

*Case Name:*

**Beiko v. Hotel Dieu Hospital St. Catharines**

**Between**

**Dr. George Beiko, Dr. Lawrence Aedy, Dr. Bruce Lennox  
and Dr. Gerald Scaife, Plaintiffs/Respondents, and  
Hotel Dieu Hospital St. Catharines, the Religious  
Hospitallers of St. Joseph of the Hotel Dieu of  
St. Catharines (carrying on business as Hotel Dieu  
Shaver Health and Rehabilitation Centre) and Rita  
Soluk, Defendants/Moving Parties**

[2007] O.J. No. 331

154 A.C.W.S. (3d) 856

Court File No. 06-CV-304230PD2

Ontario Superior Court of Justice

**G.B. Morawetz J.**

Heard: November 21, 2006.

Judgment: January 26, 2007.

(58 paras.)

*Civil procedure -- Pleadings -- Striking out pleadings or allegations -- Grounds -- Lack of jurisdiction -- The defendants' motion to strike the statement of claim was granted, but the plaintiffs were granted leave to amend, and they were directed to take into account all issues relating to doctors' privileges previously determined under the Public Hospitals Act -- It was not open to the court to usurp the statutory regime -- Public Hospitals Act.*

*Health law -- Health care professionals -- Particular professions -- Ophthalmologists, optometrists and opticians -- The defendants' motion to strike the statement of claim was granted, but the plaintiffs were granted leave to amend, and they were directed to take into account all issues relating to doctors' privileges previously determined under the Public Hospitals Act -- It was not open to the court to usurp the statutory regime -- Public Hospitals Act.*

*Health law -- Hospitals and health care facilities -- Doctors' privileges -- Cancellation, revocation or restriction -- Appeals -- The defendants' motion to strike the statement of claim was granted, but the plaintiffs were granted leave to amend, and they were directed to take into account all issues relating to doctors' privileges previously determined under the Public Hospitals Act -- It was not open to the court to usurp the statutory regime -- Public Hospitals Act.*

*Professional responsibility -- Professions -- Health care -- Ophthalmologists, optometrists and opticians -- The defendants' motion to strike the statement of claim was granted, but the plaintiffs were granted leave to amend, and they were directed to take into account all issues relating to doctors' privileges previously determined under the Public Hospitals Act -- It was not open to the court to usurp the statutory regime -- Public Hospitals Act.*

*The defendants brought a motion to have the plaintiff members of the Service of Ophthalmologists' action dismissed for disclosing no reasonable cause of action or alternatively that the court had no jurisdiction -- The plaintiffs' action was for breach of contract and negligent misrepresentation, and the question was whether the action could be sustained notwithstanding a failure to follow the statutory appeal route set out in the Public Hospitals Act -- The plaintiffs had abandoned an appeal before the Health Profession Appeal and Review Board -- The plaintiffs claimed they had been induced into entering an agreement which permitted the recruitment of a new ophthalmologist in exchange for an agreement not to reduce the plaintiffs' OR time, which was subsequently reduced -- The defendants argued there was no privity of contract between any physicians and the Hospital and further that physicians were independent contractors to whom the "privilege" of using the hospital facilities was afforded and, the relationship was neither one of employment nor contractual -- HELD: The motion to strike was granted, but the plaintiffs were given leave to amend -- The statement of claim alleged the required elements of a tort save and except that damage to the representee resulted -- The Act established a comprehensive code under which the hospital determined privileges for staff members -- It was not open to the court to usurp the statutory regime by conducting a hearing independent from the process set out in the Act -- The parties did not have access to the court to determine issues of privilege in the absence of following the statutory route -- The statement of claim was to be substantially revised to take into account all matters relating to the issue of privilege that had been determined under the Act.*

**Statutes, Regulations and Rules Cited:**

Ontario Rules of Civil Procedure, Rule 21.01(1)(b), Rule 21.01(3)

Public Hospitals Act, s. 13, s. 36, s. 37(7)

Statutory Powers Procedure Act, s. 15, s. 16

**Counsel:**

Toshi **Takishita**, for the Plaintiffs/Respondents.

Lorne M. Honickman and Jessica Caplan, for the Defendants/Moving Parties.

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### **ENDORSEMENT**

**1 G.B. MORAWETZ J.:**-- The issue is whether the plaintiffs can sustain this action for breach of contract and negligent misrepresentation, notwithstanding a failure to follow the statutory appeal route set out in the *Public Hospitals Act* (the "Act"). In this case, the plaintiffs abandoned an appeal before the Health Profession Appeal and Review Board (the "Appeal Board") and brought this action.

**2** The defendants bring this motion to have this action dismissed on the basis that the Statement of Claim discloses no reasonable cause of action and further that the Court has no jurisdiction over the subject matter of the action.

**3** The plaintiffs submit that they were not required to exhaust any appeal routes under the Act before commencing the action. Moreover, the statutory appeal route did not allow for an award of damages, which is the remedy sought by the plaintiffs.

**4** The motion has been brought under Rule 21.01(1)(b) and (3).

**5** Rule 21.01(2) provides that no evidence is admissible on a motion under clause (1)(b). There is no such prohibition in respect of clause (3). Accordingly, the relief sought under Rule 21.01(1)(b) is considered without regard to the affidavit of Ms. Caplan, filed in support of the motion.

**6** The claim is for damages resulting from negligent representations and breach of contract of one or more of the defendants. The plaintiffs were members of the Service of Ophthalmologists for the defendants Hotel Dieu Hospital St. Catharines, The Religious Hospitallers of St. Joseph of the Hotel Dieu of St. Catharines (c.o.b. Hotel Dieu Shaver Health and Rehabilitation Centre) (the "Hospital"). The other defendant, Ms. Rita Soluk, is the former Chief Executive Officer of the Hospital.

**7** The claim for damages for breach of contract and misrepresentation is in the amount of \$500,000. Special damages in an amount not yet determined are also claimed, as well as exemplary, aggravated and punitive damages in the amount of \$50,000.

**8** The plaintiffs allege that in January 2004, representatives of the Hospital advised that the Hospital wanted to recruit a new ophthalmologist. The plaintiffs were told that the purpose of retaining a further ophthalmologist was to increase the number of ophthalmologic cases being performed at the Hospital. The plaintiffs raised concerns about the proposed recruitment because there was a shortage of operating room (OR) time and as a result, they advised the Hospital that they would not agree to any recruitment that would result in a reduction of the OR time that each of

the plaintiffs were assigned or using.

**9** The plaintiffs further allege that Ms. Soluk requested that they proceed with the recruitment effort. Further, the OR time for the new recruit would be a new block and the recruitment effort would not in any way affect the existing OR time allocation of the plaintiffs.

**10** The plaintiffs state that they relied on the assurances and representations of Ms. Soluk and that similar representations were also provided by other representatives of the Hospital. In doing so, they were induced to enter into an agreement, the terms of which required the plaintiffs to recruit a new ophthalmologist. In exchange, the Hospital would not reduce the plaintiffs' existing OR time.

**11** In August 2004, the Hospital advised that it would be rescinding the Friday morning block of OR time of the plaintiffs. Subsequently, representatives of the Hospital advised Dr. Beiko, on behalf of the plaintiffs, that an error had been made and the plaintiffs would be permitted to continue the Friday morning block. The plaintiffs allege that they relied on these representations and continued with the recruitment process which resulted in a new ophthalmologist being recruited in September 2004.

**12** Subsequently, the OR Utilization Committee ("ORUC") advised them that the decision to rescind the Friday morning block of OR time would not be changed.

**13** The plaintiffs', disagreeing with the ORUC's determination, appeared before the Medical Advisory Committee ("MAC").

**14** The MAC determined that the plaintiffs would not receive the OR time to which they claimed they were entitled. The decision of the MAC was later affirmed by the Hospital's Board of Trustees (the "Trustees"). The plaintiffs initiated but later withdrew their appeal of that decision to the Appeal Board pursuant to Section 41 of the Act.

**15** The plaintiffs allege that the conduct of Ms. Soluk was intended to injure them in a manner that interfered with the plaintiffs' method of making a living, thereby causing them economic loss and that the conduct of one or more of the defendants constituted a breach of the terms of the agreement. The plaintiffs further state that the representations of Ms. Soluk and representatives of the Hospital were made negligently and constitute a breach of duty owed by one or more of the defendants to the plaintiffs and that the plaintiffs relied upon these representations to their own detriment. The plaintiffs state that but for the negligent misrepresentations they would not have entered into the agreement to recruit the new ophthalmologist.

**16** The plaintiffs allege that they have suffered damages, including but not limited to damages for loss of income and breach of contract and that full particulars will be provided prior to trial and that the defendants are also liable for exemplary, aggravated and punitive damages.

**Issue 1 - Should the plaintiffs' claim be dismissed in that it discloses no reasonable cause of**

**action pursuant to Rule 21.01(1)(b)?**

**17** The test to be applied under Rule 21.01(1)(b) is whether it is plain and obvious that the Statement of Claim discloses no reasonable cause of action. On a Rule 21.01(1)(b) motion, (i) the material facts pleaded are taken as proven unless they are based on assumptive or speculative conclusions which are incapable of proof; (ii) the novelty of the cause of action is of no concern; (iii) the Statement of Claim is to be read generously to accommodate drafting deficiencies; and (iv) if the claim has some chance of success, the action should be allowed to proceed. See *Hanson v. Bank of Nova Scotia* (1994), 19 O.R. (3d) 142 (C.A.). The plaintiffs submitted that the Court should not look beyond the pleadings and determine if the action has any chance of success.

**18** The plaintiffs allege that there was a contract entered into pursuant to which they would participate in the recruitment of the new ophthalmologist and in exchange the Hospital would not reduce the plaintiffs' existing OR time.

**19** The defendants take the position that there is no privity of contract between any physicians and the Hospital and further that physicians are independent contractors to whom the "privilege" of using the hospital facilities is afforded and, the relationship is neither one of employment nor contractual.

**20** It seems to me that the allegations in the Statement of Claim with respect to breach of contract do not necessarily relate, in their entirety, to the issue of privilege. On its face, the breach of contract claim relates, at least in part, to the issue of the recruitment of a new ophthalmologist.

**21** On the issue of negligent misrepresentation, the Statement of Claim must allege the five elements of that tort: (i) the existence of a duty of care, based on a "special relationship; (ii) that the representation was untrue, inaccurate or misleading; (iii) that the representor acted negligently in making the representations; (iv) that the representee relied upon the representations and (v) that damage to the representee resulted.

**22** In my view the Statement of Claim alleges the required elements of a tort, save and except for aspects of the fifth element, (as against the Hospital), namely that damage to the representee resulted. My findings with respect to this issue are canvassed more fully below and will require the plaintiffs to make fundamental amendments to the Statement of Claim.

**23** Although the foregoing leads to the conclusion that the plaintiff has survived the attack under Rule 21.01(b), this does not put an end to the inquiry.

**Issue 2 - Should the plaintiffs' claim be dismissed on the grounds that the Court has no jurisdiction over the subject matter pursuant to Rule 21.01(3)?**

**24** The defendants have also moved under Rule 21.01(3) to dismiss the action on the grounds that the Court has no jurisdiction over the subject matter of the action. In this regard, the affidavit of Ms.

Caplan is relevant.

**25** Ms. Caplan deposes that this dispute centres around the allocation of OR time and that the determination of OR time is made by the ORUC.

**26** On September 8, 2004, the ORUC held a meeting to determine OR time with respect to the new ophthalmology recruit. At this meeting it was decided that a certain OR time block previously assigned to Ophthalmology Service would be given up. The plaintiffs disagreed with this determination and they appeared before the MAC on January 19, 2005. A motion was tabled and proposed that the OR block "be returned to the Service of Ophthalmology". No one voted in favour of the motion. Six members voted against the motion, with one abstention. The reasons for the decision were:

1. The Service of Ophthalmology currently utilized only 71% of their OR time, indicating that the group has sufficient OR time.
2. The OR Utilization procedure was followed and the OR Utilization Committee acted fairly and equitably in their assessment and made decisions based on the best utilization of the Hospital's OR resources.

**27** On January 20, 2005, the MAC released its decision and reasons. The reasons for the decision were the same as those provided at the meeting held the previous day.

**28** On April 26, 2005, the Trustees held a special meeting to consider the MAC decision. The MAC decision was affirmed by the Trustees and the plaintiffs were informed of this decision by letter dated May 4, 2005.

**29** The notification stated that after careful and lengthy deliberation, the Trustees affirmed the recommendation of the MAC for the following reasons:

1. The recommendation of the MAC was based on an accurate and equitable application of the principles associated with the assignment of OR time by the OR Utilization Committee, based on utilization by the service and the respective individual physicians.
2. The representation made regarding OR time for the new ophthalmologist was respected.
3. It is further recognized that any representation or assignment of OR time has been and will continue to be subject to current and future application of OR allocation principles and requirements, as based on the best interest of the patients and circumstances affecting the hospital including resources available.

**30** The plaintiffs made a request for hearing before the Appeal Board, pursuant to s. 41 of the Act, but subsequently abandoned their appeal, and brought this action.

**31** The defendants submit that this Court lacks the jurisdiction to hear this action. The defendants submit there is no privity of contract as between the plaintiffs and the Hospital. The plaintiffs are independent practitioners to whom the "privilege" of using hospital facilities is afforded. The central issue is that of the plaintiffs' privileges with respect to OR time and, therefore, any change with respect to the amount of OR time allocated to the plaintiffs would be tantamount to a change in privilege. They further submit that any dispute between a physician and a hospital with respect to the issue of privileges is governed by the Act.

**32** The defendants submit that the plaintiffs are attempting to circumvent the statutory appeal route by bringing this claim in the common law courts and that the courts have consistently dismissed claims/injunctions/applications for judicial review in situations where the statutory right of appeal has not been properly exercised.

**33** In *Jain v. North and West Vancouver Hospital Society* (1974), 43 D.L.R. (3d) 291, the plaintiff physician brought an application for an interlocutory injunction to allow him to practice in the defendant's hospital pending trial of an action in which he brought a mandatory injunction requiring the hospital to re-admit him to the staff. The regulations thereby provided for an appeal to the Medical Appeal Board which the physician did not exercise. Meredith J. stated:

If the interlocutory injunction here sought were granted, the function of the Medical Appeal Board would be totally bypassed, indeed usurped, on slender evidence indeed. If the injunction were made final at trial the Court, it seems to me, would be going much further.

**34** In *Lawson v. Toronto Hospital Corp.* [1991] O.J. No. 463, the plaintiff physician brought a motion for an interim injunction for various forms of relief with respect to the plaintiffs' privileges with respect to use of the operating rooms at the Toronto Hospital. The physician submitted that the hospital reduced the number of hours during which he could use the operating rooms, thereby depriving him of his full privileges. In addition, it was alleged that the acts of the hospital were exercised for wrongful purposes. Davidson J. found that former s. 38 of the Act (now s. 41) did provide the procedure for the doctor's dispute resolution and applied the principles in *Jain* and *Re Williams v. Board of Directors of Kemptville District Hospital* (1986), 29 D.L.R. (4th) 629. Davidson J. was of the view that if the effect of the steps taken amounted to "substantially altering his hospital privileges", Dr. Lawson had recourse to s. 38 of the Act.

**35** The defendants submit that this Court has no jurisdiction to hear this claim as the plaintiffs have attempted to characterize the dispute as a breach of contract and misrepresentation, but it still remains nothing more than an application for judicial review of the decision of the MAC.

**36** The plaintiffs were unable to reference any Canadian case involving a dispute over privileges where the physicians successfully sought direct redress in the courts as opposed to following the statutory process as set out in the Act, or its equivalent in a jurisdiction outside of Ontario.

**37** However, the plaintiffs submit that this is an action for damages arising out of an alleged breach of contract and/or negligent misrepresentation by the Hospital. Further, none of the cases cited by the defendants stand for the proposition that physicians cannot have privity of contract or that they cannot commence actions for damages arising out of breach of contract and negligence against Hospitals in relation to decisions affecting their privileges.

**38** They further submit that although the board is the administrative tribunal responsible for deciding appeals under the Act, the board does not have the required jurisdiction to award damages. Consequently, the plaintiffs submit that they were unable to request a remedy of damages from the board through the statutory appeal route and accordingly, they can commence an action before the courts for such a remedy. For authority for the proposition that the board cannot award damages, they rely on *Straka v. Humber River Regional Hospital et al.*, [2000] O.J. No. 4212 (C.A.).

**39** It would also appear that the plaintiffs' argument does have some further support in s. 13 of the Act which contemplates that there can be an action for damages against a member of the staff or of a board for actions not taken in good faith. The section provides:

No action or other proceeding for damages or otherwise shall be instituted against any member of a committee of the medical staff of a hospital or of a board or of the staff thereof for any act done in good faith in the execution or intended execution of any duty or authority under this Act or the regulations or for any alleged neglect or default in the execution in good faith of any such duty or authority.

**40** The plaintiffs rely on four cases for the proposition that physicians can bring actions against hospitals for breach of contract and/or negligent misrepresentation, and that the Court has the jurisdiction to hear any such actions.

**41** The case of *Aynsley et al. v. Toronto General*, [1969] 2 O.R. 829 (C.A.) can be distinguished. It was an action for medical malpractice. One of the issues considered by the Court was the liability of a hospital for the negligent act or omissions of an employee vis-à-vis a patient. It was not a case where a physician brought an action against a hospital for breach of contract and/or negligent misrepresentation.

**42** The case of *Sheppard v. Colchester Regional Commission*, [1994] N.S.J. No. 215 (S.C.) can also be distinguished. This case did involve the claim of a physician for damages arising from breach of contract. Certain actions taken by the board in respect of a suspension and a non-renewal of privileges were not in accordance with the powers of the board as set out in the By-laws. There is nothing on the record to suggest that in this case the board was not acting in accordance with its powers.

**43** The case of *Shaver Hospital for Chest Diseases v. Salasar*, [1978] O.J. No. 717 (S.C.J.) can also be distinguished. This case arose out of a contract of employment between the plaintiffs and the

defendant physician Dr. Salasar. The employment contract established that Dr. Salasar was on a straight salary basis of \$40,000 per annum, plus certain fringe benefits and then all fees received by him from OHIP for professional services rendered in the course of his employment were to be paid over to the hospital. There is nothing on the record to suggest that the plaintiffs in this case were operating under this type of agreement.

**44** The case of *Donald v. Sarnia General Hospital*, [2000] O.J. No. 5764 (S.C.J.) is also distinguishable. This case involved an action by doctors as against the hospital claiming for compensation owing to them under the terms of their contract. It was a question of sorting out financial arrangements which existed between the parties through most of the 1990s. It was not a question of privileges.

**45** In my view, the Act establishes a comprehensive code under which the hospital determines privileges for a member of staff.

**46** Section 36 establishes the basis upon which the board (defined in the Act) may determine hospital privileges. Having undertaken that responsibility, it follows that issues relating to privilege are determined in accordance with the provisions of ss. 36-43. Although the board has not specifically been granted the power to award monetary damages, it does have the power to establish a MAC, which has the authority to consider and make recommendations to the board respecting any matter referred to it under s. 37 and perform such other duties as assigned to it by or under this or any other Act or by the board.

**47** Every application in respect of privileges is to be submitted to the administrator who immediately refers such application to the MAC.

**48** The MAC in turn makes recommendations in respect of each application in writing to the board. The MAC also gives written notice to the applicant and to the board of its recommendation. Thus, an applicant can then require a hearing by the board in accordance with subsection 37(7). At a hearing by the board, the person requiring the hearing is afforded an opportunity to examine before the hearing any written or documentary evidence that will be produced at the hearing.

**49** The findings of fact of the board pursuant to a hearing are to be based exclusively on evidence admissible or matters that may be noticed under ss. 15 and 16 of the *Statutory Powers Procedure Act*.

**50** Any member of the medical staff of a hospital who considers himself or herself aggrieved by any decision which substantially alters his/her privileges is entitled to written of the decision and a hearing before the Appeal Board.

**51** The procedures in respect of a hearing before the board also apply to a hearing before the Appeal Board. The Appeal Board has the authority to substitute its own opinion for that of the board, person or body making the decision appealed from.

**52** There is a further procedure available to any party to appeal from the decision of the Appeal Board to the Divisional Court, which appeal may be made on a question of law or fact or both and the Court may substitute its opinion for that of the Appeal Board.

**53** It seems to me that in establishing such a comprehensive code to deal with issues of privilege, it is not open for this Court to usurp the statutory regime by conducting a hearing independent from the process as set out in the Act. This Court lacks the jurisdiction to do so. In my view, parties do not have access to the Court to determine issues of privilege in the absence of following the statutory route.

**54** The bringing of an action for damages is not inconsistent with determining a privilege issue in accordance with the statutory process. However, it is incumbent upon any party who wishes to bring an action for damages, arising out of a privilege issue, to first proceed by way of the statutory route to establish the basis for sustaining the claim in damages. There may very well be situations in which an applicant, by following the statutory process, will succeed in establishing the basis for a remedy in damages. But it is only after establishing the basis through the statutory process that it is open for the applicant to then bring an action for damages in the ordinary courts. To permit applicants to commence actions for damages on a privilege issue without following the statutory process would result in a system whereby a dissatisfied party would be able to bypass the specialized tribunal, a result that, in my view, is not permitted under the Act.

**55** In the circumstances of this case, the allocation of OR time is a matter of privilege which was determined under the regime set out in the Act. This Court can determine claims for damages arising out of this privilege issue, but such determination has to take into account that the issues relating to privilege have been determined.

**56** The plaintiff has brought this action in respect of breach of contract and negligent misrepresentation, which can, theoretically result in a claim for damages. However, in its current form, the Statement of Claim does not qualify as a proper pleading as against the Hospital. It must be substantially revised to take into account that all matters relating to the issue of privilege have been determined, in a final sense, under the Act. In the result, the plaintiffs' claim for damages for loss of income cannot be sustained. Consequently, this cause of action is to be limited to non-income areas. The defendants' motion under Rule 21.01(3) with the respect to the claim as against the Hospital is granted. The Statement of Claim is struck out, as against the Hospital, but the effect of this order is to be stayed for 30 days so that the plaintiffs, if they wish to do so, may move for leave to amend its pleading in the manner required.

**57** With respect to the claim as against Ms. Soluk, the plaintiffs allege that much of her involvement predated the determination of privileges. It is conceivable that the plaintiffs may have an independent cause of action against her. In the result, the defendants' motion to have the claim struck as against Ms. Soluk is dismissed.

**58** There has been divided success on the motion. Insofar as Ms. Soluk and the Hospital did not

have separate representation, it is appropriate that the plaintiffs and the defendants each bear their own costs.

G.B. MORAWETZ J.

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