other criteria. The facts grounding Dr. Boozary's comments in this tweet are: Dr. Gill blocked Dr. Boozary on Twitter, Dr. Gill is a medical doctor, Dr. Gill had more than 20,000 twitter followers and Dr. Gill tweeted (which is quoted in Dr. Boozary's August 6 tweet) that "we don't need a vaccine". Calling Dr. Gill blocking him a "badge of honour" is a comment, as this is a subjective personal perspective on the known fact. Dr. Boozary also comments subjectively that he considers the existence of her account "unsettling" and a "win for misinformation", which are also clearly opinions.

[262] While Dr. Boozary has met the criteria for the defence of fair comment for all three expressions at issue, Dr. Gill has failed to establish that Dr. Boozary was actuated by express malice, an onus which she bears in order to defeat the privilege. Malice relates to the state of mind of the defendant and is ordinarily established through proof that the defendant knew the statement was untrue, was reckless with respect to its truth, did not believe the statements were true, or had some improper motive or purpose. Although Dr. Gill did not plead malice with any specificity, her claim that Dr. Boozary acted maliciously cannot succeed on any of these bases. Dr. Boozary affirmed his belief in the statements and that he made those statements for the purpose of expressing his opinion on the dissemination of public health information, without malicious intent. Dr. Boozary also denied Dr. Gill's unsupported allegation that his tweets were sexist, racist, or misogynistic.

[263] In applying the balancing test, Dr. Boozary rightly submits that Dr. Gill has failed to establish both the existence of harm as well as causation – both of which are required under the test.

[264] Dr. Boozary's expression has high importance. His tweets related to the spread of scientific information regarding the deadly global pandemic, in the midst of the crisis. Scientific and public health information about COVID-19 is a matter of obvious public interest, because everyone in the public has a substantial concern about this topic in that it affects the welfare of citizens, and in

particular there has been considerable public controversy about vaccinations. This interest far outweighs any interest that could support allowing the action against him to proceed.

[265] An application of the final balancing test results in a determination in Dr. Boozary's favour. All claims against him in this action are dismissed.

I. The Pointer Group Incorporated

[266] On October 19, 2020 Dr. Gill delivered a notice of libel pursuant to section 5 of the *Libel and Slander Act* to The Pointer concerning an article published by The Pointer on August 13, 2020 (the "Article"). The libel notice alleged that the Article contained defamatory statements about Dr. Gill.

[267] On October 22, 2020, The Pointer responded to the libel notice and denied that the Article was defamatory.

[268] The Article, published on August 13, 2020, reports on:

> (a) Tweets published by Dr. Gill on August 4, 5, 6 and 12, 2020, which appear in the Article in their entirety and which express her views that lockdowns are unwarranted and promotes the use of hydroxychloroquine as a treatment for the virus;
>
> (b) Twitter's removal of Dr. Gill's tweet on August 6, 2020, because it violated Twitter's policies. The August 6, 2020 tweet is set out in the Article even though it was removed on Twitter. That tweet promoted T-cell immunity (herd immunity) and hydroxychloroquine as humanity's effective defences against COVID-19;
>
> (c) Dr. Gill defending the use of a hydroxychloroquine and promoting it as "effective in the fight against COVID-19";
>
> (d) A complaint made to the College of Physicians and Surgeons of Ontario ("CPSO") about Dr. Gill's tweets;
>
> (e) The fact there are medical studies that have questioned the use of hydroxychloroquine as a treatment for COVID-19;
>
> (f) Health Canada's position that it does not support the use of hydroxychloroquine to prevent or treat COVID-19 without a prescription and warning Canadians about false and misleading claims; and
>
> (g) Concerns expressed by Dr. David Juurlink, head of clinical pharmacology and toxicology at the University of Toronto, regarding Dr. Gill's tweets including that her advice in her tweets is dangerous.

[269] Dr. Juurlink's comments in the Article are not the subject of Dr. Gill's claim and Dr. Juurlink is not a defendant in this action.

[270] The Article reports on Dr. Gill's own tweets, which are publicly available and are repeated verbatim in the Article. The Article also accurately reports that there are research and statements from public authorities that have contradicted Dr. Gill's views and that other members of the medical community do not support her views, have made complaints about her public statements and are concerned about the impact those statements will have on members of the public. There is nothing in the Article that is not true.

[271] Dr. Gill appears to have asserted that she did not make the statements attributed to her, and that the statements as reported were distorted and taken out of context. The Article simply reports on her tweets and does not take them out of context.

[272] Dr. Gill knowingly tweeted about the pandemic, despite the controversial nature of her views, and knowing that they would be subject to public criticism and media reports. The Article is a fair and accurate report about Dr. Gill's tweets and the controversy created by them, and is based on true underlying fact.

[273] The public has an interest in receiving competing viewpoints to those expressed publicly by Dr. Gill. Information on whether Dr. Gill's opinions expressed in her tweets are disputed is important to public debate and information about COVID-19 and potential treatments.

[274] The Pointer states that attempts to contact Dr. Gill for comment were made before publishing the Article, but she did not respond, nor did she follow up after publication of the Article. Before the Article was published, among other things, The Pointer sent an email to Dr. Gill at the email address: concernedontariodoctors@gmail.com, the email address for Concerned Ontario Doctors, but received no reply.

[275] In her affidavit sworn June 14, 2021 Dr. Gill asserted for the first time that The Pointer did not attempt to contact her before publishing the Article. She did not complain about this in her libel notice or in her Statement of Claim. In response to the libel notice, The Pointer wrote, among other things, that it had attempted to contact Dr. Gill for comment before publishing the Article. Dr. Gill did not dispute this.

[276] The Article contains references to four reliable sources: Dr. Juurlink, Health Canada, Health Link BC, and an extensive study by the New England Journal of Medicine on the efficacy of hydroxychloroquine for treatment of COVID-19.

[277] Dr. Gill claims that The Pointer did not engage in responsible journalism because it simply repeated the defamation of others without verification or competent investigation and echoed the defamation of the other Defendants. However, I agree with the arguments advanced by the Pointer that:

> (a) There was no repetition of defamation of others. The Article contained quotations from an interview The Pointer conducted with Dr. Juurlink. Dr.

> Juurlink is not a named defendant. The quotation in the Article from Dr. Juurlink is a statement of his opinion and it is a reasonable comment of his concerns about Dr. Gill's tweets. The Article is reporting his concerns, which are shared by other members of the medical community; and
>
> (b) There was no echoing of the defamation of the other defendants. The sole reference to another defendant in the Article was an indirect reference to the fact "the CBC [i.e. Radio Canada] reported Dr. Alex Nataros… filed a complaint with the [CPSO] for an "egregious spread of misinformation."" The article quotes from a tweet made by Dr. Nataros in response to Dr. Gill's tweets, which is part of Dr. Gill's claim. However, one quote of one tweet by one other defendant does not constitute a general repeating or echoing the defamation of others. As noted, the action was discontinued against Radio Canada.

[278] The Article therefore bears all of the features of a strong responsible journalism defence.

[279] Journalists at large must have the freedom to responsibly report on the COVID-19 pandemic, including Dr. Gill's comments and the criticism of them, irrespective of whether Dr. Gill has a valid basis to assert that lockdowns are ineffective or that hydroxychloroquine is effective against COVID-19. The media must be permitted to report responsibly on comments that affect the public and which are a matter of public interest.

[280] The Plaintiffs should not be permitted to stifle public discourse and participation in public health debates caused by their own public comments.

[281] In my view, the Plaintiffs have failed to discharge their onus of showing that The Pointer's defence of responsible journalism has very little chance of succeeding. In fact, I consider that the evidence entirely contradicts such a conclusion and that The Pointer has a very strong defence available to it.

[282] Further and finally, when the balancing test is ultimately applied, it results in an assessment very much in favour of The Pointer and the public interest concerns it has advanced. As a result, the claims against it in this action must be dismissed.

J. Alheli Picazo

[283] The action against Picazo is based on four tweets she posted to her Twitter account. The first three comprised a "thread" or series of tweets posted on August 6, 2020, prompted by a tweet from the Defendant, André Picard earlier that day. Picard's tweet embedded two tweets dated August 4 and 6, 2020 from Dr. Gill that read as follows:

> "If you have not yet figured out that we don't need a vaccine, you are not paying attention. #FactsNotFear"

and

> "#Humanity's existing effective defences against #COVID19 to safely return to normal life now:
> -The Truth
> -T-cell immunity
> -Hydroxychloroquine"

[284] In the first tweet in Picazo's impugned August 6, 2020 thread, Picazo wrote, "Her behaviour and tweets throughout the pandemic have been grossly irresponsible, to say the least. I would have no faith in her as a doctor for anything." Embedded in this tweet was an image of another tweet Dr. Gill sent on August 4, 2020, stating, "There is absolutely no medical or scientific reason for this prolonged, harmful and illogical lockdown. #FactsNotFear". Picazo's tweet also embedded a tweet by Bronca, which itself contained an image of the two tweets published by Dr. Gill set out at the previous paragraph.

[285] Picazo's second tweet stated, "This is unprofessional, imo." "Imo" is a well-known acronym for "in my opinion". That tweet embedded images of, and was a comment on, two additional tweets of Dr. Gill, which read:

> "#COVID19 Defined By
> "Absolute power corrupts absolutely"
> "A lie told often enough becomes truth"
> "Cancer of bureaucracy is destroying medicine"
> "Media's most powerful entity on earth: power to make the innocent guilty & to make the
> guilty innocent – control minds of masses""

and

> ""If you're not careful, newspapers will have you hating the ppl who are oppressed & loving the ppl who are doing the oppressing" 2020: frontline MDs silenced/censored for speaking the truth & upholding HippocraticOath [sic] while media invokes fear & "journalists" propagate lies"

[286] The third tweet in Picazo's thread stated, "There is an abandonment of science happening here, she just doesn't seem to be able to recognize the culprit", which was a comment on a tweet by Dr. Gill that stated:

> "My heart is broken watching #COVID19Canada unfold. Absolutely broken watching our govts embrace quackery & abandon science. Broken hearing endless political/media lies. Broken watching govts violate our freedom/rights. Broken from govts allowing Cdns to die when we can save them."

[287] The final tweet by Picazo that Dr. Gill alleges was defamatory was posted on October 20, 2020. That tweet was part of a series of tweets Picazo wrote regarding the renaming of Sir John A. MacDonald Hall at the Queen's University Faculty of Law, which was a news story at that time. Picazo was responding to comments made by Queen's Law professor Bruce Pardy that were critical of the proposal to remove the name. Picazo wrote, "What's more threatening to Canadians than the re-naming of a building? Covid denialism and promoting bad science and fringe theories/figures. #cdnpoli". That tweet contained embedded images of four other tweets from various accounts, including one from Dr. Gill that promoted the use of HCQ.

[288] Numerous articles and scholarly resources have been tendered by the various Defendants that make clear that Dr. Gill's views on the use of lockdowns as a public health measure, the proximity of reaching her immunity, the efficacy and safety of HCQ as a treatment for COVID-19, and the necessity of a COVID-19 vaccine run contrary to the generally accepted views of the scientific and medical community.

[289] To satisfy the requirements of s. 137.1(3), the moving party must demonstrate on a balance of probabilities that (i) the proceeding arises from an expression made by the moving party and that (ii) the expression relates to a matter of public interest. These requirements are easily satisfied in the case as against Picazo which arises from the four tweets referred to.

[290] Dr. Gill has claimed in defamation and also alleged conspiracy. There are no grounds to believe that either of these claims has a real prospect of success. Further, there are no grounds to believe that Picazo's defences of justification and fair comment have no real prospect of success.

[291] Picazo's impugned comments were that Dr. Gill's tweets: (a) were grossly irresponsible; (b) were unprofessional; (c) constituted an abandonment of science; (d) contained bad science; and (e) contained fringe theories.

[292] Although Dr. Gill further claims that Picazo said she engaged in "COVIDdenial". Picazo's October 20, 2020 tweet, which referred to "Covid denialism and promoting bad science and fringe theories/figures", was directed at Bruce Pardy, not at Dr. Gill. Picazo's tweet embedded four tweets (only one of which was a tweet of the Plaintiffs) that had been previously retweeted by Bruce Pardy. Reading this tweet in context, the meaning, as far as it relates to Dr. Gill's tweet, is that it was Bruce Pardy who was promoting bad science and fringe theories. Dr. Gill's tweet that was embedded in Picazo's October 20, 2020 tweet simply attached an article promoting the use of HCQ to treat COVID-19, and so the meaning (as it relates to Dr. Gill) is that the use of HCQ to treat COVID is "bad science" and a "fringe theory".

[293] In my view, these comments were not defamatory. The thrust of Picazo's comments is that Dr Gill's tweets promoted ideas and theories related to lockdowns, HCQ, and vaccines that contradicted the generally accepted medical and scientific consensus and that the tweets were, for that reason, irresponsible and unprofessional. Prior to August 6, 2020, Dr. Gill already had a reputation as an advocate of controversial opinions regarding the COVID-19 pandemic. Picazo's comments regarding Dr. Gill's tweets contain the same conclusions that a reasonable person would have reached. Picazo's tweets simply affirmed Dr. Gill's self-positioning as a bold, advocate

willing to "tell it like it is" in the face of (in Dr. Gill's view) misinformation being spread by the government, public health authorities, and the mainstream media.

[294] The content and tone of Picazo's tweets were mild and measured relative to the highly charged online discourse surrounding the COVID-19 pandemic and, in particular, to the way in which Dr. Gill expresses herself on Twitter.

[295] Picazo's impugned comments also attract a strong fair comment defence. They relate to a matter of public interest. They are based on fact, i.e., the underlying tweets from Dr. Gill that Picazo was referring to and are embedded in Picazo's tweets. These tweets, and the other tweets of Dr. Gill are publicly available on her Twitter page for the world to see.

[296] Picazo's comments are recognizable as comment and are expressly framed as such, and constitute an opinion that a person could honestly express on the proved facts. It is Picazo's unchallenged evidence that she was expressing her honestly held opinion that Dr. Gill's statements about COVID-19, vaccines and public health measures were inaccurate, irresponsible, and unprofessional for a medical doctor to be making, that they created a potential risk to public health, and that they ran counter to the prevailing views on these issues as expressed by public health authorities.

[297] The Plaintiffs have failed in their onus of demonstrating that the defence of fair comment has little or no application to Picazo's expressions. In my view, the record shows that a very strong defence in that regard is available to her.

[298] Further, Dr. Gill has failed to demonstrate or particularize any overt acts by Picazo in furtherance of the alleged conspiracy, to explain how Picazo acted in concert with other Defendants, or to set out particularized allegations of damages suffered as a result of the conspiracy. The conspiracy claim fails to meet the "substantial merit" test and should be dismissed on this basis alone.

[299] Finally, an application of the ultimate balancing test very much favours Picazo and the interests and values that she has argued must be protected. Accordingly, I conclude that all claims in this action against her ought to be dismissed.

K. Bruce Arthur

[300] On August 6, 2020, Arthur saw a tweet by André Picard, whom he follows on Twitter, which embedded the following August 4, 2020 tweet by Dr. Gill:

> "If you have not figured out that we don't need a vaccine, you are not paying attention. #FactsNotFear"

[301] Arthur was concerned by this tweet because it contradicted the public health advice he had become aware of over the previous months. He was particularly concerned that the tweet had been made by a physician.

[302] Arthur then reviewed Dr. Gill's Twitter account, and saw the following tweets:

> a) "There is absolutely no medical or scientific reason for this prolonged, harmful and illogical lockdown."
>
> b) "Current status of #COVID19 99.9% Politics, Power, Greed & Fear. 0.1% Science & Medicine."
>
> c) "#Humanity's existing effective defences against #COVID19 to safely return to normal life now: -The Truth – T-cell Immunity – Hydroxychloroquine."

[303] Arthur observed that Dr. Gill's tweets had been retweeted many, many times.

[304] Arthur also observed that Dr. Gill had tweeted about André Picard, accusing him of having been appointed by Trudeau to the COVID-19 Impact Committee "to drive the political WHO narrative." This tweet had resulted in a barrage of negative online vitriol directed at Picard.

[305] After learning that Dr. Gill had blocked him from being able to view her Twitter page, Arthur tweeted the following:

> I don't boast about being blocked, but this one is a badge of honour, from a Canadian doctor who is spreading dangerous misinformation, and who unleashed a troll farm at @picardonhealth, one of the finest public service journalists in Canada. What a disgrace.
>
> [Screenshot of Twitter message showing he had been blocked]
>
> Now, let's wait and see which media outlet her a platform. It'll be telling.

[306] This single tweet is the sole subject of the defamation claim against Arthur.

[307] The expression at issue relates to a matter of public interest – namely, the COVID-19 pandemic and ensuing public health response. The public interest nature of the expression should not be in dispute on this motion, particularly since Dr. Gill herself has extensively tweeted about this topic.

[308] When determining whether a statement has a defamatory meaning, attention must be given to the mode of communication, context, and all surrounding circumstances. As a platform, Twitter allows for an open exchange of ideas and invites users to engage with the views of others. By making controversial statements on this very public platform, Dr. Gill implicitly invited members of the public to respond to her views.

[309] Arthur's tweet cannot bear the defamatory meanings ascribed to it by Dr. Gill. It does not call her a conspiracy theorist, it does not call into question her mental stability, and it says nothing about her ability to care for her patients. It merely states Arthur's own view that her publicly-

available tweets include dangerous misinformation about COVID-19, and that the spreading of this misinformation and her related accusations hurled at Picard were a "disgrace".

[310] There is no evidence that the Arthur tweet lowered Dr. Gill's reputation. Her tweets were available for the public to see. Any reasonable member of the community could immediately look at her Twitter page and discern for themselves whether they agreed with Arthur's assessment of her tweets.

[311] Dr. Gill has fostered a reputation for herself as an outspoken and controversial advocate against public health advice on COVID-19 measures, and the mainstream media's coverage of COVID-19. Public health authorities have deemed anti-vaccine and anti-lockdown rhetoric to be "misinformation". Therefore, Arthur's characterization of Dr. Gill's tweets as "misinformation" likely served only to solidify her stance as a crusader against public health advice and the mainstream media, a reputation she herself created.

[312] Arthur's tweet also attracts a strong defence of fair comment on a matter of public interest. It was on a matter of obvious public interest. It was based in fact, as it directly responded to Dr. Gill's Twitter posts about vaccines, lockdowns, hydroxychloroquine and the overall COVID-19 public health response, which she does not dispute making. The tweet expressed an honestly held opinion that many other Defendants in this litigation shared. There is no credible suggestion or evidence that it was motivated by malice.

[313] Arthur's tweet is also recognizable as comment. Arthur was reacting to the fact that Dr. Gill had blocked him on Twitter, and tweeted that it being blocked was a "badge of honour" due to his opinion that she was "spreading dangerous misinformation" and had unfairly criticized Picard. The final words, "What a disgrace", shows that Arthur was only expressing his opinion and personal observation of Dr. Gill's actions on Twitter.

[314] Dr. Gill has not put forward any real evidence of any harm caused to her by Arthur's single tweet, or of any reputational or other harm at all.

[315] In any event, any potential harm arising from the impugned expressions is outweighed by the importance of allowing citizens to freely express themselves via social media platforms on what will be the defining public health issue of our time. An application of the ultimate balancing test to these facts requires that all claims against Arthur be dismissed.

Conclusion

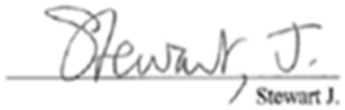
[316] For these reasons, the motions brought by the Defendants are granted, and all claims against them in these proceedings are hereby dismissed.

Costs

[317] Given the position taken on behalf of the Plaintiffs by their counsel in response to the suggestion made by some of the Defendants that the Plaintiffs' claims were being maintained with the possible benefit of third party funding, I did not consider it necessary or appropriate to refer to

it in the above reasons as it did not form any part of the applicable analysis. However, I should indicate to the parties that approach taken in that regard is without prejudice to the entitlement of any party to refer to such issue if there is a proper basis for doing so when making submissions on costs.

[318] If the parties cannot agree on the subject of costs, written submissions may be delivered by the Defendants for my consideration within 30 days of the date of this decision. Written submissions may be delivered by the Plaintiffs within 30 days thereafter.



Released: February 24, 2022

CITATION: Gill v. Maciver, 2022 ONSC 1279
COURT FILE NO.: CV-20-652918-0000
DATE: 20220224

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Dr. Kulvinder Kaur Gill and Dr. Ashvinder Kaur Lamba

Plaintiffs

– and –

Dr. Angus Maciver, Dr. Nadia Alam, André Picard, Dr. Michelle Cohen, Dr. Alex Nataros, Dr. Ilan Schwartz, Dr. Andrew Fraser, Dr. Marco Prado, Timothy Caulfield, Dr. Sajjad Fazel, Alheli Picazo, Bruce Arthur, Dr. Terry Polevoy, Dr. John Van Aerde, Dr. Andrew Boozary, Dr. Abdu Sharkawy, Dr. David Jacobs, Tristan Bronca, Carly Weeks, The Pointer, The Hamilton Spectator, Société-Radio Canada, the Medical Post

Defendants

REASONS FOR DECISION

Stewart J.

Released: February 24, 2022