SUPREME COURT OF NOVA SCOTIA
Citation: U*gursal v Ugursal*, 2024 NSSC 188

Date: 20240625
Docket: 500298
Registry: Halifax

Between:

Billur Ugursal

Plaintiff

v.

Vefik Ismet Ugursal

Defendant

Decision

Judge:	The Honourable Justice Peter Rosinski
Heard:	June 11, 2024, in Halifax, Nova Scotia
Counsel:	David G. Coles, KC for the Plaintiff Ronan Holland for the Defendant

By the Court:

1 - Introduction

[1] The Plaintiff [Billur] is the ex-wife of the Defendant.

[2] Billur has a Masters of Psychology and a long-standing practice as a Psychologist in the Halifax Nova Scotia area.

[3] The Defendant [Vefik] is a Professor of Mechanical Engineering at Dalhousie University.

[4] Billur claims by her Statement of Claim filed September 9, 2020, that Vefik repeatedly published in 2018, what she says is the defamatory public statement on the medical professional rating website "RateMDs.com":

> "Billur has no PhD degree and suffers from severe mental illness for over 30 years. She was in psychiatric institutions over 20 times in the Halifax/NS area. The diagnosis centres around schizophrenia and paranoia. Subsequently, she is unable to function in a healthy fashion and becomes periodically psychotic and destructive. She is harmful to the public and should not be part of the mental health community, except as a patient in constant care."

[5] Vefik has filed a Statement of Defence on September 30, 2020.

[6] In simple terms he denies that he posted to this website, and denies that the statements are false or defamatory; and further says that they are truthful and justified, constitute fair comment; he asserts qualified privilege over the statements; and that they were made without malice, ill feeling or ill will towards Billur.

[7] On January 15, 2021, Billur filed a Notice of Motion moving for an Order for Production of information held by RateMDs Inc. regarding:

> "(1) any and all login or user information and credentials including names, email addresses, home addresses, telephone numbers, and any other contact or identifying information of the user who submitted the below comment in respect of [Billur] on or about December 10, 2018 to the website

> www.rateMDs.com, a domain platform owned and operated by RateMDs Inc. :… and
>
> (2) a log of all submissions containing the above comment, or any substantially similar comments,… by the user, or using the login credentials, to be identified in paragraph [1] above; and
>
> (3) any and all network information including Internet protocol [IP] addresses, Internet service provider information, geographic location information, or any other network identifying information of the device or devices from which the above comment, or any substantially similar comments, were submitted in respect of [Billur] by the user, or using the login credentials, to be identified in paragraph [1] above."

[8] On January 27, 2021, Justice Ann Smith of this Court granted the Order.

[9] The February 17,2021 response from RateMDs Inc. is found at Exhibit "A" of Vefik's April 16, 2024, filed affidavit.

[10] Dates when the claimed offending words were posted to the website, notably in identical wording each time, were on August 6, August 22, August 25, September 14, September 24, September 25, November 19, and December 11, 2018.

[11] On March 23, 2023, Vefik filed a Notice of Motion moving for an Order of Summary Judgment on Evidence dismissing the proceeding, pursuant to CPR 13.04, and an order for costs.

[12] The motion was adjourned, and was amended to be heard on May 8, 2024, for a full day in Chambers. It was further adjourned for a full day hearing on July 11, 2024.

[13] As a result of the discussions with the Justice who set down that hearing, the present hearing, a motion to strike, all or a portion of, the contents of the affidavit of Billur, was scheduled for June 11, 2024 before me.[1]

[14] I am satisfied that portions thereof should be struck.

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[1] For clarity, I note that no written notice of motion ensued. The parties were content to proceed on the basis of the Justice's direction.

2 - Striking portions or all of the content of an affidavit

[15] *Civil Procedure Rule* [”CPR”] 39 deals with affidavits.

[16] CPR 39.02 reads:

> (1) A party may only file an affidavit that contains evidence admissible under the rules of evidence, these Rules, or legislation.
>
> (2) An affidavit that includes hearsay permitted under these Rules, a rule of evidence, or legislation, must identify the source of the information and swear to, or affirm, the witness's belief in the truth of the information.

[17] CPR 39.04 deals with the striking of part or all of an affidavit:

> (1) A judge **may strike** an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit.
>
> (2) A judge **must strike** a part of an affidavit containing either of the following:
>
> (a) Information that is not admissible, such an irrelevant statement or a submission or plea;
>
> (b) Information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.
>
> (3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.
>
> (4) A judge who orders that the whole of an affidavit be struck may direct the prothonotary to remove the affidavit from the court file and maintain it, for the record, in a sealed envelope kept separate from the file.
>
> (5) A judge who strikes parts, or the whole, of an affidavit must consider ordering the party who filed the affidavit to indemnify another party for the expense of the motion to strike and any adjournment caused by it.

[18] In argument, Vefik objects to the contents of Billur's affidavit on the following bases – because portions thereof are:

- in the nature of a submission, plea, or legal conclusion
- irrelevant
- bad character evidence or similar fact evidence /impermissibly prejudicial
- purported "medical opinion regarding Billur's diagnoses"
- not in the personal knowledge of Billur
- vexatious or scandalous
- statements of opinion, belief or speculation.

[19] In his reasons from *Colbourne Chrysler Dodge Ram Limited v MacDonald*, 2023 NSSC 309, which involved a Defendant's motion to stay an action on the basis that the matter should be subsumed within an arbitration proceeding previously commenced by the Defendant, in comprehensive measure, Justice Keith set out the relevant law, and stated in relation to affidavits filed:

> **LAW**
>
> [20] The jurisdiction for striking inadmissible evidence from an affidavit is codified in Rule 39.04(1) which states that: "A judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit."
>
> [21] Rule 39.04(2) and (3) provide further direction regarding a judge's jurisdiction:
>
> > (2) A judge must strike a part of an affidavit containing either of the following:
> >
> > (a) information that is not admissible, such as an irrelevant statement or a submission or plea;
> >
> > (b) information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.

> (3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.

[22] As the Jacobs Affidavit and Gillis Affidavit were filed as part of an interlocutory motion, Rule 22.15 “Evidence on a Motion” is germane. Rule 22.15(1) states:

> (1) The rules of evidence apply to the hearing of a motion, including the affidavits, unless these Rules or legislation provides otherwise.

[23] Both the Defendants and the Plaintiff rely on *Waverley (Village Commissioners) v. Nova Scotia (Minister of Municipal Affairs*), 1993 NSSC 71 (“**Waverley**”), a seminal decision released more than 30 years ago and still a fixture in the law regarding objections to the admissibility of affidavit evidence. All parties quote the following paragraphs from Waverley which is so cemented in the applicable jurisprudence as to have become virtually axiomatic:

> 1. Affidavits should be confined to facts. There is no place in affidavits for speculation or inadmissible material. An affidavit should not take on the flavour of a plea or a summation.
>
> 2. The facts should be, for the most part, based on the personal knowledge of the affiant with the exception being an affidavit used in an application. Affidavits should stipulate at the outset that the affiant has personal knowledge of the matters deposed to except where stated to be based on information and belief.
>
> 3. Affidavits used in applications may refer to facts based on information and belief but the source of the information should be referred to in the affidavit. It is insufficient to say simply that "I am advised."
>
> 4. The information as to the source must be sufficient to permit the court to conclude that the information comes from a sound source and preferably the original source.
>
> 5. The affidavit must state that the affiant believes the information received from the source.

[24] There are several additional comments to be made in this case regarding the law and practise for striking affidavit evidence.

PRELIMINARY COMMENTS ON MOTIONS TO STRIKE AFFIDAVIT EVIDENCE

[25] Obviously, litigants should not file affidavits containing inadmissible evidence. Moreover, a properly functioning adversarial system requires opposing parties to identify and confront inadmissible evidence. Thus, the *Civil Procedure Rules* properly provide a mechanism for parties to challenge inadmissible affidavit evidence.

[26] That said, broad, indiscriminate attacks on affidavit evidence:

1. Weaken the adversarial system by undercutting the goals of efficiency and economy in civil litigation; and

2. May prematurely distort the facts before the impugned facts can be better understood in their proper legal context.

Efficiency, Practicality And Economy

[27] As indicated, receiving an affidavit from an opposing party should not be seen as an open-ended invitation to identify every possible evidentiary concern without regard to its importance or the resulting impact in terms of cost and delay.

[28] Judges will scrutinize the evidence and are capable of allocating the evidentiary weight it deserves, if any. It is not necessary to challenge every bit of information no matter how minimal its potential evidentiary value might be.

[29] As importantly, focussing on material (not trivial) issues better achieves the promise of Nova Scotia's Rule 1.01 for "the just, speedy and inexpensive determination of every proceeding." Focussing on material issues also better aligns with the Supreme Court of Canada's warning in *Hyrniak v. Mauldin*, 2014 SCC 7 at para. 2, that:

> … a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

[30] Saunders, J. (as he then was) similarly spoke to the need for pragmatism and economy in *Balders Estate v. Halifax (County) Registrar of Probate*, 1999 CanLII 3209 (NS SC), 176 N.S.R. (2d) 262 (NSSC) (leave to appeal refused (1999 NSCA 119)) when he observed at para. 33 that:

> … one should not apply too narrow, too rigid an approach to the principles so carefully drawn by Justice Davison in Waverley. This is not to say that such requirements are to be waived or ignored in certain circumstances; clearly they are not. However, they ought be applied in the manner obviously intended by Justice Davison; that is which respects and protects the very object of the *Civil Procedure Rules*, namely: ... to secure the just, speedy and inexpensive determination of every proceeding (C.P.R. 1.03 [now 1.01]).

[31] The Civil Procedure Rules clearly permit motions to strike affidavit evidence; however, they should not be interpreted as promoting a forensic dissection of every conceivable evidentiary issue, regardless of its importance. To find otherwise would encourage litigants to spend inordinate amounts of time nitpicking and, in doing so, subvert the move towards more efficient and cost-effective proceedings.

[32] Obviously, this does not mean that litigants may file affidavits littered with inadmissible evidence. Rather, the point is simply that litigants should bring a reasonable degree of judgment to bear before approaching every perceived evidentiary problem as a call to arms.

Prematurely Distorting The Factual And Legal Context

[33] "Relevant" information is that which, as a matter of logic and human experience, tends to prove or disprove a fact in issue. (*Sipekne'katik v. Mi'kmaw Family and Children's Services Nova Scotia,* 2023 NSCA 44 at para. 31 and *Murphy v. Lawton's Drug Stores Ltd.*, 2010 NSSC 289 at para. 20). Facts "in issue" obviously do not include any random fact which a party may wish to prove. Facts "in issue" are legally significant and may be further sub-categorized as including:

1. Material facts: Material facts are those core, essential facts which ground a cause of action or defence. In *R. v. Candir*, 2009 ONCA 915 (leave to appeal to SCC dismissed), the Ontario Court of Appeal wrote: "Evidence is material if what it is offered to prove is in issue [at the proceedings] according to the governing substantive and procedural law and the allegations contained in the indictment [or the civil pleadings]" (at para. 49). In *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, the Nova Scotia Court

> of Appeal wrote that a "material fact" is one which is essential to a cause of action or defence (at para. 27). Similarly, in the subsequent decision of *Coady v. Burton*, 2013 NSCA 95, the Court of Appeal wrote that a material fact is an "important factual matter that anchors the cause of action or defence" (at para. 42); and
>
> 2. Secondary or collateral facts: Secondary facts are those which make a material or core fact more or less probable based on reason, logic, and human experience. Secondary facts are not relevant if, for example, their connection to a core, material fact is imagined, or based upon sheer, unfounded speculation, or premised on some absurd misrepresentation of reality.

[34] Assessing whether a fact is legally relevant requires a clear understanding of the substantive law applicable to the underlying claim or defence.

[35] If the fact and legal arguments underpinning a claim or defence are not fully developed, it may not be reasonably possible to safely predict the implications of striking affidavit evidence. Worse, prematurely striking evidence may improperly or prematurely skew the contest in favour of one side. This risk is particularly acute where a party seeks to strike affidavit evidence at an early stage in the proceeding - before the facts and ultimate legal arguments are fully developed.

[36] The Rules allow a party to seek an order striking affidavit evidence at any stage of the proceeding. And there will obviously be circumstances where inadmissible affidavit evidence must be struck immediately. However, in an adversarial system, the parties are required to muster and prove relevant evidence in support of their respective claims and defences. The Court provides oversight, protects the integrity of the process, and ensures compliance with the rules of evidence, among other things.

[37] Where a party brings interlocutory proceedings in advance of the ultimate trial (or hearing) to attack affidavit evidence, that moving party must present legal arguments which are sufficiently developed to assess relevance in its proper factual and legal context - or risk having their concerns dismissed as premature, unproven, or indeterminate at that stage in the process.

Hearsay and Opinion

[38] In addition to relevance, the Defendants allege that the Jacobs Affidavit and the Gillis Affidavit contain inadmissible hearsay and opinion evidence.

[39] The concerns around the inadmissibility of hearsay and opinion evidence are somewhat different from those which arise around relevance. As indicated, information is relevant (and admissible) where it tends to prove a fact in issue. The inquiry is tethered to the facts and law which apply to the specific case at bar. The concerns around hearsay and opinion are more general in nature and driven largely by the nature of this type of evidence.

Hearsay

[40] An out-of-court statement is hearsay when offered for its truth and the opposing party is denied the opportunity to conduct a contemporaneous cross-examination of the person making the statement. While hearsay evidence may be relevant, it is presumptively inadmissible because of its inherently unreliable nature. Absent cross-examination, there is an unacceptable risk that the person to whom the out of court statement is attributed may be mistaken, or under a misapprehension, or biased, or lying. (See *R. v. Bradshaw*, 2017 SCC 35 at para. 105). That said, exceptions are admitted where certain specific circumstances are sufficient to allay the various risks and potential prejudices which undercut the reliability of hearsay evidence. In *R. v. MacKinnon*, 2022 ONCA 811, the Ontario Court of Appeal provided the following three-step framework for assessing if/when hearsay evidence meets the test for "threshold reliability" [2] and, is therefore, admissible:

> 62 To summarize, the focus at the admissibility stage is on threshold, not ultimate reliability. The *Starr/Mapara* framework for determining the admissibility of hearsay evidence may be further developed as follows:
>
> i. Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The onus is on the party tendering the evidence to show that it meets the requirements of a traditional exception or the principled approach.
>
> ii. Evidence that falls under a traditional exception to the hearsay rule is presumptively admissible as traditional exceptions embody circumstantial guarantees of trustworthiness. (In the case of a spontaneous utterance exception, the inherent reliability stems from the requirement that the statement was made contemporaneously with a startling event that dominates the mind.)

a. In "rare cases" however, evidence falling within an existing traditional exception may be excluded because there are "special features" such that the hearsay statement does not meet the requirements of the principled approach in the particular circumstances of the case. The onus rests on the party resisting admission.

b. In the context of the spontaneous utterance exception, the basis for asserting a "rare cases" exception includes circumstances of gross intoxication, highly impaired vision, and exceptionally difficult viewing conditions, which are sufficiently grave that the trial judge cannot exclude the possibility of error or inaccuracy on a balance of probabilities. However, the "rare cases" exception does not include weaknesses that go to the ultimate reliability of the evidence or reliability concerns that are inherent in the traditional exception.

iii. Hearsay evidence that does not fall under a traditional exception may still be admitted under the principled approach if sufficient indicia of necessity and threshold reliability are established on a *voir dire* on a balance of probabilities. This is established by satisfying the following criteria:

a. Threshold reliability (or reliability for the purpose of admission into evidence only) may be established through procedural reliability, substantive reliability, or both.

b. To establish procedural reliability, there must be adequate substitutes for testing the evidence and negating the hearsay dangers arising from a lack of oath, presence, and cross-examination. Procedural reliability is concerned with whether there is a satisfactory basis to rationally evaluate the statement.

c. To establish substantive reliability, the circumstances surrounding the statement itself must provide sufficient circumstantial or

evidentiary guarantees that the statement is inherently trustworthy. This is a functional inquiry. Substantive reliability is concerned with whether there is a rational basis to reject alternative explanations for the statement, other than the declarant's truthfulness or accuracy. Where hearsay evidence has sufficient features of substantive reliability, there is no need to consider any extrinsic evidence that corroborates or conflicts with the statement. Courts should be wary not to turn the principled approach into a "rigid pigeon-holing analysis": *Khelawon*, at paras. 44-45.

d. If substantive reliability is still lacking after examining the circumstances surrounding the statement, trial judges can rely on corroborative evidence to establish substantive reliability only if the corroborative evidence meets the criteria set out by the Supreme Court in Bradshaw.

e. The process set out in Bradshaw is as follows: (i) identify the material aspects of the hearsay statement tendered for its truth, (ii) identify the hearsay dangers raised, (iii) consider alternative, even speculative, explanations for the statement, and (iv) determine whether the corroborative evidence led at the *voir dire* rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.

[41] Paragraph 20 of Davison, J's decision in *Waverley* also touches upon several more technical requirements which must be met when presenting hearsay evidence in an affidavit. To repeat:

3. Affidavits used in applications may refer to facts based on information and belief but the source of the information should be referred to in the affidavit. It is insufficient to say simply that "I am advised".

4. The information as to the source must be sufficient to permit the court to conclude that the information comes from a sound source and preferably the original source.

5. The affidavit must state that the affiant believes the information received from the source.

[42] That said, compliance with these technical requirements does not automatically render hearsay information admissible. The phrase "I am advised by [source of hearsay information] and do verily believe…." is not a spell that magically validates hearsay evidence or renders inadmissible hearsay impervious to challenge.

…

Opinion Evidence

[44] Generally speaking, opinion evidence is inadmissible. Two particular problems associated with expert opinion relate to the fact-finder's ability to properly assess the reliability of evidence which is beyond (not within) the expertise of an ordinary person and associated, potentially prejudicial effects on the fact-finding process. In *R. v. Mohan*, 1994 SCC 80, Sopinka, J. describes these problems at para. 23:

> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. As La Forest J. stated in *R. c. Béland*, 1987 CanLII 27 (SCC), [1987] 2 S.C.R. 398, at p. 434, with respect to the evidence of the results of a polygraph tendered by the accused, such evidence should not be admitted by reason of "human fallibility in assessing the proper weight to be given to evidence cloaked under the mystique of science.

[45] To this, in *White Burgess Langille Inman v. Abbott and Haliburton Co*, 2015 SCC 23, Cromwell, J. added the following additional potential dangers associated with expert opinion evidence at para. 18:

> There is a risk that the jury "will be unable to make an effective and critical assessment of the evidence": *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330 (Ont. C.A.), at para. 90, leave to appeal refused, [2010] 2 S.C.R. v (note) (S.C.C.). The trier of fact must be able to use its "informed judgment", not simply decide on the basis of an "act of faith" in the expert's opinion: J. (J.-L.), at para. 56. The risk

> of “attornment to the opinion of the expert” is also exacerbated by the fact that expert evidence is resistant to effective cross-examination by counsel who are not experts in that field: D. (D.), at para. 54. The cases address a number of other related concerns: the potential prejudice created by the expert's reliance on unproven material not subject to cross-examination (D. (D.), at para. 55); the risk of admitting "junk science" (J. (J.-L.), at para. 25); and the risk that a "contest of experts" distracts rather than assists the trier of fact (Mohan, at p. 24). Another well-known danger associated with the admissibility of expert evidence is that it may lead to an inordinate expenditure of time and money: Mohan, at p. 21; D.D., at para. 56; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387 (S.C.C.), at para. 76.

…

[49] The law also recognizes certain limited exceptions where the opinions being expressed lie within a person’s ordinary experience. An ordinary layperson may express an opinion such as, for example, another person seemed angry or whether objects such as clothing appeared tattered and worn. Referring again *to Mi'kmaw Family and Children's Services*, Chipman, J. reviews the law around ordinary opinions expressed by affiants who are not qualified as experts (at paras. 12 – 13).

APPLICATION OF THE LAW

Objections Based on Relevance

[50] The Defendants argue that virtually every paragraph in the Gillis Affidavit and Jacobs Affidavit should be struck as “irrelevant”. Of the 14 paragraphs in the Jacobs Affidavit, the Defendants state that paragraphs 2 – 11 and 13 – 14 are irrelevant.

[51] However, the parties have yet to file written submissions on the ultimate issue regarding a stay of proceedings and the arguments on relevance in the motion are narrow and offers only a glimpse into the facts that may or may not be relevant to the motion for a stay.

[underlining added by me]

[20] More recently, Justice Keith reiterated the principles at issue in the context of defamation from his reasons in *Fraser v MacIntosh – Wiseman*, 2024 NSSC 115:

> [3] In a nutshell, the individual Plaintiff Fraser alleges that the March 9 Email is defamatory and that the Defendant republished (or facilitated the republication) of it to others. The Plaintiffs collectively allege the tort of placing the Plaintiffs in a false light. The corporate Plaintiff DLF Inc.

(Fraser's professional corporation) also claims consequential losses caused by the alleged harm originally suffered by its "face" and sole source of income, Fraser.

…

[8] Each party each raised numerous evidentiary objections against the evidence filed by the other. These reasons consolidate the objections raised by all parties in a single decision. I attach:

(a) Schedule "A" which is a table addressing the objections raised by the moving party (Defendant) against the Corrected Fraser Affidavit;

(b) Schedule "B" which is a table addressing the objections raised by the responding party (Plaintiff) against the Original MacIntosh-Wiseman Affidavit.

[9] The tables contain explanations for my various conclusions and reasons. I also refer to the following *Civil Procedure Rules* and related jurisprudence which provide the conceptual foundations for the following identified objections:

1. *Civil Procedure Rule* 22.15 "Rules of evidence on a motion";

2. *Civil Procedure Rule* 39 "Affidavit" and particularly subrule 39.02 "Affidavit is to provide evidence" and 39.04 "Striking part or all of affidavit";

3. Relevance: *McDonald v. Hue*, 2024 NSSC 24 at paras. 23 - 27;

4. Hearsay: *McDonald v. Hue*, 2024 NSSC 24 at paras. 33 - 37 and *Colbourne Chrysler Dodge Ram Limited v. MacDonald*, 2023 NSSC 309 at paras. 40 - 43;

5. Speculation and Lay Opinion: *McDonald v. Hue*, 2024 NSSC 24 at paras. 40 - 44 and *Colbourne Chrysler Dodge Ram Limited v. MacDonald*, 2023 NSSC 309 at paras. 44 - 48;

6. Argument: *McDonald v. Hue*, 2024 NSSC 24 at paras. 38 - 39; and

[10] As will be seen in the attached Schedules, **the issue of prematurity arises in this case.** I refer to *Colbourne Chrysler Dodge Ram Limited v. MacDonald*, 2023 NSSC 309 at paras. 33 – 37**. The Court may decline to strike affidavit evidence in an interlocutory proceeding where, in effect, the Court is being required to prematurely determine a central**

> **legal issue at a point when the facts and legal arguments have yet to be fully developed.** On this point, I note *Civil Procedure Rule* 13.04(6)(a) which recognizes the Court's discretion to decline answering an issue of law in a motion for summary judgment even if there is no genuine dispute of material fact for trial. That same discretion exists with greater force where a party moves for summary judgment and then seeks to resolve an interconnected question of law as part of a preliminary motion to strike affidavit evidence – before the motion for summary judgment is heard."
>
> [My bolding added]

3 - The background to the motion to strike portions of paragraphs and complete paragraphs in Billur's affidavit

[21] Billur's affidavit was filed to contest Vefik's motion for summary judgment on evidence. It contains 15 paragraphs.

[22] I bear in mind Justice Keith's concerns of prematurity at paragraph 54 in *Colbourne,* but conclude they are not a material factor in the circumstances here.

[23] The pleadings were first filed in September 2020.

[24] Much time has passed since the Production Order in relation to RateMDs Inc. was authorized in January 2021.

[25] Billur has had time to gather evidence and present its position on the motion for Summary Judgment on evidence filed by Vefik on March 23, 2023.

[26] I infer that Billur is putting her best foot forward in response to the Summary Judgment motion, when she filed her affidavit which is presently contested.

[27] At paragraph 47 of his May 21, 2024, Brief, Vefik has particularized his position about which of the various paragraphs of Billur's affidavit sworn April 24,2024 are inadmissible (namely, paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14).

[28] From the arguments presented in this motion to strike, it appears that the crux of the Summary Judgment on evidence arguments made by Vefik are that there is insufficient evidence that it was he who posted the comments on the "Rate MDs" website, although I remain mindful his pleadings also assert other defences.

[29] The evidence before me sufficiently establishes that in September 2018, there was an upcoming Court hearing on November 1 –2, 2018, wherein Billur, as grandmother to her daughter's son, sought "access visits" to him.

[30] Billur was contesting access as against her daughter and son-in-law, who were relying upon Vefik as a witness on their behalf.

[31] The postings on the website were recorded between June 8 and December 11, 2018.[2]

[32] Billur's evidence suggests that a viable inference is that during the time interval of the postings, only, or especially, Vefik had a motive to undermine her professional reputation (but I note here she also could have believed that concurrently it would also undermine her fitness as a grandparent seeking access), and that only he would have had this precise of knowledge of her past, and only he had repeatedly made such claims directly to her in the past (ie., his claim that she had schizophrenia).

[33] Moreover, she says that she recognized as his, "this quasi-medical language" used in the postings.

[34] In discovery she was asked, and answered:

> Q- So, the only reason that my client is implicated from these posts, is that you recognize the language, and you say there's a motive?
>
> A- Right on… he has made the similar claims, and he has brainwashed my daughter, my son-in-law, other people in the Turkish community. It came back to me… he has a history of defaming me, slandering me" [Exh "B" Vefik's affidavit].

[35] In summary, Billur's case at trial for defamation against Vefik will be a circumstantial case – that is, it is not one of direct evidence implicating Vefik, but rather one of indirect evidence said to implicate him.

[36] The key issues for Billur will be to prove authorship of the posts, and that they are defamatory.

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[2] Billur stated in Discovery that her sister had alerted her to the alleged defamatory posting in May 2018, (Exh "B"-Vifek's April 16, 2024, filed affidavit.).

[37] At trial, Billur will be asking the trier of fact to infer more likely than not that Vefik was the creator of the posts to the RateMDs website, and to conclude that they were defamatory, and not excused by any defences.

[38] Let me then turn to the precise complaints about Billur's affidavit.

4 - The portions of Billur's affidavit that are inadmissible

[39] Billur's affidavit is not a model of elegant drafting, and that in turn has created an unnecessary amount of work for opposing Counsel and the Court.

[40] I will focus on Vefik's position set out at para. 47 of his May 21, 2024, Brief, as expanded upon by his Counsel in oral argument.

[41] I have also contextually kept in mind both Vefik's affidavits filed on April 16 and 30, 2024. They are both in the nature of wholesale denials by Vefik to any claims made by Billur.

The paragraphs in issue are:

1 "I am the Plaintiff in this proceeding and as such have personal knowledge of the matters attested to herein."

[This paragraph was not put in issue.]

2 "The postings set forth in the Statement of Claim are the only posting on "RateMDs" referable to me, which are disparaging/defamatory of me."

[The bolded portion is struck as it is a legal conclusion and not a fact established. Although Billur references the "postings set forth in the Statement of Claim…" and properly her affidavit should not reference/adopt portions of the Statement of Claim, this is not problematic because the identical wording appears as Exhibit "B" in her affidavit.];

3 **"Concurrent to my pregnancy in 1981, the Defendant began physical and mental abuse towards me. He punched my pregnant belly."**

[The bolded portion is struck as it is irrelevant- see for example, Justice Keith's reasons from Colbourne Chrysler Dodge Ram Limited v MacDonald, 2023 NSSC 309 at para. 33.]

4 **"Attached hereto and marked Exhibit "A" is an extract from the discovery examination of the Defendant conducted on October 25, 2021. That the Defendant would reject the truth of my allegation in respect to such a serious matter based upon a simple denial from the offender, without any inquiry of him about the alleged circumstances is typical of his disrespect and disregard for me. It is typical of his acting to cause me pain."**

[The bolded portion is struck as it is irrelevant];

5 "The Defendant's description of me as suffering from 'schizophrenia' was first stated by him during my pregnancy and he has continued to ascribe that condition to me notwithstanding that I have not been diagnosed with that condition. This false alleged diagnosis has not been said by anyone else other than my ex-husband; he has belittled me by claiming I am schizophrenic."

[The wording in the web post refers to "severe mental illness for over 30 years… in the Halifax/Nova Scotia area. The diagnosis centres around schizophrenia and paranoia". The affidavit evidence of Vefik includes that he is presently 68 years old, and that "I have lived in Halifax Nova Scotia since 1977…". He also included in his affidavit Billur's discovery examination wherein she stated: "he has attempted to convince me that I suffer from schizophrenia… I still recall that day when he made that claim… This was shortly after he obtained his PhD… He obtained his PhD around September 1987, and this was shortly after that." While Billur states in the paragraph "This false alleged diagnosis has not been said by anyone else other than my ex-husband"- I interpret that as, no one else has directly communicated that to her, and seen in that light, this paragraph is relevant and not otherwise inadmissible.]

6 **“After I learned of the Defendant’s affair with my younger sister, while he and I were married, I made it clear I would be proceeding to obtain a divorce. The Defendant’s response was to threaten my life, suggest I jump off one of the bridges and kill myself, and to advise that I would not see our daughter if I divorced him.** His allegations that I was schizophrenic assisted him in achieving my daughter’s alienation from me.”

[The bolded portion is struck as it is irrelevant. There is some evidence that her estrangement from her daughter was ongoing at the time of the Court proceedings in 2018. I also bear in mind Justice Keith’s concerns in Colbourne about pre-maturity, as also captured by Gomery J in Di Franco v Bueckert ,2020 ONSC 1954 at paras. 18-20.]

7 “Court proceedings involving a peace bond [s. 810 Criminal Code] and divorce proceedings were bitter and highly contentious. **His lack of respect, overhaul (sic) treatment and attitude towards me continuing through to the finalization of our divorce was demeaning and intended to hurt me and poison my relationship with our daughter.** His animus towards me continuous and it finds expression in the postings of RateMDs, a true copy of which is attached hereto and marked Exhibit “B”.

[The bolded portion is struck as it is irrelevant and otherwise inadmissible.] [Although the divorce proceedings were initially concluded in the 1990s, there is no specific factual evidence to counter Billur’s position that over time, Billur’s daughter became estranged from her as a result of Vefik’s words and actions, which she characterized as a continuing animus by him against her. At paragraph 7 of Vefik’s April 30, 2024, filed affidavit, he stated: “As to paragraph 7 of Billur’s affidavit, our daughter Yasemin Ugursal and her husband Kirk Lewis filed peace bond proceedings against Billur several years ago. Although I testified as a witness, I was otherwise not involved in that proceeding. I deny all other allegations within.”]

8 **The Defendant has asserted that I was so dangerous that I was placed in a straitjacket on at least two occasions, notwithstanding straitjackets are not used in Canadian hospitals. His allegation was untrue.**

The Defendant has asserted that I was so dangerous that I was placed in a straitjacket on at least two occasions, notwithstanding straitjackets are not used in Canadian hospitals. His allegation was untrue.

9 **"When I demanded he pay half the money he had taken from our savings account, he replied 'I don't have to listen to a woman'."**

[The bolded portion is struck as it is irrelevant.]

10 "I have never claimed that I have a PhD and to suggest as the publication does, that I do not have a 'PhD degree' implies, and was intended to imply, that I have been misrepresenting my credentials."

[This paragraph is relevant and not otherwise inadmissible.]

11 **"I do verily believe the accusations contained in the publications detailed in the Statement of Claim are authored and caused to be published by the defendant; his denials as set out in his affidavit of April 15 are untrue."**

"I do verily believe the accusations contained in the publications detailed in the Statement of Claim are authored and caused to be published by the defendant; his denials as set out in his affidavit of April 15 are untrue."

12 "I am unaware of anyone else who would try to ruin my reputation and negatively affect my professional practice other than my ex-husband, **whose agenda has always been to diminish me and cause me pain. I adopt as true paragraphs 4, 5, 6, and 7 of the Statement of Claim on file** and state that other than my ex-

husband, no one has the desire and purported knowledge (untrue) to make the defamatory publications."

[The bolded portions are struck. Not all of this paragraph's contents are struck, because:

1. Although the first sentence thereof has been argued by Vefik to merely be Billur's "belief" – that she believes there is no one else who would be motivated to make such web postings - which is arguably irrelevant and argumentative/conclusory - I bear in mind Justice Keith's comments about access to justice/pre-maturity, and note that the evidence on this motion to strike suggests that no other person has directly stated such claims of "schizophrenia" to her, as I interpret her paragraph 5; consequently it is proper not to strike all the first sentence (except to the extent of the expansively vague, bad character reference: "whose agenda has always been to diminish me and cause me pain");

2. While it is improper for an affiant to claim to "adopt as true" any portion of their pleadings in their affidavit because the "pleading" nature of a statement of claim is at odds with a fact-driven affidavit, it would be open to her to request that the Court permit her to amend the affidavit, to formally bring into her affidavit the factual statements that she seeks to rely upon. It would be in the interests of justice to allow her to revise her affidavit accordingly.

I note that paragraph 4 of the Statement of Claim is already effectively contained in her affidavit as Exh. "B"; and somewhat so, for paragraph 5, 6, (affidavit paragraphs 10, 5, 7) though not expressly - but inferentially - para. 7 of the Statement of Claim.

Consequently, I will formally strike only the bolded portion of the second sentence. In relation to the content of the second sentence, I question whether Billur can properly make the conclusory factual statement that "no one [else] has the desire and purported knowledge… to make the defamatory publications".

The evidence references that in 2018, Billur was also litigating an acrimonious Family Court proceeding with her daughter and son-in-law.

Presuming that Vefik had in the past made such claims regarding Billur, through their contact with Vefik, her daughter and son-in-law could have been aware of such information, which in turn, they could have posted on the website.

In any event, Billur is entitled to state as facts in her affidavit that:

1. In the past Vefik told her that in his opinion, her behaviour was consistent with her having schizophrenia; and

2. (with appropriate detail) he had various bases for having a relevant animus against her in 2018. The Court is satisfied that both these items are directly or indirectly contained in her affidavit.]

13 "I have read the excerpts of my discovery transcript attached to the Affidavit of the Defendant filed in respect to this proceeding. My certainty that the Defendant was the publisher of the impugned postings on RateMDs crystalized prior to issuing the Statement of Claim in this proceeding."
[The bolded portion is struck because Billur's belief is irrelevant, no matter what the basis of her belief or opinion in that respect.]

14 "I will be instructing my counsel to file a jury trial."

15 "I make this affidavit in support of my being able to place this matter before a jury."

[The bolded portions of the preceding two paragraphs are struck as they do not relate to facts relevant to the motion for summary judgment on evidence.]

5 What remains after the stricken portions of the affidavit are removed?

[42] Let me for convenience reproduce what remains of Billur's affidavit:

> **1** "I am the Plaintiff in this proceeding and as such have personal knowledge of the matters attested to herein."
>
> **2** "The postings set forth in the Statement of Claim are the only posting on "RateMDs" referable to me, which are disparaging of me."
>
> ….
>
> **5** "The Defendant's description of me as suffering from 'schizophrenia' was first stated by him during my pregnancy and he has continued to ascribe that condition to me notwithstanding that I have not been diagnosed with that condition. This false alleged diagnosis has not been said by anyone else other than my ex-husband; he has belittled me by claiming I am schizophrenic."
>
> **6** "His allegations that I was schizophrenic assisted him in achieving my daughter's alienation from me."
>
> 7 "Court proceedings involving a peace bond [s. 810 Criminal Code] and divorce proceedings were bitter and highly contentious. His animus towards me continuous and it finds expression in the postings of RateMDs, a true copy of which is attached hereto and marked Exhibit "B".
>
> **10** "I have never claimed that I have a PhD and to suggest as the publication does, that I do not have a 'PhD degree' implies, and was intended to imply, that I have been misrepresenting my credentials."
>
> **12** "I am unaware of anyone else who would try to ruin my reputation and negatively affect my professional practice other than my ex-husband... and I state that other than my ex-husband, no one has the desire and purported knowledge (untrue) to make the defamatory publications."

[43] The remainder of the affidavit is intelligible.

Conclusion

[44] I will sign an Order to be drafted by Billur's counsel that reflects my decision herein.

[45] Costs were discussed and counsel were agreed that $2000-$2500 was a reasonable amount to be awarded to the successful party on the motion to strike portions, or all of the affidavit of Billur.

[46] I direct that Billur pay $2500 to Vefik, in any event of the cause, and not later than 60 days from the date of the filing of the Order.

Rosinski, J.