2011 CarswellOnt 15974
Ontario Superior Court of Justice

Lock v. Waterloo (Regional Municipality)

2011 CarswellOnt 15974, [2011] O.J. No. 4898, [2013] W.D.F.L. 775, 220 A.C.W.S. (3d) 731

William Lock and Rose Lock, Plaintiffs and The Regional Municipality of Waterloo operating as Grand River Transit, Defendant

J. Sebastian Winny D.J.

Heard: October 25, 2011
Judgment: November 4, 2011
Docket: Kitchener 1644/10

Counsel: Ms Whitney Hall, Mr. Tim Ellis, for Plaintiffs
Mr. Filipe A. Mendes, for Defendant

Subject: Family; Insurance; Civil Practice and Procedure; Torts

Headnote

Family law --- Marriage — Immunity in tort — Negligence — Arising out of motor vehicle accident — Miscellaneous
Insurance --- Automobile insurance — No-fault benefits — General principles
Judges and courts --- Jurisdiction — Small Claims or other inferior courts — Monetary jurisdiction — What constituting claim — Claim in contract or tort
Remedies --- Damages — Damages in tort — Personal injury — Principles relating to awards of general damages — Motor vehicle accidents — Miscellaneous

***J. Sebastian Winny D.J.*:**

1 Judgment was reserved after this full-day trial, and reasons were to follow on a preliminary ruling dealing with the jurisdiction of the Small Claims Court to hear this matter. What follows are those reasons and the reasons for judgment dismissing the action with costs.

Nature of the Proceeding

2 The plaintiffs are spouses of one another and both allege personal injuries sustained while they were passengers on Grand River Transit's bus number 52 in Cambridge on May 13, 2009. They also each claim damages pursuant to s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3. Their claims are subject to the statutory immunity and deductibles under the Bill 198 amendments to s. 267.5 of the *Insurance Act*, R.S.O. 1990, c. I.8.

Issue 1: Jurisdiction

3 The action was commenced by statement of claim issued in the Superior Court of Justice, in which each plaintiff claimed damages of $1,000,000. The matter was then transferred to this court on consent, but the claim had not been amended to reduce the claimed damages amounts. The circumstances of this matter present three separate questions of jurisdiction: (A) does the Small Claims Court have jurisdiction to deal with this case when the pleaded damages claims are $1,000,000 for each plaintiff? (B) to proceed in this court, can the plaintiffs now reduce their damages claims to $25,000 each or are they limited to $25,000 between them? (C) in a case involving deductions from any damages award, is the monetary jurisdiction $25,000 before deductions or $25,000 after deductions?

Issue 1(A): Does the Small Claims Court Court have jurisdiction to deal with this case when the pleaded damages claims are $1,000,000 for each plaintiff?

4 The monetary jurisdiction of the Small Claims Court is $25,000, exclusive of interest and costs: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 23(1)(a), O.Reg. 626/00, s. 1(1). The claim in this case, as pleaded when the matter was called for trial, exceeded that limit because each plaintiff claimed damages of $1,000,000. However the parties had transferred the action to this court, on consent, and their intention was to proceed to trial in this court with the damages claimed to be limited to this court's monetary jurisdiction.

5 Their error was in using the consent transfer procedure under *Courts of Justice Act* s. 23(2), which provides as follows:

> **(2) Transfer from Superior Court of Justice** - An action in the Superior Court of Justice may be transferred to the Small Claims Court by the local registrar of the Superior Court of Justice on requisition with the consent of all parties filed before the trial commences if,
>
> (a) the only claim is for the payment of money or the recovery of possession of personal property; and
>
> (b) the claim is within the jurisdiction of the Small Claims Court.

6 At the time of transfer, since the pleaded claims exceeded the jurisdiction of the Small Claims Court, the parties and the local registrar erred by proceeding under s. 23(2). The correct procedure would have been for the plaintiffs to first amend their pleading so as to limit their damages claims to come within this court's jurisdiction, and only after such an amendment were effected could consent transfer from the Superior Court of Justice to the Small Claims Court under s. 23(2) be effected.

7 In my view, however, this court does possess the necessary jurisdiction to deal with the matter, since the parties' intention was and remains to proceed in this court and the plaintiffs' monetary claims will be amended down to the monetary jurisdiction of this court.

8 In *Helsberg v. Sutton Group Achievers's Realty Inc.* (2002), 165 O.A.C. 122 (Ont. Div. Ct.), Justice John Macdonald dealt with a case where the amount of damages claimed, both in the plaintiff's claim and in closing submissions at trial, exceeded the maximum monetary jurisdiction of the Small Claims Court, but the deputy judge's judgment at trial was for an amount that was within the monetary limit. The court held that the Small Claims Court had no jurisdiction over the claim and its judgment had to be set aside. Justice Macdonald questioned whether a claim exceeding the court's jurisdiction was a nullity or whether the plaintiff could have simply abandoned the excess, but he did not decide that point.

9 The prospect of a plaintiff's claim being a nullity if damages exceeding the court's monetary jurisdiction are claimed, is significant because it would create risk of a successful limitation defence once a plaintiff commences a fresh claim properly pleaded. However that problem was addressed by Justice Low in *Alexandrov v. Csanyi* (2009), 247 O.A.C. 228 (Ont. Div. Ct.), at para. 9, where Her Honour observed that a proceeding that is commenced in a court without jurisdiction may be transferred under s. 110 of the *Courts of Justice Act*. In my view, if the Small Claims Court lacked jurisdiction over a claim because damages in excess of our limit were claimed, a simple transfer to the Superior Court of Justice would normally be the appropriate remedy. But here the parties want to proceed in this court, have previously agreed in that regard, and have consented to a transfer by the local registrar. The only sticking point is that the claim was not amended to properly reflect that agreement.

10 In *Mailman Publishing v. Century 21 - Georges Bank Realty Ltd.* (1993), 127 N.S.R. (2d) 112 (N.S. S.C.), it was held that a consent order transferring a case from the superior court to the Small Claims Court implies the consent of the parties that the claim would be limited to the applicable monetary jurisdiction, such that a party could not later be heard to resile from that consent. In this case, no one is resiling; it is simply a question of whether I can proceed despite the failure to amend prior to the transfer, and when the pleading before me asks for damages of $1,000,000 for each plaintiff.

11 When asked by the court at the start of trial, the plaintiffs made a request to amend their damages claims to within the court's monetary jurisdiction. I was satisfied given the abovementioned authorities that the court's jurisdiction is not compromised by

the current state of the pleadings, and that granting the amendment was the appropriate remedy, which would permit the court to hear the trial. Based on *Helsberg*, *supra*, however, it would appear that failure to address the point might well have produced a judgment that was a nullity. Given that risk, it is preferable for parties to address the amendment issue before using the consent transfer procedure under s. 23(2). It is also what the section effectively requires.

Issue 1(B): To proceed in this court, can the plaintiffs now reduce their damages claims to $25,000 each or are they limited to $25,000 between them?

12 After initially objecting that the plaintiffs were limited to $25,000 between them, defence counsel conceded that they were entitled to each claim the maximum monetary amount. I agree.

13 The same point has been addressed under the Simplified Procedure provided in Rule 76 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. There is a monetary limit for the mandatory application of that procedure and it has been held that multiple plaintiffs each claiming within the monetary limit can be properly joined in one claim: *Baker v. Chrysler Canada Ltd.* (1998), 38 O.R. (3d) 729 (Ont. Gen. Div.), leave to appeal denied 112 O.A.C. 277 (Ont. Div. Ct.) . It has also been held that Rule 76 should be liberally interpreted to carry out its policy of containing the cost of litigating the smaller claims to which it applies: *Lillie v. Bisson* (1999), 46 O.R. (3d) 94 (Ont. C.A.) . In my view both of those principles are equally true of proceedings in the Small Claims Court.

14 To hold otherwise would be to require that the case at bar be divided into two actions involving virtually identical allegations of fact and law. I see no useful purpose in requiring that multiplicity of proceedings, nor any proper basis to do so under the law of joinder or the law defining this court's jurisdiction.

15 Section 23(1)(a) of the *Courts of Justice Act* gives this court jurisdiction "in any action for the payment of money where the amount claimed does not exceed the prescribed amount..." "Action" is defined under s. 1(1) of the Act only as including proceedings, other than applications, commenced by a not-exhaustive list of originating documents. The list does not refer to the Small Claims Court and does not mention the Plaintiff's Claim which, along with the Defendant's Claim, is the originating document in this court.

16 Section 1(1) of O.Reg. 626/00 sets the monetary jurisdiction of the Small Claims Court, stating that "The maximum amount of a claim in the Small Claims Court is $25,000." That differs from s. 23(1) by referring to a "claim" in this court rather than an "action" in this court. As was found in *Action Auto Leasing & Gallery Inc. v. Robillard* (2011), 106 O.R. (3d) 281 (Ont. Div. Ct.), dealing with the minimum appealable amount, there is a material inconsistency between the language of the Act and the language of the corresponding regulation.

17 The *Courts of Justice Act* and its regulations should be interpreted liberally and as a coherent package. In my view, properly interpreted, the effect of the applicable provisions is that plaintiffs suing together in one action in the Small Claims Court may properly each claim damages up to the maximum monetary jurisdiction of the court. [1]

18 Accordingly, both plaintiffs in this case are limited to claiming damages of $25,000 each rather than $25,000 in total, exclusive of interest and costs, and their claims are amended accordingly.

Issue 1(C): In a case involving deductions from any damages award, is the monetary jurisdiction $25,000 before deductions or $25,000 after deductions?

19 Defence counsel argued that deductions, including the statutory deductible of $30,000 off general damages (under *Insurance Act* s. 256.5(7), subparagraph 3, and O.Reg. 461/96, s. 5.1(1)) must be deducted from $25,000 because that is the monetary jurisdiction of the court, with the result that no net amount can be recovered. I disagree. Binding authority provides that plaintiffs may allege and prove any amount of damages in the Small Claims Court. It is the amount of the judgment which they claim, and the amount which this court may allow, which are limited.

20 The leading case is *Burkhardt v. Beder* (1962), [1963] S.C.R. 86 (S.C.C.), holding that deductions were to be deducted from the jury's award and not from the lower amount claimed in the plaintiff's pleading. The court specifically approved the dissent of Orde J.A. in *Anderson v. Parney* (1930), 66 O.L.R. 112 (Ont. C.A.) , which addressed the monetary limit of the Small Claims Court (then called Division Court). Orde J.A. found that a deduction for contributory negligence should come off the amount of damages assessed and not the lower amount which was actually claimed in that case and which was the then monetary limit of the court's jurisdiction ($120). His Lordship said at para. 43 that the monetary limit "is a limit on the amount recoverable by the judgment of [the Small Claims Court]. It is immaterial by what steps the amount due to the plaintiff in respect of a single cause of action is ascertained and fixed." In other words, the limit is on the net amount claimed, after consideration of deductions such as for contributory negligence.

21 More recent decisions on appeals from the Small Claims Court confirm that the law remains as stated above: see *Dunbar v. Helicon Properties Ltd.* (2006), 213 O.A.C. 296 (Ont. Div. Ct.); *Bohatti & Co. v. DeBartolo*, [2003] O.J. No. 5045 (Ont. Div. Ct.).

22 Mr. Mendes cited *Rider v. Dydyk* (2007), 87 O.R. (3d) 507 (Ont. C.A.). That case deals with a different question involving the proper approach to costs under *Insurance Act* s. 267.5(9) and its interaction with rule 49.10 of the *Rules of Civil Procedure*. He also cited *Von Felix v. Enterprise Rent-A-Car*, [2002] O.J. No. 1109 (Ont. S.C.J.), at para. 23, where Justice P. Thomson held, when this court's monetary limit was $10,000, that no net amount could possibly be awarded for a claim that was subject to a statutory deductible of $15,000 under *Insurance Act* s. 267.5(7), subparagraph 3. With respect, I find that decision is wrong and Her Honour's more recent decision in *Tabingo v. Bitton* (2006), 36 C.C.L.I. (4th) 121 (Ont. S.C.J.), is correct. There she held at para. 10, citing *Burkhardt*, *supra*, among other authorities, that there has never been a limit on the amount of damages which may be assessed in this court. Rather the limit is on the amount which may be claimed and the amount which may be awarded.

23 I conclude that each plaintiff in this case can claim up to the maximum monetary jurisdiction of this court as the net amount claimed, after consideration of any deductions off the damages otherwise assessed by the court.

Issue 2: Liability

24 The plaintiffs allege and must therefore prove on a balance of probabilities that their damages were caused by negligence on the part of the defendant's employee, for which the defendant would be vicariously liable. I find for the defendant on this issue.

25 The liability evidence consists of several documents and the evidence of both plaintiffs and the defendant's bus driver Mr. Mastromatteo. The incident occurred on May 13, 2009.

26 William Lock was 77 years of age at the time. Unfortunately, his recollection of events is very poor and he was able provide very little and it might well be fair to say no useful evidence on liability. What little detail he was able to provide in-chief often involved leading questions by his representative. I consider it appropriate to discount the weight of the little evidence he gave on liability to the extent that it was elicited by leading questions.

27 He said that the couple were on a bus travelling to Kitchener. In fact the couple were heading home to north Cambridge (formerly known as Preston), travelling towards Kitchener but not to Kitchener. He was not sure where they had got on the bus. He did not know how fast the bus was going when the accident occurred, nor whether he had a walker or cane with him that day. He was "not quite sure" where on the bus they had sat down, and he did not remember too much about the events. He said "I can't say too much because I was unconscious most of the time."

28 Rose Lock was 72 at the time. She said that they had gone for a walk, from Shantz Hill (Preston) southbound along King Street, to "the delta" (a five-way intersection at Hespeler Road). By that point it was too much for them to walk back and so they caught the number 52 bus back.

29 On boarding the bus, the seats designated for disabled and elderly people were occupied by teenagers. It was a Wednesday about 4 p.m. and many teenagers were heading home from school. The bus was quite full. No one offered them the designated

seats and the driver did not ask anyone to move, so they sat together immediately behind the bus driver, her in the window seat and him in the isle seat.

30 There was some kind of argument between a female passenger and one or more other passengers. Some profanities were uttered. The driver attempted to intervene verbally. He was trying to get the argumentative passengers to behave. At one point he threatened to call the police. Mrs. Lock perceived that the driver was in a bad mood or angry based on the tone and volume of his voice. She herself was perturbed by the profanity. After a time the bus driver stopped the bus because of these events and the stop lasted some 10 to 15 minutes. The stop was somewhere between the delta and the Cambridge hospital.

31 During this stop, some passengers left the bus. Mrs. Lock perceived that they included the passengers with whom the female passenger had been arguing, but not the female passenger. She also observed the driver leave the bus and use a cellphone outside the bus. She surmised that he was calling the police and someone showed up. She believed it was the police but she did not actually see who it was. The driver returned and the trip resumed.

32 Mrs. Lock said that the female passenger continued swearing and there was some continued verbal exchange between her and the driver. Suddenly the driver stopped the bus and it was at that point that the accident giving rise to this case occurred. She said that her husband was propelled forward from the sudden stop. She tried to catch him, but without success. He then "sort of rolled" and ended up on the floor by the front door of the bus.

33 On cross-examination, Mrs. Lock said that she felt the driver had been speeding, but she had no idea of what speed the bus was travelling. She said that when he suddenly stopped, they went forward, then we went back, and then her husband fell off his seat. She said it "happened so quick". She said he had hit his head but she did not know what it had hit. At first she said she did not know if the walker had fallen over, but then she said that it had fallen over. She said that after the bus stopped the driver had picked her husband up and said "there's nothing wrong with him"; that the driver was "snottly-like" and sent her to sit farther back in the bus away from her husband. They carried on home and she did not call an ambulance. She did not see a "goose bump" on his head until later.

34 Mr. Mastromatteo is 61 years of age and has worked for the defendant as a bus driver for 10 years. He had previous experience as a firefighter in Toronto. He said that on the day in question it was a full bus at about 4:15 p.m. He said that students can be rambunctious and sometimes there can be swearing, which he feels other passengers should not be subjected to. When this happens he needs to use a firm voice to intervene. He could not recall the specific incident of the argument and stopping the bus near the hospital as described by Mrs. Lock, and he was very clear that he could not have called the police that day because that would have generated a report, but there was none.

35 He said that students can be "pretty rowdy" and he usually gives one warning before taking further steps. The protocol is to avoid getting physically involved in a dispute and to call a supervisor. If he had told people to stop swearing, he would not expect to remember that. He could not recall pulling over that day but if he had he would have called a supervisor.

36 Mr. Mastromatteo said that the incident when Mr. Lock fell occurred at a point on King Street where there is a left turn just before a flour mill. The turn is awkward for a 40-foot bus given the size of the two northbound lanes. In addition there is a bus stop not far ahead and it is likely that he was changing from the left lane to the right lane as he navigated the turn, planning to stop for passengers at that stop. It was during the turn that he observed an item roll forward beside him, which he believed was a can of food and possibly it came from Mr. Lock's walker which had some bags hanging or attached to it. Then he saw Mr. Lock fall forward beside him and land with his head closest to the door. He described and demonstrated from the witness box that he saw Mr. Lock come forward beside him at an angle consistent with a line from the seat in which he had been seated towards the door or the front of the bus close to the door.

37 Mr. Mastromatteo appeared to think or to have surmised that Mr. Lock's fall resulted from him holding or leaning on his walker, which moved when the bus turned left, leaving Mr. Lock unsupported and causing him to lose his balance.

38 I will now review the material parts of the documentary evidence on liability.

39 Mr. Mastromatteo completed an "Employee's Report" dated May 14, 2009 (Exhibit 1, Tab 3, p. 6). On the second page it contains the following statement:

> As I entered the curve on King Street south of Fountain Street, I heard a bang. I looked towards the front doors of the bus. An elderly man & his stroller with groceries had fallen over...

40 That report includes a diagram of the subject location, showing the accident as having occurred right at the mid-point of the left turn on King before the flour mill, just after the bridge over the Speed River.

41 Mrs. Lock wrote an undated letter to the defendant (Exhibit 1, Tab 6). I take it, on a balance of probabilities, to have been written fairly soon after the accident. In it she says this:

> ... as we were driving along the straight bit on Coronation Road he [the driver] seemed to speed up then suddenly he slammed on his brakes causing by husband and myself to pitch right forward and then backwards. As we went forward I put my right arm out to grab hold of my husband and it pulled at my shoulder causing lots of pain. Then suddenly my husband just pitched of [sic] his seat and ended up on the bus floor near the door..."

42 There is a written statement by Mr. Mastromatteo dated June 17, 2010 (Exhibit 1, Tab 1). He said (at page 2) that he remembered "that an elderly man fell out of his seat and tipped over his buggy or walker full of groceries." He says he parked the bus "and saw an elderly man on the floor of the bus beside the groceries."

43 The court must consider all of the evidence and determine the facts on a balance of probabilities. My findings of fact are as follows.

44 The stopping for 10 to 15 minutes near the hospital on Coronation Blvd resulted in the departure from the bus of individuals involved in the argument with the female passenger. The bus driver had left the bus and used his cellphone to call his supervisor and his supervisor may have attended to review the situation before the bus got going again. The police did not attend and Mrs. Lock's supposition in that regard was wrong. The bus driver had threatened to call them but did not do so, probably because calling them would have kept the bus and its passengers waiting needlessly when the problem passengers, except for the female passenger, appeared to have left the bus in any event.

45 I do not accept that Mr. Mastromatteo was in the bad mood or angry in the way Mrs. Lock perceived him to be. He used a firm raised voice to try and control the argument and swearing amongst some of his passengers, but I don't accept that he lost any significant degree of self-control or that his driving after the brief stop was affected by anger on his part.

46 The accident occurred as the bus turned left on King Street just before the flour mill. Mrs. Lock's letter to the defendant was wrong when it suggested this happened on Coronation Blvd. King Street does become Coronation Blvd for a section at and near the hospital, but this accident occurred at the section of King Street just south of Fountain Street near the flour mill, as Mr. Mastromatteo testified and as the defendant's records indicate, and not on the Coronation Blvd section.

47 I reject Mrs. Lock's evidence of sudden braking just before her husband fell from his seat. She was wrong about other details and on balance I find that she was wrong about the braking. On a balance of probabilities I find that Mr. Lock fell out of his seat from some combination of the centrifugal force from the bus turning left and his posture at that moment. I accept that Mr. Lock was holding or leaning on the walker which most likely was beside him in the isle, with his right hand. The left turn would naturally have created outward pull of both the walker and Mr. Lock.

48 The direction of Mr. Lock's fall, which appears generally consistent in the evidence of both Mr. Mastromatteo and Mrs. Lock, was approximately diagonal from his seat to the front door. That corresponds with the fact of the left turn and the point the bus had reached in that turn when he fell, in accordance with Mr. Mastromatteo's diagram.

49 Therefore I find that the plaintiff's theory of negligence based on sudden braking by Mr. Mastromatteo must fail.

50 The alternative theory of negligence is that inadequate care was taken by Mr. Mastromatteo to permit the plaintiffs to use the seats designated for elderly or disabled passengers. There is no evidence of how many such seats existed on this bus, nor as to their location within or on which side of the bus. Accordingly there is no basis to find that Mr. Lock's fall would probably not have occurred had he been seated elsewhere.

51 Nor do I accept that the defendant is liable merely because Mr. Mastromatteo did not take steps to ensure that designated seats were vacated by other passengers in favour of the plaintiffs. The driver has a variety of matters to attend to while driving a public bus, the first and foremost of which is to attend to driving the bus. While stopped, he could intervene or not intervene in seating elderly passengers and neither choice would be inherently unreasonable. But as he testified and I accept, offers of help will give offence to some elderly or disabled people. At the same time, common courtesy among passengers can be relied on to produce a chance of designated elderly or disabled seats being yielded in some cases. Passengers themselves are free to ask others for their seat. Intervention by the driver, particularly when the bus is full and many of the passengers are rowdy teenagers, could itself create new risks of conflict. Passengers if specifically asked to move for more elderly passengers, could refuse. I am unable to accept this aspect of the plaintiff's theory of negligence.

52 The result is that I find for the defendant on the issue of liability and accordingly this action must be dismissed.

Issue 3: Insurance Act Immunity

53 This action is subject to the Bill 198 immunity provisions under the *Insurance Act*, as set out in s. 267.5 of the Act and ss. 4.1 to 4.3 of O.Reg. 461/96, as amended. Section 267.5(5)(b), as applicable to the claims of both plaintiffs to general damages, provides that to be entitled to an exception to that general immunity, each of them must establish that, as a result of the accident, they sustained "permanent serious impairment of an important physical, mental or psychological function." O.Reg. 461/96 ("the regulation") goes on to create additional requirements for accidents which occurred on or after October 11, 2003.

54 Section 4.2(1) of the regulation creates specific criteria for a finding of permanent serious impairment of an important physical, mental or psychological function. Subsection 1, subparagraph iii, as applied to this case, requires that the impairment must "substantially interfere with most of the usual activities of daily living, considering the person's age." Subsection 2, subparagraphs iii and iv, as applicable to this case, require that the important function either "be necessary for the person to provide for his or her own care or well-being" or "be important to the usual activities of daily living, considering the person's age." Subsection 3 defines the permanence requirement.

55 Section 4.3 of the regulation creates specific evidentiary requirements for plaintiffs claiming an exception to the general immunity. Section 4.3(2) requires the evidence of at least one physician and that such evidence explain the things set out in that subsection. Section 4.3(3) contains additional requirements for the training and experience of physicians whose evidence is tendered under that provision. Section 4.3(4) requires that, to qualify under that provision, the physician's evidence must contain a favourable conclusion of the issue of the causation of the impairment by the accident. Section 4.3(5) requires corroborative evidence on the issue of the change in function that is alleged to qualify for an exception to the general immunity.

56 Although neither side referred to the regulation in submissions before me, it modifies, refines and fortifies the analysis set out in *Lento v. Castaldo* (1993), 15 O.R. (3d) 129 (Ont. C.A.), leave to appeal denied (S.C.C.): see *Sherman v. Guckelsberger*, [2008] O.J. No. 5322 (Ont. S.C.J.), at para. 99-112; *Antinozzi v. Andrews*, [2011] O.J. No. 3335 (Ont. S.C.J.), at para. 42.

57 In this case, only one piece of medical evidence is tendered as to each plaintiff which might satisfy the requirements of the regulation: the reports prepared as to each plaintiff by Kinetex Innovative Assessments & Rehab Centre Inc., which are signed by Dr. P.A. Bright, M.D., and by Mr. Paul Weber, Clinic Director/Operations Manager (Exhibit 1, Tabs 9 & 10). There are reports by a Mr. Fred Winch, rehabilitation and disability consultant, but he is not a physician.

58 Neither of the Kinetex reports indicates what role Dr. Bright, as opposed to Mr. Weber, played in its creation. Interviews and examinations of each plaintiff were conducted on September 27, 2010. The reports contain information about the accident, subsequent treatment, current symptoms, pre-accident activities and current limitations, physical demands and related functional

abilities, physical examination findings, and diagnoses of current injuries. The report on Mrs. Lock concludes with a section on recommendations for future investigation and treatment. The report on Mr. Lock contains no similar concluding section.

59 Neither report purports to include the evidence which might comply with the requirements of the regulation. Specifically, there is no attempt to comply with the requirements of s. 4.3(4), s. 4.3(3) or the combined requirements of s. 4.3(2)(a) to (d). As to the requirement for corroboration under s. 4.3(5), I find no corroboration as to the alleged changed function of Mrs. Lock, and will assume for the sake of argument that Mrs. Lock's own evidence gives sufficient corroboration of Mr. Lock's changed function. There is simply no other available conclusion than that the requirements of the regulation are not met as to both plaintiffs.

60 Since the claims of both plaintiffs fail to satisfy the requirements of the regulation, I have no alternative but to find that both claims for general damages fail to qualify for an exception to the general immunity under s. 267.5(5) and both claims would have been dismissed accordingly even if my conclusion on liability had been different.

61 While it is unnecessary to do so, I will observe that even if these claims had been subject to the less onerous Bill 59 version of s. 267.5, the claim of Mrs. Lock would clearly have failed to qualify for an exception to the general immunity.

Issue 4: Damages

62 In light of my conclusions on liability and the *Insurance Act* immunity, I find it unnecessary to assess the plaintiffs' damages. I note that any assessment of general damages would have been subject to a $30,000 deductible for each plaintiff and any assessment of the derivative *Family Law Act* claims would have been subject to a $15,000 deductible for each plaintiff, under s. 5.1 of the regulation.

Costs

63 Since judgment was reserved, the parties have not addressed costs. I will determine costs, but provided that if either party wishes to press for a different award, such party may deliver brief written submissions within ten days and the other party may respond within a further ten days. However I note that any defence offers to settle would not qualify for rule 14.07(2) cost consequences since the plaintiffs have not obtained a judgment.

64 I award costs to the defendant fixed at $1,600 all-inclusive, consisting of a representation fee of $1,500 and $100 for disbursements.

Footnotes

1 I note that under the Small Claims Court Forms, Form 1A - Additional Parties, recognizes the prospect of multiple plaintiffs joining in a single action in this court. Forms 7A and 10A - Plaintiff's Claim and Defendant's Claim, respectively, contain a box to indicate the amount of damages but does not ask for clarification whether the amount is a total for multiple plaintiffs or whether there are separate amounts claimed for each of multiple plaintiffs. I view that as simply a shortcoming of the forms.