CITATION: Anderson v. LHSC, 2025 ONSC 4374
COURT FILE NO.: CV-23-1311
DATE: 2025/07/31

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SCOTT ANDERSON, Plaintiff

AND:

LONDON HEALTH SCIENCES CENTRE, Defendant

BEFORE: Mr. Justice Joseph Perfetto

COUNSEL: Katie Warwick, for the Plaintiff

Simon A. Clements and Landan E. Peleikis, for the Defendant

HEARD: February 12, 2025

Perfetto J.

Introduction

1. In 2022 a former nurse at the London Health Sciences Centre (LHSC) contacted the College of Physicians and Surgeons of Ontario (CPSO) to advise that in 2014 the plaintiff, a physician with privileges at the LHSC, expedited the death of a patient. The CPSO referred the nurse's complaint about the plaintiff to the LHSC. The LHSC conducted an interview of the complainant nurse and of a second nurse that had been identified but who was not present for the alleged event. The alleged patient was not identified through the complaint itself. The LHSC undertook the task of attempting to identify the alleged patient and to investigate the complaint. Along that path, the LHSC reviewed some specific cases in more detail. The process undertaken by the LHSC took some seven (7) months to complete. The LHSC determined that there was no foundation for and therefore no merit to the allegations. It was determined that the plaintiff's conduct did not, at any time, fall below the standard of care. Put differently, the plaintiff was exonerated of any alleged wrongdoing.

2. The plaintiff was not advised of the complaint or the investigation of the complaint until after the LHSC had determined that the complaint was without foundation. The plaintiff requested information about the complaint and about the investigation, including the names of those involved. The LHSC initially provided no information to the plaintiff. The plaintiff then sought to obtain this information through a request pursuant to the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 (FIPPA). This request was denied by the Privacy Consultant of the LHSC. The plaintiff then

brought the present Action as against the LHSC only, alleging defamation, breach of fiduciary duty, breach of contract, negligence and negligent misrepresentation. The plaintiff also asserts that the LHSC has intentionally inflicted mental suffering, distress and pain. At its core, the plaintiff's claim is premised on the notion that the LHSC denied him procedural fairness in the manner that the LHSC handled the complaint. Specifically, the plaintiff focuses on a failure by the LHSC to advise him of the complaint at the time it was made, denied him the opportunity to participate in the process and denied him the opportunity to respond to the allegations, notwithstanding the LHSC's finding that the allegations were without merit.

3. In this context, the LHSC brings a Rule 21 motion seeking to strike the plaintiff's statement of claim on the basis that it represents an abuse of process and that, in some respects, it discloses no reasonable cause of action. The plaintiff has brought a motion for production of the documentation related to the investigation. In this regard, the LHSC resists production on the basis of relevance and privilege. The LHSC also brought a Rule 20 motion for summary judgement which this Court determined could not proceed until after the production motion was determined.

4. For the reasons that follow, the LHSC's Rule 21 motion is granted in part and the plaintiff's motion to compel production is granted in part. These reasons explain why I have arrived at these determinations.

Factual Overview

5. The following factual overview informs the motions in this matter. To the extent that other factual aspects of this case are relevant, they are referenced within the discussion of the legal issues.

6. Dr. Anderson, the plaintiff, is a licensed Emergency Medicine and Critical Care Medicine Physician and has had privileges at the LHSC since 1996. Dr. Anderson operates the Dr. Scott Anderson Medicine Professional Corporation. Pursuant to federal legislation, Dr. Anderson has provided eligible patients with Medical Assistance In Dying (MAID). Dr. Anderson is one of the few physicians in Ontario that provide MAID. That said, the circumstances of the motions before me do not turn on the plaintiff's capacity as a physician providing medical assistance in dying.

7. Between 2011 and 2019, Dr. Anderson was the Site Chief of Critical Care Medicine at the LHSC. The LHSC is made up of Victoria Hospital, Children's Hospital, University Hospital and Lawson Health Research Institute, all located in London. Ontario. The LHSC is governed by a board of directors and is subject of the *Public Hospitals Act*, R.S.O. 1990, c. P.40 (*PHA*).

8. The LHSC has a Medical Advisory Committee (MAC). The MAC is made up of the heads of the various hospital departments. The Chief Executive Officer (CEO) of the LHSC is also a member of the MAC. The MAC has a chair. At the time of the complaint in question, Dr. Fawaz Siddiqi was the interim chair of the MAC. During the currency of the investigation, Dr. Alex Barron became the chair of the MAC. Meetings of the MAC are minuted by a recorder from Medical Affairs within LHSC. The MAC makes recommendations from time to time, to the LHSC's Board of Directors. This includes in the context of issues related to dismissal, suspensions or restrictions of hospital privileges as it concerns credentialed professional staff members which includes physicians like Dr. Anderson. The reporting relationship and the relevant procedures and requirements that govern in this context are set out in the *PHA* and the associated By-laws.

9. What permits a physician to practice in a hospital setting such as the LHSC are privileges granted by the hospital to that physician. Dr. Anderson has privileges at the LHSC and has cross-appointment privileges to St. Joseph's Health Care London (St. Joe's) which, like LHSC, is located in London, Ontario.

10. The scope of the privileges granted to a physician vary but may include the right to admit patients, assign beds to them and use the hospital's equipment and other resources to support the physician's specific practice. At no point during the relevant time frame of this matter, were Dr. Anderson's privileges suspended or removed for any reason. As far as this Court is aware, there have been no complaints about Dr. Anderson until September 12, 2022 when the CPSO informed the LHSC that there had been a complaint forming the subject matter of this litigation.

11. As indicated, the complaint consists of allegations by a single nurse that in 2014, Dr. Anderson had expedited the death of an end-of-life patient. The complaint was made in late August 2022. The complaint in question was received by Dr. Siddiqi from Dr. Anil Chopra of the CPSO. Dr. Chopra was a staff member of the CPSO. The allegations related to a male patient that was alleged to be between the age of 78 and 82. At the time of the alleged event, the unidentified patient was alleged to be diagnosed with Chronic Obstructive Pulmonary Disease exacerbation (COPD). The patient was alleged to have been in the University Hospital Cardiac Surgery Recovery Unit. There were, it was alleged, no family with the patient. The core of the allegation was that the patient's death was expedited by the plaintiff by administering Propofol and Ativan. As per the accepted practice and because the CPSO only deals with complaints made by patients, it was LHSC's duty to investigate the complaint.

12. It is important to recognize that end of life care and MAID are distinct. The complaint did not pertain to Dr. Anderson providing medical assistance in dying. In fact, the legislation that permits physicians to provide medical assistance in dying was not in existence during the time when the circumstances of the complaint are to have occurred. The complaint involved a single patient. At no point was that patient identified by name or in any other manner in the complaint made, other than as described above.

13. The complaint nurse, who through LHSC counsel was identified to Dr. Anderson by their initials, was interviewed on November 4, 2022, after some time was spent obtaining that nurse's consent and arranging for the interview to take place. A second nurse, who through LHSC counsel was identified to Dr. Anderson by their initials, was identified and provided a statement to the LHSC investigation on December 14, 2022. The second nurse was not present for the alleged incident but was apparently told about it by the complainant nurse. The second nurse claimed that the alleged events were to have occurred on a Friday evening, but they were unable to recall if the alleged events occurred in 2014 or 2015, thus bringing the precise timing of the alleged incident into issue. This in turn required an expansion of the scope of the LHSC's review of the matter.

14. According to the examination evidence of Dr. Barron, the issue raised through the complaint was not a physician performance management issue but rather a standard of care for patient safety issue which was governed by the credentialled professional staff by-law[1].

15. The process of identifying the alleged patient generally consisted of the following approach[2]. Given the statements of the complainant nurse and the second nurse, the LHSC conducted a computer search which enabled the identification of all male patient deaths from all of the LHSC campus hospitals from 2012 to 2016. As indicated, a broader range was used given the uncertainty of the time frame alleged. This led to the identification of 600 deaths. These deaths represented a broad range of patients, including from the University Hospital and the Victoria Hospital. This was used as a starting point. Not all deaths involved patients where Dr. Anderson was the treating physician, however, the catchment area of the search was broadened somewhat to take into account that Dr. Anderson may have been involved with a patient's care even though he was not the Most Responsible Physician (MRP) for purposes of the records. As I appreciate it, that a record lists an MRP does not necessarily mean that *another* physician (i.e. not the MRP) was involved in that specific patient's care.

[1] Examination Dr. Barron at p. 40 Question 97.
[2] This evidence was provided by counsel for the LHSC during Dr. Barron's examination. However, the information was elicited by Dr. Anderson's counsel directly from the LHSC's counsel. It is clear from a review of the transcript of Dr. Barron's examination that counsel for Dr. Anderson was content with opposing counsel providing these details. They form part of the record before me.

16. Accordingly, the charts related to these deaths were further narrowed given the demographics of the patient in the complaint. Two charts were identified for further review as they were deemed to be possible matches to the details provided in the complaint. During the examination of Dr. Barron, counsel for the LHSC provided this example of how the search was conducted:

> So for patient deaths at University Hospital between September 1, 2013 and December 31, 2015, that produced 2,203 hits. It was then filtered for deaths in the CSRU, which is where the nurse reported that this event had happened, and that filtered it down to 124. It was then filtered by gender for male and age between 70 and 90, and that filtered it to 38. It was then filtered by admitting physician, and then it was filtered by diagnosis of COPD. So that's the nature of the filtering that was done. And ultimately, as Dr. Anderson – Dr. Barron told you, two charts were pulled and reviewed.[3] [emphasis added]

17. The above searches, which were distinct from the review of the charts, were conducted by staff in the Health Information Management area of the hospital. These persons are experts in this area and were not told about the reason for the search.

18. The focus of the review was on cases in which Dr. Anderson was involved in the patient's care and where high doses of particular medication described was administered, these being among the most distinctive features of the complaint. In his examinations, Dr. Barron indicated that even though the doses looked high on their face, referring to the two charts indicated in the passage above, other medications taken by the patient may have resulted in the patient having built a tolerance to the subject opioids which explained the higher doses required. This notion was confirmed through consultation with a pharmacist, who I understand, was never told that the inquiry related to the plaintiff.

19. The evidence placed before this Court, specifically the examination of Dr. Barron, indicates that it is not the case that 600 charts were reviewed in any detail other than to apply a criteria flowing from the complaint with some allowance for error in the details as to time frame and possibly age of the patient. In other words, it is not the case that 600 charts related to Dr. Anderson were reviewed in detail. Based on the examination evidence, in reality, the review was very circumscribed. As is clear from the examination for discovery of Dr. Barron, which was filed by the plaintiff in their motion, "[t]here was no chart review until they winnowed it down to these two cases." As further explained in the same examination for discovery, "patient charts were not pulled, reviewed manually." Of the charts that were actually reviewed, the review was conducted based on a template.

[3] Examination for Discovery of Dr. Barron p. 67 Q.140

Of the two charts identified, Dr. Barron reviewed them himself. It is noteworthy, and as alluded to above, that Dr. Barron has assumed the role of MAC chair on March 1, 2023.

20. The evidence before this Court supports the position that the CPSO did not receive a written report from the complainant nurse, at least none that was provided to the LHSC, nor did the CPSO prepare a written report of the complaint.

21. The investigation of the complaint by the LHSC took place between November 2, 2022, when the complainant nurse was interviewed by the LHSC and March 21, 2023, when the LHSC investigation was completed, again, concluding that the complaint was without foundation. The investigation took place in a confidential manner, according to the LHSC. This meant that the persons involved in the investigation undertook to the LHSC that they would keep the investigation confidential and not share details. The LHSC is also to have promised those providing information to the investigation confidentiality. This included the nurse that made the complaint to the CPSO and another nurse, whose identities have never been revealed to the plaintiff.

22. Dr. Anderson was not provided the opportunity to be involved in the investigation nor was he advised of the investigation, while it was ongoing. That is, at no point during the investitive period was Dr. Anderson aware of the complaint, that the complaint was being investigated, how it was being investigated and by whom. Accordingly, Dr. Anderson's input into the allegations was not sought.

23. Dr. Anderson was never, formally or informally accused of any wrongdoing by anyone at the LHSC. As indicated, the investigation concluded that there was no evidence that Dr. Anderson fell below the standard of care in his treatment of any end-of-life patient. As Dr. Barron put it in his examination, he was "thoroughly convinced that Dr. Anderson has not fallen below the standard of care at any time". As far as this complaint was concerned, Dr. Anderson was exonerated.

24. On March 21, 2023, Dr. Alex Barron, in his capacity as the Chair of the LHSC's MAC advised the CPSO of the results of the investigation. No further investigation of the complaint has taken place. In other words, the matter, as far as the LHSC is concerned is closed. Similarly, the CPSO closed the matter.

25. On March 22, 2024, Dr. Barron e-mailed Dr. Anderson requesting an in-person meeting about an issue that had arisen. The e-mail did not provide Dr. Anderson with any indication of the gravity of the issue or the type of issue that had arisen, nor did it indicate that the issue had been resolved in Dr. Anderson's favour. In the days that followed, Dr. Barron and Dr. Anderson exchanged e-mails about meeting. In these e-mails, Dr.

Anderson expressed his concern that there was an issue concerning him and asked for details of same. Other than advising him that there was a complaint and that it had been resolved with no further action planned by the LHSC or the CPSO, no details were provided. Dr. Barron, in his March 27, 2023 e-mail to the plaintiff indicated that the LHSC planned no action with respect to the complaint and that the same was true for the CPSO. Dr. Barron indicated that, he was reaching out as a professional courtesy in order to reassure the plaintiff and to explain the process that was undertaken to investigate the complaint. In Dr. Barron's examination for discovery evidence, in answer to question 107, he indicated that while he notified Dr. Anderson of the investigation, there was no requirement "under any circumstances to notify him, or any other physician for that matter, they they're being investigated."

26. On March 29, 2023, at a meeting with Dr. Baron, Dr. Anderson was advised of the complaint, the investigation that had taken place and the results of that investigation. At this point, Dr. Anderson was not provided with the panoply of production that would otherwise have been provided to him had the matter proceeded to a hearing as contemplated by the applicable By-laws.

27. On March 31, 2023, Dr. Anderson sent an e-mail to Dr. Barron summarizing the March 29, 2023 meeting, from his perspective. In that same e-mail, Dr. Anderson repeated his request for a copy of the complaint or any report, this time requesting that Dr. Barron personally obtain these documents. Dr. Anderson sought to confirm that only Dr. MacDonald, whom he reported to at the relevant time, and Dr. Haddera knew about the investigation, as Dr. Anderson expressed concerns about how the allegations "may have caused irreparable damage" to his reputation. Relatedly, Dr. Anderson requested a list of every person within the LHSC that had knowledge of the complaint or report and who participated in the investigation of same.

28. In early to the middle of April 2023, Dr. Anderson contacted Dr. Chopra at the CPSO. According to the information provided by Dr. Anderson, Dr. Chopra is to have advised Dr. Anderson that another physician, Dr. Siddiqi, was involved in the investigation.

29. Dr. Anderson sought to learn about the details of the investigation and those involved, including the identity of the complainant nurse. In aide of that pursuit, he made a request of the LHSC for the information which the LHSC denied. As indicted earlier in these reasons, Dr. Anderson pursued a FIPPA request. The FIPPA request was made on April 14, 2023. According to Dr. Barron's evidence at his examination, Medical Affairs assembled all of the available documentation pursuant to Dr. Anderson's request and those documents were provided to the privacy group within the LHSC. On May 12, 2023, this request was denied. The LHSC took the position that FIPPA does not apply to the

records being requested as they are "credentialing records" and not subject to the FIPPA. Dr. Anderson did not appeal or seek any form of review. Rather, he began the within Action, by filing a Statement of Claim on July 4, 2023. The Statement of Claim makes it evident that Dr. Anderson seeks to discover the particulars and details of the investigation. Despite the fact that it was made plain to him that the complaint was without merit, Dr. Anderson seeks information about the findings of the investigation. Importantly, the Statement of Claim indicates that Dr. Anderson seeks to discover the extent to which knowledge of the investigation has spread through his personal and professional community.

30. The Statement of Claim, being part of the court record and available to the public was the subject of media reporting. The information about the investigation found in the court documents has been augmented by Dr. Anderson's statements to the media. Dr. Anderson has also discussed the investigation at staff meetings within the LHSC with some individuals that were not involved in the investigation. In essence, Dr. Anderson claims the fact that, the result of the investigation aside, the complaint was investigated without his knowledge or involvement caused him to suffer damages in the form of mental distress, loss of opportunity and damage to his reputation.

31. The LHSC filed their Statement of Defence on September 20, 2023. On the evidence before me, the LHSC has made no public statements about the complaint, the investigation or about the plaintiff.

32. Examinations for discovery took place on January 24, 2024.

33. According to Dr. Barron's examination evidence, at no point in the history of this matter were the police contacted to investigate the allegations.

The Position of Dr. Anderson

34. Dr. Anderson's position in this litigation is premised on the argument that he was entitled to be made aware of the complaint and the investigation at the outset. While he was advised that the investigation had been concluded and that the determination was that his care had not fallen below the required standard and in fact the complaint was determined to be without merit, the LHSC was required to inform him. Moreover, Dr. Anderson alleges that when the LHSC finally advised him of the investigation, the LHSC misrepresented the true manner and scope of the investigation, including misrepresenting the number and identity of those that were involved in the investigation.

35. Dr. Anderson's claims are essentially premised on the argument that he was not afforded due process. In his written material, the plaintiff references the lack of opportunity to

participate in the investigation such as providing a written statement, the lack of any written reasons for the decision to exonerate him, and that he is not aware of the people in the LHSC who were part of the investigation. As a result, he suffered damages including mental distress and reputational harm, although it is to be acknowledged that it appears that of any of the steps taken by the LHSC, none resulted in publicity of this matter.

36. With respect to the LHSC Rule 21 motion, Dr. Anderson's position is that the delay in bringing the motion is, in and of itself, a basis to dismiss the motion. In the alternative, Dr. Anderson argues that his pleadings, namely, the Statement of Claim, disclose reasonable causes of action. He denies the LHSC's claim that this litigation is an abuse of process and simply a way to obtain documents that he was not able to obtain through his FIPPA request.

37. Dr. Anderson's motion to compel production is focused entirely on the scope and manner of investigation, as well information related to decisions made and identifying those that were involved in the investigation. He argues that this information is relevant to his claims and that the LHSC's assertion of privilege, other than solicitor and client privilege, is without merit.

The Position of the LHSC:

38. The LHSC's position, not surprisingly is very different. Fundamentally, the LHSC argues that Dr. Anderson was not entitled to any notice of the investigation of the complaint. Any notice or due process is only triggered when a decision is made that negatively impacts Dr. Anderson's privileges. Put differently, procedural fairness is inextricably linked to the deprivation of privileges or some negative outcome, none of which occurred here. If there had been, the *PHA* provides for how that would unfold and the due process to be afforded. Here, there was no such impact and accordingly Dr. Anderson was not entitled to any notice or procedure. This is the main foundational flaw in the plaintiff's argument, says the LHSC. Dr. Anderson was not called upon to respond because there was no need to respond, given that it was determined that the complaint was without foundation.

39. The LHSC argues that there is no reasonable cause of action in relation to many of the claims in the Statement of Claim and further, and distinctly, that the *entire* statement of claim ought to be struck as the Action constitutes an abuse of process.

40. No fiduciary duty is owed by the LHSC to Dr. Anderson. The LHSC argues that the duty owed to Dr. Anderson is that any restriction of his privileges at the hospital must be made in accordance with the statutory framework set out in the *PHA* and in accordance with the

professional staff By-Laws of the LHSC which provide procedural safeguards to credentialed physicians.

41. Moreover, the LHSC argues that there is no cause of action with respect to the claim of contract. There is no contract pled and further none of the other required elements are addressed in the pleadings.

42. With respect to defamation and intentional infliction of mental suffering (IIMS) , the LHSC takes the position that these are to be dealt with in the Rule 20 motion. That motion, if necessary, is to proceed after the present motions are decided.

43. Further the LHSC argues that the Action is really not about damages but rather is about obtaining information about the investigation, which they argue is an abuse of the Court's process. Further, the Action is an abuse of process because it constitutes a collateral attack on the LHSC Privacy Consultant's decision in the FIPPA context, not to produce the credentialling records which essentially form the investigative file.

44. With respect to the plaintiff's motion for compelled production, the LHSC argues that the investigation undertaken was confidential and that those that participated in the investigation were given assurances of confidentiality. The LHSC relies on the Wigmore Privilege (also referred to within these reasons as the Wigmore criteria and the Wigmore conditions) to resist production.

45. What is clear from this Court's perspective is that, there is a meaningful distinction between the making of the complaint, which the LHSC had no part in and the requirement to investigate which was a requirement place upon the LHSC about which they had no choice. Moreover, even if Dr. Anderson was advised of the complaint at the outset, there is no legal obligation that I am aware of that would require, at that time, for the LHSC to consult with, much less take their direction from Dr. Anderson as to the manner and scope of the investigation, including who would be involved.

The LHSC's Rule 21 Motion

46. The LHSC's Rule 21 Motion seeks to strike the plaintiffs Statement of Claim on the basis that it does not disclose a reasonable cause of action and also on the basis that it constitutes an abuse of process. Below I explain why the LHSC's motion succeeds with respect to the plaintiff's claim based in contract but fails in all other respects.

The Law Regarding Rule 21

47. Rule 21.01(1)(b) permits this Court to strike out a pleading that discloses no reasonable cause of action. The Court is not entitled to review any evidence in making this

determination. The test is whether the allegations contained in the pleadings only and without the resort to any evidence, state a legally sufficient or substantially adequate claim. Put differently, a pleading should be struck if, assuming the facts set out in the pleadings could be proven on a balance of probabilities, it is plain and obvious or beyond doubt that they do not disclose a reasonable cause of action.

48. The leading case in this regard, *Darmar Farms Inc. v. Syngenta Canada* et al., 2018 CanLii 7129 (ONSC) provides the following at para. 16:

> The law that has developed around Rule 21 is well settled. The following guiding principles emerge from the cases:
>
> 1. a claim will not be struck unless it is plain and obvious it cannot succeed: *Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959*;
> 2. the facts pleaded are to be assumed to be true unless they are patently ridiculous or incapable of proof: *Prete v. Ontario (1993), 16 O.R. (3d) 161* (C.A.); *Nash v. Ontario (1995), 27 O.R. (3d) 1* (C.A.);
> 3. a claim must be read with a forgiving eye for drafting deficiencies: *Doe v. Metropolitan Toronto (Municipality) (1990), 74 O.R. (2d) 225* (C.A.);
> 4. the novelty of a cause of action is not determinative: *Hunt, supra; Doe, supra*; *R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42*;
> 5. the court is not precluded from striking a negligence claim simply because it asserts a novel duty of care. Whether such a duty of care exists is a question of law that is appropriately resolved on a Rule 21 motion: *Syl Apps Secure Treatment Center v. B.D.*, *[2007] 3 S.C.R. 83*; and
> 6. a critical analysis is required in order to prevent untenable claims from proceeding, particularly given scarce judicial resources and the challenges of systemic delay: *Rayner v. McManus*, *2017 ONSC 3044* (Div. Ct.).
>
> No evidence is admissible on the motion, although documents specifically referenced in the statement of claim can be considered because they are incorporated into it: *Web Offset Publications Limited v. Vickery (1999), 43 O.R. (3d) 802* (C.A.). However, documents referred to in a response to a demand for particulars are not admissible: *Pearson v. Inco Ltd*., *[2001] O.J. No. 4990* (S.C.J.).

Delay by the LHSC in Bringing the Rule 21 Motion

49. The plaintiff argues that the LHSC's Rule 21 motion ought to be dismissed for delay. A motion pursuant to Rule 21.01 is to be brought promptly. The Court in *Reid v. Wikwemikong Unceded Indian Reserve*, No. 26, [2009] O.J. No. 3642 provided the following at paragraphs 12-13:

> Both Rule 21.10(a) and (b) are governed by Rule 21.02 which requires that such any such motion be brought promptly. Delay in bringing a Rule 21 motion is a sufficient ground to dismiss the motion, and is not merely a matter affecting costs (see: *Fleet Street Financial Corp.* v. *Lewison* (2003), 31 C.P.C. (5th) 145 (S.C.J.); *Colonna* v. *Bell Canada* (1993), 15 C.P.C. (3d) 65 (Ont. Gen. Div.)).
>
> In my view, the inordinate delay of WUIR in bringing this motion -- some eighteen months following delivery of its Statement of Defence and Crossclaim -- is ample justification for dismissing the motion. In particular, I agree with the comments of Montgomery, J. in his decision in *Mackenzie* v. *Wood Gundy Inc.* (1989), 35 C.P.C. (2d) 272 concerning a defendant who moved to strike out allegations in a plaintiff's pleading (at p. 273):
>
> > I agree with the Master that the delay of 5-6 months in launching the motion was too long ... The time is long past when this type of delay can be tolerated in the course of the pleading stage of an action. We are into the era of judicial supervision of the conduct of a lawsuit, and it is imperative that cases be moved on through the preliminary stages and get to trial as expeditiously as possible.

50. In the present case, there is a considerable amount of delay prior to the bringing of the Rule 21 Motion. As the plaintiff correctly set out in their written argument, 15 months elapsed from the delivery of the Statement of Defence and some 11 months from the examination for discovery.

51. The LHSC explains the delay by indicating that it waited to complete Dr. Anderson's examinations for discovery and then sought to bring the Rule 21 motion together with a Rule 20 motion for summary judgement. While the manner in which the LHSC pursued their motions may not be a model of efficiency, I accept that their conduct in this case was not such as to warrant a summary dismissal of their motion. Although I determined that the Rule 20 motion could not proceed without a decision on the plaintiff's motion to compel production, I appreciate that the jurist who scheduled the motions before this Court took a different view in that regard. Accordingly, the LHSC's approach of waiting until they could bring both motions together in order to reduce costs in the litigation and

attempt a final disposition of this matter in an expedited fashion, was not an unreasonable approach.

52. As is explained below, I have determined that the contract claim is to be struck because it discloses no reasonable cause of action. In my view, achieving a just result militates in favour of not dismissing the Rule 21 motion for delay, and rather dispose of the contract claim, which I explain below, is an untenable claim. Were I to have dismissed the LHSC's Rule 21 motion and thereby allow the contract claim to proceed, requiring additional resources in order to reach a disposition, that would represent an inefficient use of scarce resources and would not represent a just outcome, in this case.

53. Whether to dismiss the LHSC's Rule 21 motion requires the Court to exercise its discretion. Having considered the jurisprudence set out above in the context of the specific circumstances of this case, I exercise my discretion and decline to dismiss the LHSC's Rule 21 motion for delay. Accordingly, the plaintiff's request to dismiss the Rule 21 motion is dismissed.

54. A failure to bring such a motion promptly may be taken into account in awarding costs. While I have found that the delay in the LHSC bring their Rule 21 motion is not sufficient delay, in these circumstances, to warrant the dismissal of the motion, I make no findings at this time with respect to whether the delay occasioned in bringing the Rule 21 motion ought to be a factor in the cost analysis.

Whether the Statement of Claim Discloses a Reasonable Cause of Action

55. In this portion of these reasons, I deal with the LHSC's argument that the pleadings do not disclose a reasonable cause of action. Below I deal with each claim in the Statement of Claim.

Defamation Claim

56. The LHSC, in their oral argument confirmed that the defamation claim was only to be considered as part of their overarching argument in relation to abuse of process. In other words, the LHSC did not advance the argument that the defamation claim disclosed no reasonable cause of action, despite the fact that the LHSC was only investigating the complaint and had not made the utterances within the complaint. As the LHSC's counsel put it, the defamation claim ought to be carved out of the Rule 21 motion, save for the abuse of process argument. The plaintiff did not make substantive submissions with respect to the defamation claim, except for their argument pertaining to whether the litigation constitutes an abuse of process. Accordingly, I have not considered the defamation claim when I considered whether the pleadings disclose a reasonable cause of action. I deal with the abuse of process argument later in these reasons.

Intentional Infliction of Mental Suffering

57. Within the statement of claim, Dr. Anderson alleges damages for intentional infliction of mental suffering (IIMS). This aspect of the claim did not form part of the LHSC's Rule 21 motion. As indicated in their initial written argument and in the LHSC reply factum, this claim was argued as part of the LHSC Rule 20 motion. In my view, that is the appropriate lens through which to assess that claim.

58. During oral argument however, counsel for the LHSC seemed to argue that the considerations in a Rule 21 motion ought to be applied to the IIMS claim. If that was the intention, I find that when the Statement of Claim is viewed as a whole and the legal requirements of this particular claim are considered, it cannot be said that the claim is untenable nor is it plain and obvious that no reasonable cause of action is disclosed by the IIMS claim.

Breach of Contract

59. The plaintiff, in a cursory manner within their written materials, alleges a breach of contract. As explained, on a Rule 21 motion, the Court is bound by the pleadings. The Statement of Claim is organized in such a fashion that each claim is identified and the relevant and associated pleadings are presented. Nowhere in the Statement of Claim does the plaintiff deal with an alleged breach of contract other than indicating that it is a claim that is being advanced.

60. A pleading of breach of contract requires the plaintiff to identify the nature of the contract, the parties to the contract, the facts supporting privity of contract, the terms of the contract that are relevant, the specific terms that were allegedly breached, the conduct that gave rise to the breach and the damages flowing from that breach. In this regard, I accept the LHSC's argument that it is "plain and obvious" that the pleadings in this regard do not disclose a reasonable cause of action. The pleadings do not address the existence of a contract, its terms, the terms breached or the conduct that specifically forms the foundation of a breach of a term of the contract.

61. During oral argument, the plaintiff's counsel argued that there was an oral contract between the LHSC and the plaintiff. However, that was not pled and accordingly, that argument fails.

62. To the extent that there is a mention of a contract in the Statement of Claim, it is struck.

Should Leave be Granted to Amend the Pleadings with Respect to Breach of Contract?

63. I am not prepared to permit an amendment to the Statement of Claim. In this case, any amendment would be to permit the plaintiff to add a claim as the breach of contract was not developed in any way in the pleadings. In my view, there is no possibility, on the information provided to this Court, that the plaintiff could amend his pleadings in a way which could disclose a reasonable cause of action in contract.

The Remainder of the Claims within the Statement of Claim:

64. The LHSC argues that, like the contract claim the Statement of Claim overall, discloses no reasonable cause of action. I deal with these in turn below and explain why I do not accept the LHSC's argument in this regard.

65. The LHSC must overcome a high hurdle in order to succeed on this motion. As indicated earlier in these reasons, they must demonstrate that it is "plain and obvious" that the Statement of Claim discloses no reasonable cause of action, in the particular case. In order to succeed, the pleadings are to be given a generous reading. The facts plead are to be accepted as being true unless they are patently ridiculous or incapable of proof. In this context, only if I determine that the claims therein are untenable, should the Statement of Claim be struck.

66. An overview of the rationale that forms the foundation of the pleadings appears at paragraph 22 of the Statement of Claim, which provides the following:

> **Damages**
>
> The Plaintiff states that they have sustained damages in the form of mental distress and loss of opportunity and reputation as a result of a breach of fiduciary duty, bad faith, defamation, and negligence by the Defendant Hospital. [emphasis added]

67. The engine that drives the plaintiff's claim, is the manner in which the LHSC handled the complaint and the manner in which they conducted the review and investigation of that claim. As explained earlier in these reasons, there is no issue that Dr. Anderson was not notified of the complaint or about the investigation until he was advised that the investigation had been concluded. Despite being exonerated by the investigation Dr. Anderson claims the damages as set out in the passage above. Accordingly, the manner of investigation and that Dr. Anderson was not notified of the complaint and the investigation while it was ongoing is the thread that runs through each of the claims in the Statement of Claim. In the plaintiff's written argument, in particular, this thread is referred to as a lack of procedural fairness.

Breach of Trust and Fiduciary Duty

68. The pleadings in this regard indicate that the LHSC owed Dr. Anderson a fiduciary duty on account of the long-standing relationship in which the LHSC administers the practicing privileges of Dr. Anderson. In this regard, the LHSC's position is that Dr. Anderson is an independent contractor and that his relationship with the LHSC is governed entirely by the *PHA*. While there is no remedy triggered here, given the outcome, any remedy is found in Administrative Law, argues the LHSC.

69. The pleading assert that this relationship is one where Dr. Anderson's "practical interests and privileges are particularly vulnerable to the discretion" of the LHSC, which gives rise to the LHSC's fiduciary duty to the plaintiff. In this context, that the LHSC failed to notify Dr. Anderson of the complaint and the investigation and that he was not afforded due process, argues the plaintiff, resulted in the LHSC breaching their fiduciary duty to him.

70. The nature of the relationship, whether a fiduciary duty exists and further whether the LHSC's conduct in investigating the complaint constitutes a failure to afford Dr. Anderson with due process are areas where the parties have diametrically opposed views. The LHSC's position is that there is no fiduciary duty owed to a physician by a hospital in these circumstances. The Public Hospitals Act (*PHA*) governs the relationship between a doctor and a hospital. Further, LHSC advances the argument that the *PHA* provides a remedy in administrative law for physicians who believe they have been denied due process in circumstances where their rights and privileges have been negatively impacted, none of which occurred here. The *PHA* provides a complete framework which applies to the relationship between hospitals and doctors. The precedent event that engages the *PHA* is the hospital's restriction of the doctor's privileges. Dr. Anderson's privileges were never restricted in this case, accordingly the *PHA* has no application and accordingly there was no duty to notify Dr. Anderson of any investigation. The LHSC adds that even when the *PHA* related by-laws are engaged, which they were not here, that only gives rise to a duty to provide due process but not a fiduciary duty. The LHSC position is summarized to a large extent in the following portion of their Statement of Defence:

> The duty owed to Dr. Anderson is that any restriction of his privileges at the hospital must be made in accordance with the statutory framework set out in the Public Hospitals Act and the professional staff By-Laws of the Hospital which provide procedural safeguards to credentialed physicians." The hospital's primary duty is the care of patients. That duty required the investigation to be undertaken.

71. The above position is consistent with the evidence of Dr. Barron during his examination for discovery at p. 42 in answer to questions 104 to 107. In part, Dr. Barron testified that "[i]t's actually stated in the professional – credentialed professional staff by-law that

LHSC has no requirement to notify the physician. And Dr. Anderson signed on to that every year when he reapplies for his privileges".

72. While the LHSC argument is not lost on this Court, the Rule 21 motion provides for the striking of pleadings that are untenable. It must be "plain and obvious" or beyond doubt that the respondent could not succeed in this aspect of the claim. While I appreciate the unique aspects of this case, specifically that the investigation resulted in a determination that the complaint was without foundation, that Dr. Anderson's care of patients did not fall below the required standard and that Dr. Anderson's privileges were not restricted in any way, it is not plain and obvious that the claim will fail. The plaintiff advances an argument that in the circumstances, especially the relationship between the parties, gives rise to a duty which required Dr. Anderson to be advised because of the seriousness of the allegations which pertained directly to Dr. Anderson's daily work and the scope of the investigation. Dr. Barron's evidence, including the portions noted above, may be a factor to consider, but on a Rule 21 motion is not determinative of the issue. While no cases precisely like the present one speak to what the outcome ought to be here, I am unable to conclude that the claim is untenable such that it ought to be struck. I make no comment on the ultimate strength of the case.

The Negligence and Negligent Misrepresentation Claims

73. These claims are dealt with together as they are related. As discussed in the previous section, the plaintiff alleges that the close relationship between the LHSC and Dr. Anderson, is an essential element of the negligence analysis. Further, that the LHSC was vested with the discretion to make decisions about Dr. Anderson's privileges gives rise to a duty. Moreover, the plaintiff takes the position that the LHSC did not follow its own Guidelines for Physician Performance Management by not providing the appropriate process in the course of the investigation.

74. Both claims are rooted in the manner in which the LHSC conducted the investigation and because Dr. Anderson was not advised of the investigation and its scope until the investigation had concluded. The plaintiff indicates that the harm that ensued from the manner of investigation, including reputational harm and mental distress, was foreseeable. As indicated above, this is the common thread that runs through the plaintiff's claim. This aspect of the claim also relies on the notion that when Dr. Anderson was advised of the investigation, the LHSC made material misrepresentation to him.

75. While I have considered the LHSC's arguments at paragraph 55-64, in my view, these are arguments that are best made in the context of a Rule 20 motion or at trial. I am also mindful that the court is not precluded from striking a negligence claim simply because it asserts a novel duty of care, as may be the case here. However, the high test to strike

pleadings in a Rule 21 motion requires this Court to conclude that the claim is untenable. Even a weak claim is not struck if the claim is arguable. Here, I note that while the Court was provided with several cases, there was no case that contemplated precisely the circumstances here, where a serious allegation going to the core of a physician's duty was investigated without the knowledge of the subject.

76. The requirement to find that the claim is untenable is to strive to eliminate the use of scarce resources on matters where it is "plain and obvious" that there is no reasonable cause of action while at the same time not overshooting the mark by striking claims that, while relatively not as strong or perhaps somewhat novel or unique, are still plausible or tenable.

77. In arriving at this conclusion, I am fully aware that the investigation concluded with a complete exoneration of Dr. Anderson. However, the litigation is foundationally based on the notion that despite the outcome, the *manner and scope*, in which the LHSC proceeded gives rise to the claims and the damages that flow therefrom. While I make no comment on the outcome of a potential Rule 20 motion or a trial, it is my view that Dr. Anderson is entitled to continue with these claims, at this point.

78. In all of the circumstances, I do not conclude that the claims in negligence and negligent misrepresentation are untenable nor that it is plain and obvious that they disclose no reasonable cause of action.

Bad Faith Conduct of the Defendant Hospital

79. While the concept of good faith is, as the LHSC argues, commonly seen in actions for wrongful termination, the plaintiff seeks to apply it here. The plaintiff's claim of bad faith conduct on the part of the LHSC is, essentially based on the same premise as the other claims discussed above. Dr. Anderson claims that the nature of the relationship with the LHSC required them to conduct the investigation in good faith. While I am less confident that this claim is a tenable one, it is closely aligned with the other claims because it turns primarily on the nature of the relationship between the parties and what, if any obligations, the LHSC had with respect to the manner in which they conducted the investigation as well as if, when and how they advised Dr. Anderson of the investigation, that I am not prepared to strike this aspect of the pleadings. To the extent that a Rule 21 motion is meant to be mindful of scarce resources spent on untenable claims, I do not see that concern here. If the claim is truly untenable, that will likely turn on the determination of the aforementioned issues which are common to the other claims and overarching in this litigation. In my view, justice is best served, in the circumstances of this case, by permitting this claim to proceed.

Conclusion on Rule 21 Motion:

80. While I have determined that the pleadings, other than the claim based in contract, have survived the narrow scrutiny permitted by Rule 21, this Court makes no comment as to the outcome of a Rule 20 motion. The analysis in the context of a motion for summary judgment is markedly different than in a Rule 21 motion.

Whether the Action is an Abuse of Process

81. Rule 21.01 (3) (d) provides that an action may be dismissed if it is an abuse of the court's process. The LHSC argues that this Action, in its entirety, is an attempt to relitigate the decision of the LHSC's Privacy Consultant. The LHSC argues that the plaintiff ought to have appealed the Privacy Consultant's decision and that the Action is a collateral attack on that decision. Accordingly, the entire Statement of Claim ought to be struck, in the view of the LHSC. Respectfully, I do not see this issue as the LHSC does.

82. In relation to Dr. Anderson's request for documents related to the complaint and investigation of that complaint, the Privacy Consultant rendered a decision, which provided the following:

> Access is denied to items 1 through 6 of the request under section 65 (6) (5) of the Act. The provisions apply to the records because FIPPA does not apply to any credentialling records. According to s.65 (6) (5), the Act does not apply to records collected, prepared, maintained, or used by or on behalf of a hospital in relation to meetings, consultations, discussions, or communications about the applications for hospital appointments , the appointments or privileges of persons who have hospital privileges and anything that forms part of the personnel file of persons who have hospital privileges.

83. Accepting for present purposes, the LHSC's argument that the Privacy Consultant is a tribunal as contemplated in the *Statutory Power Procedures Act* R.S.O. 1990, c.S.22 (*SPPA*), the Privacy Consultant's decision was simply that the documents being requested were credentialling records and accordingly FIPPA did not apply. This is different than had the Privacy Consultant agreed that the FIPPA was the appropriate framework to pursue the documents and then decides that the documents would not be provided for some substantive reasons. In the present case, the Privacy Consultant did not assess the request for documents on the merits but rather disposed of the request by indicating that FIPPA did not apply.

84. It is clear that Dr. Anderson accepted the Privacy Consultant's view. However, that does not lead to the conclusion that by accepting that FIPPA did not apply to the documents

requested, Dr. Anderson is foreclosed from pursuing this Action. The litigation is based on various causes of action, none of which were before the Privacy Consultant and the Privacy Consultant did not decide the claims raised in the Action, in any way. Accordingly, while a portion of this litigation consists of production of documents, and in that regard the Privacy Consultant dealt with that issue, the substance of the litigation is broader than that. Therefore, this litigation is not a collateral attack on the Privacy Consultant's decision.

85. The LHSC also argued that the Action is an abuse of process because the purpose of the Action is to obtain discovery of what occurred in the investigation rather than a pursuit of the claims in the Statement of Claim. Respectfully, I disagree. This situation may have very well started with Dr. Anderson's request for documents, however, the claim has evolved. Even counsel for the LHSC indicated in submissions that in the Rule 21 motion context, at least, the defamation claim was tenable. Accordingly, the documents may inform the merits of the claims, however, the litigation does not appear to be for the sole purpose of obtaining the documents. I appreciate the LHSC's reference to Dr. Anderson's comments to the media, however, when those comments are viewed in the full context of this matter, it is clear that they do not represent the entirety of the litigation as set out in the Statement of Claim. Moreover, it may very well be that Dr. Anderson has some overarching view as expressed to the media, however, that, on its own, does not appear to be a basis for striking out claims that are otherwise tenable.

86. Moreover, the Ontario Court of Appeal in *Read Sataur v. Starbucks Coffee Canada Inc*. 2017 ONCA 1017 provided the following at paragraph 7:

> The motion judge also held that the pleading against the individual defendants was an abuse of process because they were named parties solely to obtain discovery. Even accepting that the two defendants were named solely to examine them for discovery, doing so in this case does not amount to an abuse of process. Quite the contrary. It is not an abuse of process to bring a lawsuit against individual defendants for the purpose of obtaining discovery from them, if the plaintiff has pleaded a proper cause of action against those individual defendants, as we have found that the plaintiff has in this case. [emphasis added]

87. Again, I have found that the plaintiff has plead a proper cause of action, apart from the contract claim.

88. In the result, I do not find that the Action is an abuse of the court's process.

Dr. Anderson's Motion to Compel Production

89. The plaintiff's motion to compel production is in relation to the documentation related to the LHSC's investigation. In fairness, however, it is not the case that Dr. Anderson has not been provided with any information or production in relation to the investigation. A review of the examination for discovery of Dr. Barron along, with the other evidence placed before this Court makes clear that Dr. Anderson is well aware of a number of key aspects of the investigation:

1. The date of the complaint.

2. That the complaint was first to the CPSO and then referred to Dr. Siddiqi by Dr. Chopra.

3. The nature of the conduct complained of. Specifically, that it was alleged that Dr. Anderson expedited the death of one patient by the administration of opioids.

4. That the complaint nurse, identified by their initials, was previously employed by the LHSC but at the time of the complaint was not. That the complainant nurse had worked with the plaintiff a few times before the event in question.

5. The delay in interviewing the complaint nurse was due to obtaining the necessary consent of the complainant nurse and arranging a time.

6. That Dr. Siddiqi was involved in the interview of the complainant nurse which was conducted over Teams. Also part of the interview was the Director of Medical Affairs and an Ontario Nurse Association Union representative.

7. That there was a second nurse involved who had been told of the allegations by the complainant nurse.

8. That the second nurse was interviewed in person by Dr. Siddiqi along with the Director of Medical Affairs and with the MAC Chair Executive Assistant all present.

9. No other interviews were conducted by the LHSC other than the complainant nurse and the second nurse.

10. The location of where the incident is to have taken place.

11. The time frame of when the incident was to have taken place.

12. While the LHSC refused to provide specific evidence, Dr. Anderson was advised that the delay of 8 years in the making of the complaint was related to reasons that would implicate "Personal Health Information" of the complainant nurse.

13. The time frame of the investigation.

14. The process that was used to investigate the complaint. The examination of Dr. Barron demonstrates this. Dr. Anderson was told that the investigation consisted of taking of a complaint and another interview of a second nurse along with a chart review. With respect to the latter, the chart review did not involve a detailed review of each chart that names Dr. Anderson in some capacity. Rather, the process consisted of identifying all patient deaths in the time period and then applying criteria by expert staff to narrow matters to very few charts that were pulled and reviewed.

15. A pharmacist was consulted in order provide an opinion on dosage of opioids in a specific hypothetical circumstance. Dr. Anderson was advised that this pharmacist was not privy to the complaint, or the doctor involved.

16. The chart review included Dr. Barron who concluded that Dr. Anderson had not fallen below the standard of care in dealing with any patient.

17. That the investigation concluded that there was no foundation to the complaint.

18. That no action was planned.

19. That his privileges were never at any time in jeopardy.

20. That the investigation was conducted confidentially in order to avoid the complaint being spread throughout the LHSC or hospital community during the investigation.

90. The focus of the motion to compel production is with respect to various items that the LHSC has identified pertain to the review and investigation conducted but with respect to which the LHSC is claiming a privilege. These items have been provided to the Court for review and they consist of Items 18 to 69 of Schedule B of the Affidavit of Documents of the LHSC. With two exception which is addressed below, none of these items relate to solicitor and client communications or are otherwise subject to that recognized privilege.

Rather the LHSC claims a case-by-case privilege which is otherwise referred to as the Wigmore Privilege, which is discussed in detail below.

91. The plaintiff also seeks to compel the LHSC to answer questions refused during examinations. These are resisted by the LHSC on the same basis as Items 18 to 69.

92. The context within which the production issue is considered, is important. Production must be guided by the issues that are raised in the litigation. In this case, I have determined that the contract claim is to be struck. Accordingly, and as explained below, that informs the production that is ordered in this case.

The Legal Principles

93. There is no dispute as between the parties that the Court is entitled to order that answers refused at examination for discovery be answered and that documents, about which privilege is claimed but not substantiated, be produced.

94. In this case, whether the Court makes any of the orders requested by the plaintiff is governed by a determination of relevance and the application of the factors set out in the Wigmore Privilege. Again, the determination of relevance and privilege are context specific and to be reflective of the issues in the litigation. In the context of this litigation, a document that is relevant and not otherwise captured by the privilege claimed must be disclosed.

95. In order for a document or information to be relevant it must tend to make a fact in issue more or less probable. The threshold is a relatively low one. At the production stage, as opposed to the admissibility stage, issues regarding probative value, exclusionary rules of admissibility and arguments about ultimate use to be made of the document or information do not determine whether the document or information, is to be produced. If it is determined that a document or information is not relevant, it is not produced. If it is determined to be relevant, then the Court must consider the application of the Wigmore Privilege.

96. The Wigmore Privilege is, in effect, four conditions or criterion that must exist in the context of the particular case in order to establish a privilege against the disclosure of information or communications. The criteria is set out below:

a) The communication must originate in a confidence that they will not be disclosed.
b) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties

c) The relation must be one which in the opinion of the community ought to be sedulously fostered
d) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation

97. In *Straka v. Humber River Regional Hospital* [2000] O.J. No. 4212 (C.A.) (*Straka*) at paragraph 59, the Court indicated the following:

> It has been long established that confidentiality alone, no matter how earnestly desired and clearly expressed, does not make a communication privileged from disclosure: Wigmore at 2286. Something more than confidentiality must exist and this something more must satisfy the Wigmore conditions (citations omitted) [emphasis added]

98. This is of particular import to the present case because the LHSC, through the affidavit of Krista Muncaster, emphasize that confidentiality was promised to those involved in the investigation and, as Ms. Muncaster indicated in her affidavit, the word "confidential" appears more than 270 times on the various documents in question and those involved had an expectation that the documents would remain confidential and not disclosed. As the above passage indicates privilege is not established by the mere assertion on a document, but rather through the consideration and application of the criteria.

The Categories in this Case

99. A review of the questions refused, and items 18-69 reveal that there are essentially two categories that emerge in this motion for production. The first deals with the complaint itself and the identity of the complainant nurse and the second nurse that was contacted in the course of the investigation. The second category pertains to the manner in which the review and investigation were conducted and the steps taken in the investigation, along with those involved. This second category includes information related to the scope of the investigation and the decisions made in this regard as well as decisions related to when and how the plaintiff was to be advised of the investigation. Below, I deal with these in turn and then address the specific questions refused, followed by a consideration of the specific documents provided by the LHSC in items 18-69.

Category 1: The Complaint and the Identity of the Complainant Nurse

100. Any information that may be contained in the materials and any information requested through questions that pertain to this category are not relevant to the present litigation. Accordingly, the plaintiff's motion to compel production in this regard is dismissed. Below, I explain why I have arrived at this conclusion.

101. Properly characterized, it is important to recognize what this litigation is and what it is not. This litigation is not about the merits of the complaint that was investigated. It is not about the propriety on the part of the complaint nurse to make the complaint. The only defendant here is the LHSC.

102. The Statement of Claim, exclusively focused on the conduct of the LHSC. Claims of bad faith, defamation, breach of fiduciary duty, negligence, and the like are exclusively focused on the LHSC conduct. Even the defamation claim is focused on the conduct of the LHSC "as a result of the investigation" as indicated in the Statement of Claim. Specifically, the plaintiff's claim is focused on the manner in which the LHSC investigated the claim, who was involved in the investigation of the complaint, its scope, how they investigated and the fact that Dr. Anderson was not advised of the investigation until the LHSC disclosed to him that it had been completed. None of these issues are informed by knowing who made the complaint or by having the actual complaint in hand. In this regard it is noteworthy that the plaintiff is not left in the dark as to the essential details of the complaint, as the LHSC has provided a considerable amount of information in that regard already.

103. To the extent that the plaintiff wishes to argue at trial that the specifics of the complaint and the person who made the complaint (including information about the second nurse) informs the conduct of the hospital, I reject that argument. Firstly, nowhere in the plaintiff's materials do they advance such an argument. Secondly, none of the claims in the pleadings turn on this level of detail.

104. The LHSC's primary basis for resisting providing this information is the chilling effect that such disclosure could have on future cases. Given that I have determined that this information is not relevant to this litigation as cast by the pleadings, I need not determine that issue in this case. To be clear, no information regarding the complaint nurse or the second nurse which could tend to identify either of them is to be produced to Dr. Anderson. Moreover, no statements or documents of the complaint, beyond what has already been provided by the LHSC is to be produced to Dr. Anderson.

Category 2: The Scope of the Investigation and Decisions Made in the Course of the Investigation:

105. This category of documentation or information is relevant to the litigation. As discussed in the context of the Rule 21 motion, the plaintiff's claim is based on the manner in which the LHSC investigated the complaint. The claims, as cast in the pleadings, turn on the notion that, given the relationship between Dr. Anderson and the LHSC, a duty was owned to him. Further, that the manner in which the investigation was conducted, in particular with respect to the breadth and scope, including the number people involved is relevant to the issue of damages. Moreover, the decision making with respect to whether and when

Dr. Anderson was to be advised of the investigation is also central to his claims. Accordingly, the second category of information and documents in this case meets the low threshold for relevance.

106. The exception to this finding of relevance is the circumstance where the names and identifying information about any patient is included in Items 18-69 or in part of any answer to a question refused that this Court orders answered. All names and information that could identify any patient in any document are to be redacted prior to production to the plaintiff.

107. In addition, any names or contact information of any individuals that are not directly involved in the investigation, such as administrative staff members of the LHSC are to be redacted from anything ordered to be produced to the plaintiff. Moreover, any cell phone or other contact information of any person, regardless of their role in the investigation, are to be redacted from anything ordered produced to the plaintiff, as this information is not relevant.

108. Given that the second category of information is relevant, I must now turn to consider whether the documents and information are privileged from disclosure. That requires a consideration of Wigmore the conditions set out above. Below, I deal with each in turn.

a) <u>The communication must originate in a confidence that they will not be disclosed</u>

109. Those involved were repeatedly advised that their involvement in the review conducted and the investigation was confidential in nature. As per Ms. Muncaster's affidavit, the word confidential appears more than 270 times on the various documents in question and those involved had an expectation that the documents would remain confidential and not disclosed. In Ms. Muncaster's affidavit, at paragraph 8, the following summary of the basis for the argument that the communications originated in confidence is provided:

> The investigation was conducted on a confidential basis. The element of confidence was critical to protecting patient safety and ensuring that the Hospital's ability to investigate future complaints would not be prejudiced. The element of confidence was also crucial to protecting Dr. Anderson's reputation in the event that the Complaint was unfounded.

110. Ms. Muncaster explained that the documents in relation to which the Wigmore criteria applies consists of e-mails, timelines, charts and schedules.

111. During Dr. Barron's examination for discovery, at p. 31, counsel provided the following:

> The entire investigation was confidential. Everyone involved in the investigation undertook their role with the expectation that everything they did was being kept confidential. And as a result, the investigation falls within the parameters of privilege established by Wigmore.

112. The LHSC made arguments with respect to the identity of the complainant nurse and the second nurse interviewed and the contents of the complaint. As indicated, I have determined that those aspects are not relevant to the litigation as set out by the plaintiff.

113. Accordingly, the communications that remain in question are entirely between those employed by the LHSC and those having some part in the investigative process, whether that be actively taking steps or guiding the process and making decision about the scope of the investigation.

114. While I accept that there was likely discussion about the confidential nature of the investigation and that the word confidential appears on many, if not all of the communications before the Court, this is not determinative of this criteria. First, to the extent that the communication originated in confidence, it is not reasonable that the communications and documents would never be disclosed. At the outset of the investigation, those involved had no way to know the outcome of the investigation. Specifically, they would have no way to know in advance that the complaint would have no merit. It is only reasonable that those involved would have within their contemplation that if there was merit to the complaint, that the documents in support of that conclusion would be provided to Dr. Anderson as per the *PHA* by-law and the process of disclosure described therein. In that scenario, Dr. Anderson would have been entitled to know the process and the decision making around the investigation, including its scope, in order to determine whether the investigation was fairly conducted. I appreciate that this is not the current scenario, however, those involved in the investigation would not have known the outcome while the investigation was on going. Accordingly, it cannot be said that the documents and communications in question originated in a confidence that they would not be disclosed. As is clear in the materials, the notion of confidentiality was applied to the investigation while it was ongoing. There is nothing in the evidence that suggests that the investigation would remain confidentially for all time.

b) <u>This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.</u>

115. This is a question of the relationship between those conducting the investigating and those providing the information. The LHSC in their written argument, indicate that the persons who provided the information in confidence include current and former employees of the

hospital as well as those that currently or formerly worked there and accordingly, confidentiality is essential to satisfactorily maintain the relationship.

116. I do not accept this argument. Firstly, the argument that protection of patient safety requires the maintenance of the relationship between those involved in the investigation (excluding the complainant) encounters the same difficulty as set out above. I need not repeat that analysis here. It is sufficient to indicate that if the complaint had some merit and that further steps would be taken, it would require the production of the communications and documents that the LHSC currently resists. Secondly, the satisfactory maintenance of the relation between the parties, in this case, does not rely on the confidentiality of the documents at issue. The communications themselves are between members of the LHSC whose role, in part, is to engage in these types of investigation when the circumstances require. I am unable to accept that if the communications in question are disclosed, that the members of the LHSC would cease to investigate in appropriate cases like the present one. This is not a case where the parties in contemplation in this second Wigmore criterion involve a person bringing the complaint forward, such as a complainant reporting to an investigative agency. It may be that in those scenarios, depending on the specific circumstances, the relationship between those investigating and those providing the information calls for confidentiality in order to maintain that relationship in the future. However, that is not the present case.

c) The relation must be one which in the opinion of the community ought to be sedulously fostered; and

117. The LHSC argues that (as per *Straka, supra*) that it is in the public interest that every technique including offering confidentiality be made available to the hospital in order to maintain the required standard of care to its patients. From here the hospital argues that the relationship between the hospital and the "participants" be sedulously fostered.

118. This argument may be more apt in the context of the complainant nurse and the information related to their identity and the information related to the complaint. Without repeating my earlier analysis, I have determined that in this litigation, that information is not relevant.

119. Accordingly, the relationship that is to be sedulously fostered is that between those that participated in the investigation of the matter. I need not repeat my earlier analysis. With those reasons in mind, I find that their relationship is not one that engages any concerns such that the community would reasonably be of the opinion that the relationship should be sedulously fostered. Their relationship is one that, foundationally, exists because of their roles within the LHSC. They are duty bound to investigate and as part of their

employment they are required to complete certain tasks. For instance, in this case, that involved undertaking certain review tasks. In other instances that involved making decisions about the scope and manner of the investigation, including when it would be drawn to a close and whether and when Dr. Anderson would be advised. Unlike the investigator – informant/complainant relationship, that arguably must be fostered in order to encourage reporting of any believed wrongdoing that could impact the safety of patients in the hospital, those involved in this matter performed the task in the investigation as part of their duties. Accordingly, while the relationship may be one that is to be sedulously fostered as between LHSC and the complainant nurse, the same is not the case for those participating in the review.

d) <u>The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation</u>.

120. The LHSC argue that the harm that would inure to the relationship is greater than the benefit gained for the correct disposal of the litigation. The LHSC argues that the interest in protecting the name of the complainant and the complaint from production served to protect the lives and the health of the public. As explained, I need not deal with this argument, as I have concluded that those aspects are not relevant to this Action.

121. The LHSC also argued that it is necessary to protect the integrity and thoroughness of the methods used and to ensure that all hospital staff can carry on without fear of reprisal. There was no evidence placed before me that would support the view that production at this time would undermine the integrity of this investigation. It may be that in another investigation the outcome is different. However, there is nothing to suggest that production would harm the integrity of this investigation or somehow reveals some technique or the like that would compromise future investigations. As explained, I do not accept that production would cause injury to inure to the relationship between those that participated in the review and investigation (other than the complaint nurse and the second nurse). Moreover, there is no compelling evidence to support the view that Dr. Anderson will seek reprisals against those involved.

122. On the other hand, production of further details of the investigation, as I will outline below, would contribute to the correct disposal of the litigation. As explained in these reasons, the production of documents that inform the manner and scope of the investigation and the decision making surrounding it are informative of the claims pled by Dr. Anderson. The communications and documents bear directly on whether the LHSC's investigating the complaint, as it was their duty, did so in a way that gives rise to any of the damages claimed.

The Wigmore Conditions Applied to Category 2

123. Informed by the above analysis, below I deal with each question refused and each of items 18-69.

The Questions Refused

124. The plaintiff, in their factum on the motion to compel production, listed the questions that they sought answers to and the basis for their request, which I have considered. Below, each question is set out, along with this Court's determination as to whether an answer is to be given by the LHSC.

a) To advise who the nurse was that filed the complaint

125. As explained, the identity of the complainant nurse is not relevant to any of the causes of action put forward to by Dr. Anderson. Indeed, in the plaintiff's written submissions in relation to this question, there is no articulation as to how the name of the complainant is relevant.

> The issue of relevance in this instance is informed by a number of factors. First, the complaint itself need not be assessed because the LHSC determined that the complaint was without any foundation. Accordingly, one would not expect Dr. Anderson, in the context of this litigation, to seek to challenge the credibility or motives of the complainant nurse. There would be no point is expending scarce resources on such an inquiry in the context of the present litigation. Had the LHSC determined that the complaint was credible and had the LHSC proceeded with seeking to limit or remove Dr. Anderson's privileges, then the identity of the nurse would be relevant. Of course, that is not the case here.

126. One of the main focuses of Dr. Anderson's claim is the procedure following and in particular that he was not advised of the investigation. Revealing the name of the complainant nurse is not relevant to that or any related issue. Put differently, whether there was a duty to alert Dr. Anderson of the investigation or whether there was a duty to afford him with an opportunity to respond to the allegations, leaving aside that the LHSC determined they had no merit, is not made more or less probable by knowing the identity of the complainant nurse. The same is true in relation to the second nurse interviewed.

127. No further answer is required by the LHSC.

b) *Question: Would the complaint have been shared with the Medical Advisory Committee?*

128. The LHSC provided an answer to this question, indicating that the MAC was not informed of the complaint.

129. No further answer is required by the LHSC.

c) *Question: Several emails were exchanged from September 9, 2022 to September 14, 2022 between Dr. Anil Chopra and St. Joseph's Health Care London to discuss Dr. Anderson, so why did Dr. Chopra contact St. Joe's.*

130. The above is related to other questions that were aimed at determining why St. Joe's was contacted and what involvement St. Joe's had in the investigation. In the written argument, the plaintiff indicted the following:

> LHSC represented to Dr. Anderson that the Complaint and Investigation remained internal at LHSC; however, LHSC contacted St. Joseph's Health Care London. St. Joseph's Health Care London is not one of LHSC's hospitals. The parties contacted by LHSC at St. Joseph's Health Care London, the nature and substance of these communications, and the scope of these communications is relevant to this action.

131. It is of note that how "the scope of these communications is relevant to this action" is not explained. In any event, the LHSC provided a response, indicating that Dr. Anderson held cross-appointment at St. Joe's. The LHSC also answered that St. Joseph's Health Care London had no involvement in the investigation. This is consistent with the detailed explanation of the process utilized in the investigation which was provided during Dr. Barron's examination. However, in the plaintiff's written argument he indicates that LHSC's initial information to him that the investigation remained internal to LHSC is contradicted by the confirmation that St. Joe's was also contacted. Dr. Anderson argues that this fact raises issues of credibility and that his follow up request for information about the nature and scope of those who were involved is relevant in these circumstances. Respectfully, I disagree. The investigation was explained in the course of Dr. Barron's examination. Only two people were interviewed, the complainant nurse and the second nurse. As explained in the evidence, the rest of the investigation consisted of a database search of cases that were narrowed to cases that were then reviewed by Dr. Barron. In aide of this review, Dr. Barron consulted with a pharmacist. The determination was then made that the complaint had no merit.

132. No further answer is required by the LHSC.

d) Question: [What was] the subject matter of the emails exchanged from September 9, 2022 to September 14, 2022 between Dr. Chopra and St. Joseph's Health Care London to discuss Dr. Anderson referenced in Schedule B at number 20 [of LHSC's Affidavit of Documents]

133. Given that this question deals with Item 20 in the LHSC Affidavit of Documents, it will be dealt with in the section of these reasons that deals with that item.

e) Question: What St. Joseph's had to do with this investigation

134. This question has already been answered by the LHSC which referenced the fact that Dr. Anderson had cross-privileges at St. Joseph's Health Care London. No further response is required.

f) Question: And given the nature of the allegations, was consideration given to whether police intervention would be appropriate.

135. During the examination of Dr. Barron, the following was asked and answered at question 129:

> MR. GRAHAM: Q. The hospital never contacted the police about these allegations, did they?
>
> A. No.

136. In my view, that is a sufficient answer and nothing further is required, subject to any direction with respect to items 18-69, discussed later in these reasons.

g) Question: If it is possible to reveal, without providing the content of the answers, the questions that were asked the nurses to better understand the nature of the investigation.

137. The plaintiff argues that the answer to the question, refused by the LHSC, informs the issue of credibility with respect to the information provided about the investigation. The evidence provided, including Dr. Anderson's type written notes of his meeting with Dr. Barron in March of 2023, does not speak to any prior statement by the LHSC about the questions asked of the nurse. In this light, it is unclear how an answer to this above question would inform credibility.

138. Equally unclear to this Court is the plaintiff's position that an answer to the above question would provide insight into the requisite qualification and experience to conduct a "quasi-criminal" investigation. If the plaintiff is interested in the qualification and experience of those that conducted the interview of the nurse, that information has been provided in the answers to undertakings already provided. In those materials, it is explained who conducted the interview.

139. It is also unclear how the questions asked of the nurse and the apparent interest in whether the questioner has the required expertise to conduct the investigation is relevant in the specific circumstances of the litigation which is defined by the pleadings prepared by the plaintiff. In a case where the investigation leads to an unequivocal finding that there is no merit to the complaint, it is difficult to understand how the subject of that investigation could raise legitimate issues to suggest that those responsible were not qualified or asked insufficient questions.

140. To the extent that the plaintiff wishes to know the questions that were asked in hoped of uncovering questions that were meant to lead the complaint to provide evidence detrimental to the plaintiff, that type of inquiry is truly a fishing expedition. In any event, that approach is incongruent with the present investigation and its result.

141. As mentioned, several times now, the content of the complaint is not relevant.

142. No further answer is required by the LHSC.

h) To identify the number of people that were involved in the interviews.

143. Simply put, this question was answered by the LHSC indicating that Dr. Siddiqi conducted both interviews. In the defendant's answers to undertakings at item 4 and in the defendant's answers to refusals at item 1, both found in the plaintiff's supplemental motion record at exhibit B, the number of people at the interviews of both nurses is provided.

144. No further answer is required by the LHSC.

i) To find out if Dr. Anderson is the lead MRP [most responsible physician] for half or how many of the 600 cases.

145. This question is relevant to understanding the scope of the investigation. Moreover, this information is strictly about Dr. Anderson. This answer simply requires the LHSC to provide a number to Dr. Anderson. No patient information need be or should be provided.

146. The LHSC is to provide an answer to this question.

j) The plaintiff seeks to know who took notes during the investigation, how the search parameters were taken, any notes taken from the cases reviewed, and particulars about a template used to review the two charts out of 600 that were reviewed.

147. With respect to the identification of the case and related inquires, I need not repeat my comments above, citing the examination for discovery of Dr. Barron. This evidence of Dr. Barron also included an explanation of the role and expertise of the Health Information Management staff. This question has been answered sufficiently. Moreover, the production of some of items 18-69 of the LHSC's Affidavit of Documents adequately informs and responds to this question. As explained those items are dealt with in a later section of these reasons.

148. Subject to my findings and direction with respect to items 18-69, no further answer is required by the LHSC.

k) To provide the name of the pharmacist involved.

149. This pertains to the merits of the complaint. The name of the pharmacist is not relevant. There is no basis to challenge any of the pharmacist's expertise. Given the outcome of the investigation, Dr. Anderson cannot reasonably seek to challenge the expertise of those involved, including the pharmacist. Unlike others involved in the investigation, there is no basis to conclude that the pharmacist guided the investigation or its scope. They were, as already explained to Dr. Anderson, consulted on a narrow issue. Accordingly, the name of the pharmacist is not to be produced to Dr. Anderson.

l) To provide an estimate on how many people at LHSC were involved in the investigation and subsequent determination.

150. With respect to the "subsequent determination" of the investigation, Dr. Barron's evidence at his discovery made it quite clear that he determined that the complaint was without foundation. He was thoroughly satisfied of this, as he put it. That aspect of the above question has been answered.

151. The number of people involved in the investigation will be sufficiently clear in the productions ordered in the subsequent section of these reasons.

152. Subject to my findings and direction with respect to items 18-69, no further answer is required by the LHSC.

m) Question: Whether Dr. Haddara played any role in the investigation.

153. This question will be sufficiently answered through the productions ordered in the subsequent section of these reasons.

154. No further answer is required by the LHSC.

n) *To provide the full names of anyone interviewed as part of the investigation.*

155. The evidence before this Court makes clear that only the nurses were interviewed. That question has been answered.

156. No further answer to this question is required by the LHSC.

Analysis Re: Items 18 to 69:

157. The LHSC has, appropriately in my view, produced items 18-69, in unredacted form, to this Court for review. I have conducted the review based on the applicable law set out earlier in these reasons and have specifically considered the issue of relevance and, if necessary, the Wigmore criteria in relation to the contents of each item.

158. At this juncture however, it is appropriate to return to the actual complaint that was made by the complainant nurse. Within several of the items reviewed, the same complaint is reproduced. The complainant nurse is also identified in various of the contested items.

159. I have already determined that the name of the complainant nurse and the second nurse, or anything that could tend to identify them, is not relevant to this litigation as currently constituted by the plaintiff. Accordingly, the complainant nurse's name and the name of the second nurse and any other information that could identify either of them is to be redacted from any items that are otherwise ordered produced.

160. Further, I have considered whether the complaint itself as apparently authored by the complainant ought to be produced. In my view, the complaint itself is not to be produced to Dr. Anderson, in the context of this litigation. I arrive at this conclusion based on my consideration of relevance as already discussed in detail earlier in these reasons.

161. Below, I deal with each of the items, 18 to 69, which are in dispute. In addition to redaction of anything that could identify the complainant nurse, the second nurse or

information about the complaint itself, as indicated earlier, any names of administrative staff that did not have any role in the investigation or in determining the scope and extent of the investigation are to be redacted. That information is simply not relevant. For instance, any names of any individuals that participated in arranging meets between those involved in the investigation are to be redacted. Further, and as already explained, any phone number, pager numbers or the like are to be redacted as this information is not relevant to this litigation.

Item 18:

162. The content of this item does not disclose anything about the manner in which the investigation was to be conducted or the timing of the investigation itself.

163. This item is not to be produced to the plaintiff.

Item 19:

164. Subject to redactions indicated earlier in these reasons, and specifically those pertaining to the complaint or the complainant nurse and the second nurse, the remainder of the contents of this item are to be produced to the plaintiff.

Item 20:

165. This item contains conversation between medical professionals. Nothing that is confidential is discussed and there no confidential relationship.

166. This item is to be produced to the plaintiff.

Item 21:

167. Subject to redactions indicated above, including anything that could identify the complainant nurse, second nurse or pertains to the complaint, this item is to be produced to the plaintiff.

Item 22:

168. Subject to redactions indicated above, *including* anything that could identify the complainant nurse, second nurse or pertains to the complaint, this item is to be produced to the plaintiff.

169. This item is particularly relevant because it speaks to two areas of the plaintiff's claim, namely the breadth of the investigation and decision making around the manner in which the review/investigation was to proceed.

170. As already explained, the Wigmore criteria does not prevent production.

Item 23:

171. This item deals entirely with the identity of the complainant and a summary of the allegations.

172. This item is not to be produced to the plaintiff.

Item 24:

173. To be produced on the same basis as item 22 above, including redactions of anything that could identify the complainant nurse, second nurse or which pertains to the complaint.

Item 25:

174. To be produced on the same basis as item 22 above, including redactions of anything that could identify the complainant nurse, second nurse or pertains to the complaint.

Item 26:

175. This item contains an e-mail along with the attached report that formed part of the review conducted by LHSC. These are relevant and not privileged based on the analysis set out earlier in these reasons.

176. This item is to be produced to the plaintiff.

Item 27:

177. This item is a timeline of the physician investigation. It is relevant to the plaintiff's claims and not privileged.

178. This item is to be produced to the plaintiff.

Item 28:

179. Relevant to the plaintiff's claims and not privileged for reasons already provided. Any information that could identify the complainant nurse, second nurse or pertain to details of the complaint not already provided are to be redacted.

Item 29:

180. This item is relevant as it pertains to the scope of the investigation. No information is being provided about the complaint. The persons involved are simply conducting database searches as part of their assigned duties. This is not new to Dr. Anderson, given the information already provided by the LHSC. However, and as already explained, the

names of those persons simply performing the search, rather than directing the investigation, are not relevant and are to be redacted prior to production to the plaintiff. This latter direction is applicable to all similar instances.

Item 30:

181. To be produced to the plaintiff on the same basis and with the same redactions as set out in item 29.

Item 31:

182. To be produced to the plaintiff on the same basis and with the same redactions as set out in item 29.

183. With respect to the chart provided and attached to the e-mail communication within this item, any patient identifiers, date of birth, date of death or any numbers used in the hospital referencing system and any reference to any medical staff other than Dr. Anderson are to be redacted in a manner that the information is removed but the number of patients can be discerned. These redactions are appropriate as the aforementioned information is not relevant to any issue in this litigation. I appreciate that this may result in a chart that has all the content redacted. However, the redactions are to be done so that the number of items in the chart can be easily determined.

Item 32:

184. This item is relevant to the process undertaken by the LHSC. It names the individuals involved in the scope and manner of investigation, which I have already determined is not privileged. For continuity and clarity, these latter individuals are distinguished from those that simply conducted searches and other tasks that they were instructed to conduct or undertake.

Item 33:

185. This item pertains to an individual already identified in these proceedings. The item is an update of the review conducted, the scope of the review and time requirements. For the reasons already provided, it is not privileged and is to be produced to the plaintiff without redaction.

Item 34:

186. This item is an e-mail with attachments. The attachments relate to information about the complaint and identifying information about the complainant nurse and the second nurse. Accordingly, and as explained in these reasons, that information is not to be produced to

the plaintiff as it is not relevant to this litigation. For the sake of clarity, none of item 34 is to be produced to the plaintiff.

Item 35:

187. This item contains a request for information. That the request was made and the breadth of the request are relevant and not privileged. However, the names of the patients, all reference numbers associate with any patients and their dates of birth are not relevant to this litigation and are to be redacted. It is acknowledged that this will remove any identifying information about any patient. As indicated, this is by design. Dr. Anderson is entitled to production of the number of patients that were being considered in this particular request, however, the specific patients and their identification or anything that could tend to identify them or used to identify them in any way, is not relevant to his claim against the LHSC.

Item 36:

188. The e-mail is relevant and not privileged. It is between people executing their duties and not a confidential communication.

189. There is a chart attached. The headings in the chart are to remain, however, any reference to patient names, date of birth, date of death or any numbers used in the hospital referencing system or reference to any physician, medical staff or employee of the hospital are to be redacted in a manner that the information is removed but the number of patients can be discerned.

Item 37:

190. The e-mail is relevant and not privileged. It is between people executing their duties and not a confidential communication.

191. There is a chart attached. The chart simply provides, in summary fashion, the update on the file review. It provides the breadth and scope of the review and is relevant to the plaintiff's claim and is not privileged.

192. No patient identifiers were observed. However, should there be any that this court has inadvertantly not observed, they are to be removed.

Items 38:

193. The e-mail in this tab is relevant to the claims of Dr. Anderson. The e-mail outlines in very brief terms the status of the review and outlines a procedure going forward. There is no communication that originated in confidence and in fact, what is discussed is the issue

of informing the plaintiff of the process that is being discussed in the e-mail itself. The parties to the communication have a professional relationship within the hospital and the confidentiality of this e-mail is not essential to maintain the relationship between the parties within the very same organization. Although not determinative it is worth observing that the sensitivity of this particular e-mail, like many others in Items 18-69 is marked "Normal", although the subject line uses the phrase "Confidential and Privileged". Two other observations emerge. First, a considerable amount of what is in this item has already been provided to Dr. Anderson in the form of evidence at discovery and statements from counsel as well as answers to undertakings, questions taken under advisement and refusals that were eventually answered. Second, had this matter proceeded on the basis that the complaint has merit, much of the information would likely be provided to Dr. Anderson. While not determinative, these factors militate against the notion that Item 38 is either irrelevant or privileged.

194. However, the e-mail does, in the second full paragraph reference information about the complainant and the complaint and is to be redacted as already explained earlier in these reasons.

ITEM 39, 40,41:

195. Any portion of these items that refers to the particulars of the complaint and anything that could tend to identify the complainant nurse or the second nurse is to be redacted. In addition, any reference to consultations with legal counsel is to be redacted.

196. The content is relevant because it deals directly with how the LHSC was dealing with the complaint and speaks directly to the issue of when and how Dr. Anderson was to be advised of the complaint and specifics about how that was to be accomplished.

Items 42 and 43, 45:

197. The e-mails in this item are very short. It is unclear as to what they pertain to and this Court was not provided with any context within which to determine its relevance or whether it is privileged. Should the plaintiff wish to pursue disclosure of these items they will have to arrange a time to bring this matter before me so that I may receive submissions. In the interim period, these items is not to be produced.

Item 44:

198. This item is relevant because it deals directly with the steps taken by the LHSC to identify the patient. It speaks to the scope of the chart review and the rationale for the scope.

199. No privilege attaches as per the Wigmore analysis already conducted.

200. Any reference within this items of the complaint beyond what has already been provided to the plaintiff by the LHSC or the complainant nurse, or second nurse is to be redacted prior to the item being produced to Dr. Anderson.

Item 46

201. This item is not relevant. It is not to be produced to the plaintiff.

Item 47:

202. This item contains information, related to a patient that has no connection with Dr. Anderson. This item is not relevant. It is not to be produced to the plaintiff.

Item 48:

203. This item contains information, related to a patient that has some connection to Dr. Anderson. However, this document is not relevant as the complaint in this matter and was determined to be without foundation. That is, production of the particulars about this patient does not inform the plaintiff's claims. It is not to be produced to the plaintiff.

Item 49:

204. This item is relevant as it sets out the process of the investigation, specifically the chart reviews that were conducted.

205. This is a summary of the work completed. It is not privileged as per the Wigmore analysis set out earlier in these reasons.

206. This item is to be produced to the plaintiff.

Item 50:

207. This item is as described in the Affidavit of Documents and is relevant to the litigation and not privileged.

Item 51:

208. This information is relevant to the steps in the investigation and not privileged.

Item 52:

209. Much of the information in the timeline provided has already been provided to Dr. Anderson through the course of these proceedings, including during the examination of Dr. Barron and through the answers given to questions previously refused, undertakings given and answers given to questions taken under advisement. The timeline deals with the decision of notification of Dr. Anderson. It is relevant to the litigation.

210. The contents of this item are not privileged.

211. As indicated several times in these reasons, any information that could tend to identify the complainant nurse or second nurse is to be redacted prior to production.

Item 53:

212. This item deals with inquiries as to whether and by whom Dr. Anderson was to be notified of the complaint. This is relevant to the issued raised in the litigation and is not privileged as per the earlier analysis.

213. This item is to be produced to Dr. Anderson.

Item 54:

214. This item has no relevance to Dr. Anderson's litigation. It is not to be produced.

Item 55, 56:

215. These items are relevant to the decision related to whether and when Dr. Anderson was to be advised. No privilege attaches, as per the analysis on Wigmore. These items are to be produced to Dr. Anderson.

Item 57:

216. When viewed in light of the statement of claim and the issues raised therein, which are focused on the manner in which the LHSC conducted their investigation, this items is relevant. However, portions of the items relate to seeking legal advice which is not relevant and are privileged. Accordingly, those portions are to be redacted prior to production.

Item 58:

217. This item contains an e-amil seeking legal advice. It is privileged and is not to be produced.

Item 59:

218. This item concerns efforts to contact Dr. Anderson and is to be produced.

Item 60:

219. This item is relevant to decision making surrounding the investigation and the notification of the plaintiff. However, the item references an individual which causes this Court to be uncertain if solicitor and client privilege applies. If it does, this item is not to be produced

to the plaintiff. If solicitor and client privilege is not applicable, the items is to be produced.

Item 61:

220. This item is relevant as it pertains to the decision to close the file.

221. The contents of this item are not privilege. This item is to be produced to the plaintiff.

Item 62:

222. This item contains information also found in item 61 and that will be produced through that item. It also contains other information which is not relevant to this litigation. Accordingly, this item is not to be produced to the plaintiff.

Item 63:

223. This item contains information in item 61 and that will be produced through that item. It also contains other information. The information that is beyond that already in item 61 is not relevant, as it does not contain anything that is relevant to the manner in which the investigation was conducted.

224. The investigation had been closed at the time this item was created.

225. This item is not to be produced to the plaintiff.

Item 64:

226. This items contains repetition of the contents in item 61. The additional aspects found in item 64 are not relevant to this litigation.

227. This item is not to be produced to the plaintiff.

Item 65:

228. This item contains e-mails to and from Dr. Anderson. The contents of this item are relevant and not privileged. This item is to be produced to the plaintiff.

Item 66:

229. This item is not relevant. There is content but it is of no substance to this litigation.

230. This item is not to be produced to the plaintiff.

Item 67:

231. The first page in this item is to be redacted as irrelevant. The remainder is Dr. Anderson's redacted Freedom of Information Request. That is clearly relevant and not privileged. Moreover, it was generated by the plaintiff and already part of the court record. There is one notation on the document that appears to have been added but that information has already been provided to the plaintiff as well.

232. This item is to be produced to the plaintiff once the first page is redacted.

Item 68**:**

233. This item is not relevant as it is after the investigation had concluded and after Dr. Anderson had been advised. The items does not deal in any way with the issues in this litigation.

234. This item is not to be produced to the plaintiff.

Item 69:

235. Not relevant to the issue in this litigation. This item is not to be produced to the plaintiff.

Disposition:

236. For the foregoing reasons, the LHSC's Rule 21 motion is granted in part only. The portions of the pleadings dealing with the contract claim are struck. The remainder of the Rule 21 motion is dismissed.

237. The plaintiff's motion for production is granted in part, in the manner as set out in these reasons. The remainder of the plaintiff's motion to compel production that was not granted, and for the reasons explained above, is dismissed. The LHSC shall make production and answer questions as detailed in these reasons within 60 days of the release of these reasons.

238. If it is necessary to hear the Rule 20 motion, the parties shall schedule that motion in the normal course. For the sake of clarity, I am not seized of any further motions related to this matter.

Costs:

239. The parties are urged to resolve the issue of costs. In the alternative, the parties may jointly request that the costs of this motion be reserved to the Rule 20 Motion. However, if the parties are unable to agree on the issue of costs and do not wish to jointly request that costs be reserved, the plaintiff is to serve and file their costs submissions within 30 days

of the date of these reasons. The defendant shall serve and file their costs submissions within 30 days of receipt of the plaintiff's costs submissions. The costs submissions are not to exceed three (3) double spaced pages, exclusive of any Bill of Costs and must utilize a minimum of 12-point font.

July 31, 2025

Perfetto J.