Court of Appeal File Number: 16 – 17 – CA

IN THE COURT OF APPEAL OF NEW BRUNSWICK

BETWEEN:

MR. BRYAN SUTHERLAND

Appellant (Plaintiff),

-and-

DR. MOSES ALATISHE

Respondent (Defendant).

FURTHER SUBMISSION

Mr. Bryan Sutherland PI.

The Self-Representing Appellant (Plaintiff)

25 Lorne Street,
Sackville, New Brunswick, Canada
Postal Code: (E4L 3Z8)

Stewart McKelvey Law Firm
Attorney Robert Dysart, the Defence,
Solicitor for the Defendant Dr. Moses Alatishe,
Suite 601, Blue Cross Centre,
644 Main Street,
Moncton, New Brunswick, Canada
Postal Code: (E1C 1E2)

BRYAN SUTHERLAND PI.

PART I: **INDEX**

PART II: FACTS:

1. The Appellant (Plaintiff) Mr. Bryan Sutherland commenced this action on January 20th 2015. Throughout this civil proceeding it has been discovered/admitted that the Respondent (Defendant) Dr. Moses Alatishe:

(a) Had no liability insurance which covered his medical practice, during the years that he diagnosed/treated the Appellant;

(b) Had no objective medical test or scientific evidence that validated his claims/diagnosis that the Appellant had a:

(i) Brain disease therein the Appellant's brain;

(ii) Brain defect therein the Appellant's brain;

(iii) Brain disability therein the Appellant's brain;

(iv) Brain abnormality therein the Appellant's brain;

(v) Chemical imbalance therein the Appellant's brain;

(vi) Biochemical imbalance therein the Appellant's brain;

(vii) Biological disease therein the Appellant's brain;

(viii) Genetic or hereditary problems therein the Appellant's brain;

(ix) Low serotonin therein the Appellant's brain;

(x) Dopamine excess therein the Appellant's brain;

(xi) Chronic illness therein the Appellant's brain.

(c) Had no cure to remedy his claims/diagnosis for he had never discovered, detected, established, proved, or found any problem therein the Appellant's brain.

2. The Appellant's CT scan of his brain read "no evidence of space occupying disease." The Appellant's EEG results were "Normal." The facts are therein the Appellant's medical chart, included as documentary evidence referenced therewith the Appellant's Affidavit of Documents, deposed at examination, acknowledged as fact therein admissions, and is reiterated by the

Appellant's expert witnesses provided therein the expert's reports. None of the evidence has been heard yet, because there has been no trial yet, and there has only been preliminary hearings.

3. Throughout this proceeding the Defence have sought many remedies and argued many excuses which has delayed this proceeding from seeing trial. Some of these many remedies and/or excuses are:

(a) Dismissing the action of the Plaintiff on the grounds that he does not have the legal capacity to commence or continue the action;

(b) Appointing a litigation guardian to continue the action on the grounds that the Plaintiff is incapable of managing his own affairs;

(c) The Plaintiff only has a grade 10 education (compared to the education of the Defendant);

(d) That summary judgment be granted in favor of the Defendant on the grounds that the Plaintiff's claim is statute-barred;

(e) That summary judgment be granted in favor of the Defendant as there is no merit to the Plaintiff's claim as it does not disclose a cause of action; and

(f) That the Appellant is out of time to appeal.

4. More specifically, the Respondent filed his second motion seeking 2 remedies from the Honorable Court of Queen's Bench. The motion was heard on May 25th 2016, at which the Defence asked for the 2 remedies as follows:

(a) **Pursuant to Rule 22.01(3) and Rule 22.04 of the Rules of Court, that summary judgment be granted in favor of the Defendant, Dr. Moses Alatishe, in the within action, and the Plaintiff's claim be struck, on the basis that there is no merit to the Plaintiff's action as it is statute-barred pursuant to section 1, 2, 5, and 27 of the *Limitation of Actions Act, SNB 2009, c L-8.5*** **("LAA")**; and

(b) In the alternative, pursuant to Rule 22 of the Rules of Court, that summary judgment be granted in favor of Dr. Moses Alatishe as there is no merit to the Plaintiff's claim as it does not disclose a cause of action.

5. Both of the remedies sought were technical and preliminary summary judgments, being a judgment following hearing, not judgment following trial. The remedy sought by the Respondent for summary judgment being that the Appellant's claim was statute-barred was not granted. This remedy was properly dismissed as such by the Honorable Justice George S. Rideout.

6. The Respondent (Defendant) has cross-appealed on the Honorable Justice George S. Rideout's refusal to strike the Plaintiff's claim on the basis of the *Limitation of Actions Act, SNB 2009, c L-8.5* ("LAA"). The Appellant contests and disputes the Respondent's cross-appeal.

PART III: ISSUES:

7. The sole issues to be decided on this cross-appeal are as follows:

A: Should the cross-appeal of the Respondent (Defendant) be dismissed on the grounds that there is no computable limitation period, prior to the evidence being heard at a full trial?

B: In the alternative, should the cross-appeal of the Respondent (Defendant) be dismissed on the grounds that the Appellant (Plaintiff) commenced the action within time, pursuant to section 2 of the *Limitation of Actions Act, SNB 2009, c L-8.5* ("LAA") and/or within the 1 year postponement granted after termination of disability?

PART IV: LAW AND ARGUMENTS:

8. For clarification on decisions regarding the limitation period in this matter of *Sutherland v. Alatishe 2016 NBQB 105*, the decision found therein the Appellant's Appeal Book: **TAB: F:15,** beginning at **page 89**, where the Honorable Justice George S. Rideout states:

> [21] I am satisfied that the relatively new **Limitation of Actions Act** is applicable to this matter and **there is no "former limitation period"** to be applied to this matter. That being said, section 5(2) of the **Act** states that: "[a] claim is discovered on the day in which the claimant knew or ought reasonably to have known."
>
> [22] In this particular matter, it is not **clear when Mr. Sutherland knew or ought to have known, that he was suffering from mental issues which may have been caused by the treatment prescribed by** his doctors including **Dr. Alatishe. <u>This is clearly a factual determination which must be made after hearing all the evidence</u>**.
>
> [23] Consequently, it may be that Mr. Sutherland's claim is "statute-barred" or it may not**. <u>But that can only be determined once all the evidence is heard and the Court can evaluate this evidence</u>**. The evidence before the Court is that Dr. Alatishe felt that Mr. Sutherland was not mentally capable to carry on this action and asked the Court to dismiss the action as he did not have the legal capacity to bring or continue the action. He also felt that a litigation guardian should be appointment due to mental incompetence or being unable to manage his own affairs. This was the first motion before the Court heard June 8th 2015.
>
> [24] I was satisfied at the hearing that Mr. Sutherland could manage the action and was capable of understanding the issues in this matter. However, some may question my competence to make that determination. Consequently, **<u>I believe that the Court should only decide when Mr. Sutherland first knew or ought to have known</u>** as contemplated under section 5 of the **Act <u>after a fulsome examination of all of the evidence</u>**.
>
> **[<u>Emphasis Added</u>]**

9. The Appellant agrees that in this specific case **<u>this is clearly a factual determination which must be made after hearing all the evidence</u>** and **<u>that can only be determined once all the evidence is heard and the Court can evaluate this evidence</u>** at trial. The Appellant agrees **<u>that the Court should only decide when Mr. Sutherland first knew or ought to have known</u>** … **<u>after a fulsome examination of all of the evidence</u>** at trial. The Appellant turns to the LAA hereunder:

10. The general limitation period (Part 2) is clear by *Limitation of Actions Act, SNB 2009, c L-8.5* ("LAA") set forth as follows:

General limitation periods

5(1) Unless otherwise provided in this Act, **no claim shall be brought after the earlier of**

(a) **two years from the day on which the claim is discovered**, and

(b) fifteen years from the day on which the act or omission on which the claim is based occurred.

5(2) A claim is discovered on the day on **which the claimant first knew or ought reasonably to have known**

(a) that the injury, loss or **damage had occurred**,

(b) that the injury, loss or **damage was caused by** or contributed to by an act or omission, and

(c) that the **act or omission was that of the defendant**.

Continuous act or omission

6 If a claim is based on a continuous act or omission, the act or omission is deemed for the purposes of calculating the limitation periods in section 5 to be a separate act or omission on each day it continues.

[Emphasis Added]

General Limitation Period:

11. The physician-patient relationship between the Appellant and Respondent was first established in the year of 2006, where they first met and first saw each other on a professional relationship basis. The action was commenced on January 20th 2015. The Appellant submits that the entire history between the Plaintiff and Defendant was well within 15 years from the day on which the acts and/or omissions on which the claim is based had occurred, pursuant to Section 2, paragraph 5(1)(b) of the LAA. Therefore, the sole question and sole dispute of the limitation period is based on when the 2 years from the day on which the claim was discovered had begun, pursuant to Section 2, paragraph 5(1)(a).

12. To clarify for this Honorable Court, if there is a computable limitation period, then we have to find when the day on which the claim was discovered. The Appellant (Plaintiff) agrees that there is no computable limitation period **prior to a full trial having been heard** for 4 reasons.

The Appellant puts forth those 4 same reasons and arguments which are found within the sections titled *Medical Records*, *Allegations, Disability, and Complexity*.

Addressing the Respondent's Submission:

13. The Appellant was served with the Respondent's Submission on Monday January 22nd 2018, and as such acknowledges receipt on that same day. Rule 62.19 reads:

> **62.19 Respondent's Submission**
>
> (1) Each respondent shall prepare a Respondent's Submission.
>
> (2) The Respondent's Submission shall consist of 5 parts and 2 schedules as follows:
>
> **Part I** An index of the contents;
>
> **Part II** A statement of the facts in Part II of the Appellant's Submission which the respondent accepts as correct, and those with which he disagrees, and a concise statement of any additional facts relied upon with such references to the evidence as may be necessary;
>
> **Part III** The position of the respondent with respect to each issue raised by the appellant followed by a concise statement of the argument, law, and authorities relied upon;
>
> **Part IV** Any additional issues raised by the respondent, each issue being followed by a concise statement of the argument, law, and authorities relied upon;
>
> **Part V** A concise statement of the order sought from the Court of Appeal, including any special disposition with regard to costs;
>
> **Schedule A** A list of authorities in the order referred to in the Submission; and
>
> **Schedule B** The text of all relevant provisions of Statutes or Regulations (or copies of the complete Statute or Regulation may be filed and served with the Submission).
>
> (3) **Where a respondent has given notice of cross-appeal**
>
> (a) his submission respecting the cross-appeal shall be included in his Respondent's Submission, and

> (b) **the appellant may deliver a Further Submission respecting the cross-appeal within 5 days from the receipt of the Respondent's Submission.**
>
> **[Emphasis Added]**

14. Pursuant to Rule 62.19(3)(b), the Appellant has complied with delivering his Further Submission respecting the cross-appeal within the 5 days from receipt of the Respondent Submission, being the date of Monday January 22nd 2018. Even further, the Defendant starts his cross-appeal on page 29 of the Respondent's Submission. Dated for January 18th 2018. The Appellant addresses the cross-appeal hereunder.

15. The Appellant disputes that the learned motions judge erred when he did not grant summary judgment on the basis of the **Limitations of Actions Act** (the LAA hereinafter). The Appellant advances that, when the LAA was pleaded, if he had to show the Court anything, it was that **the Appellant had to show when the claim was first discovered**, not when the Cause of Action was first discovered.

16. The Respondent takes the position that the Cause of Action was first discovered in January 2013, but this is incorrect. With respect to the professional relationship basis between the Appellant and Respondent, the Appellant was last seen by the Respondent in his private office on the date of May 15th 2013. I'm directing your attention to the Appellant's Book of Essential References (light blue) **TAB 8**: which is a letter addressed to Attorney Wynn W. Meldrum from Dr. Moses Alatishe. This is of most importance, for the letter indicates and is underlined, **Mr. Sutherland ceased to be my patient since his last visit on May 15th 2013**. It is further submitted that the last time that the Respondent cared for the Appellant was May 2013 as indicated in the letter, not January 2013 as asserted by the Respondent Submission.

17. Two very important conclusions to draw from this is, firstly if the Cause of Action arose in January 2013, the claim was commenced in January 2015, which is within 2 years of the date provided by the Respondent's Submission. Secondly, the professional relationship actually ended

between the Appellant and Respondent in May 2013, not January 2013, which is still within 2 years of the action being commenced in January 2015.

18. The Appellant submits that he did show the learned motions judge when he first discovered the claim, and that the learned motion judge did indicate this in his decision, which is set forth hereunder in the section *Medical Records* hereinafter.

19. The Appellant contests that he had to provide an explanation of why he did not know or could not have reasonably known about the factual issues, for the Appellant takes the position that he commenced the action within time. Never the less, the Appellant had provided his explanations to the learned motions judge and re-advances his explanations hereunder in the sections *Medical Records*, *Allegations*, *Disability*, and *Complexity* hereinafter.

20. The final argument in the Respondent's Submission is a "contrary" allegation in the Statement of Claim that the Plaintiff was opposed to some of the Defendant's actions taken during the hospitalization in 2006, including meeting with family members. While the Appellant wishes to remind this Honorable Court that he was heavily sedated for years by the Defendant, which caused the Appellant serious side effects and dangerous adverse reactions, the Appellant was also placed under disability by the Defendant. This is addressed in the section *Disability* hereinafter. The Appellant further submits that the Respondent's Submission of, "on the contrary," is not a contrary, but rather the true contrary is the **contrary intentions that appear**, which are reiterated as follows:

(i) The Defence have argued that this medicolegal matter raises complex issues;

(ii) The Appellant (Plaintiff) is a self-representing layman, and is not protected by a lawyer, and is particularly vulnerable;

(iii) The Appellant (Plaintiff) has no prior history with the Courts for any criminal or civil reasons, and this is his first experience with learning the *Rules of Court* of NB;

(iv) The Appellant (Plaintiff) is untrained in the area of law and is untrained in any post-secondary education;

(v) The Appellant (Plaintiff) is untrained in the area of medicine and as a former patient is particularly vulnerable;

(vi) The Appellant (Plaintiff) has a grade 10 education and does not have a diploma and has acted to the best of his educated ability;

(vii) The Appellant (Plaintiff) had **very little money and resources** prior to summary judgment being granted, **and had informed the Court that he could not afford expert evidence** prior to summary judgment being granted;

(viii) The Appellant (Plaintiff) had submitted and served 2 expert reports prior to summary judgment being granted, one being a medical expert report, both of which were wrongly prejudged by the presiding preliminary justice, not a trial justice;

(ix) The Appellant (Plaintiff) has further submitted 2 more medical expert reports, since summary judgment, and a medical expert has amended his expert report since Summary Judgment.

21. Now that the Appellant has replied to the Respondent's Submission and has further submitted why he was not late of commencing the action within 2 years pursuant to the LAA and/or has given an account and explained the reason for any potential delay as to why he did not or could not discover the claim, the Appellant advances his 4 sections as to the limitation period, which are headed *Medical Records*, *Allegations, Disability, and Complexity* hereinafter.

Medical Records:

22. For years the Appellant and his family were under the belief that the Appellant was terminally sick with a genetic brain disease. The Respondent had informed the Appellant's family that the genetic brain disease would peek at age 25. The Appellant turned age 25 in the year of 2013. With the dramatic improvement in the Appellant's health with no psychotropic drugs or medical treatment without relapse, and no peeking genetic brain disease emerging, the Appellant had requested his medical records from the Respondent in approximately mid-2013, but was refused to be produced by the Respondent, despite the multiple attempts to have the documents

disclosed from his private office. Months later the Appellant, his mother, and his grandmother hired a lawyer to obtain those medical documents of the Appellant from the Respondent's office and the health authority.

23. With respect to the medical records of the Appellant (Plaintiff) obtained from the Respondent (Defendant)'s private office, I am directing your attention to the Appellant's Book of Essential References (light blue) **TAB 7**: which is a request letter addressed to the Respondent Dr. Moses Alatishe from the Appellant's lawyer Attorney Wynn W. Meldrum. The request was made and the date of the letter is February 5th 2014.

24. With respect to the medical records of the Appellant (Plaintiff) obtained from the health authority, I am directing your attention to the Appellant's Book of Essential References (light blue) **TAB 9**: which is a request letter addressed to the Horizon Health Network from the Appellant's lawyer Attorney Wynn W. Meldrum. The request was made and the date on the letter is April 29th 2014.

25. The *Personal Health Information Privacy and Access Act* (the PHIPAA) reads:

> ACCESS TO PERSONAL HEALTH INFORMATION
>
> **Right to examine or copy personal health information**
>
> Right to examine or copy personal health information
>
> 7(1)Subject to this Act, **an individual has a right**, on request, **to examine or receive a copy of his or her personal health information maintained by a custodian.**
>
> 7(2)**A request made under this section shall**
>
> (a) **be made to** the custodian that **the individual believes has custody** and control **of the personal health information**, and
>
> (b) contain sufficient detail to permit the custodian to identify and locate the record with reasonable efforts.
>
> 7(3)A custodian **may require a request to be in writing.**
>
> [...]

Custodian's response

10(1)**A custodian shall respond to a request made under section** 7 as promptly as required in the circumstances, but **no later than 30 days** after receiving it, unless the time limit for responding is extended under subsection (6) or (7) or the request is transferred to another custodian under section 11.

10(2)The failure of a custodian to respond to a request within the 30-day period is to be treated as a decision to refuse to permit the personal health information to be examined or copied.

10(3)**In responding to a request, a custodian shall do one of the following**:

(a) **make the personal health information available for examination and provide a copy**, if requested, to the individual;

(b) inform the individual in writing if the information does not exist or cannot be found; or

(c) inform the individual in writing that the request is refused, in whole or in part, for a specified reason described in section 14, and advise the individual of the right to make a complaint about the refusal under Part 6.

[Emphasis Added]

26. The Respondent (Defendant) had denied the Appellant (Plaintiff) his right to examine a copy of his medical records in 2013, until the Appellant, his mother, and his grandmother hired a lawyer to obtain the information in 2014. The Respondent had replied to the Appellant's lawyer's letter. The Appellant's Book of Essential References (light blue) **TAB 8**: is a reply letter addressed to Attorney Wynn W. Meldrum from the Respondent (Defendant). The date on the letter is February 11th 2014. This was the first time that the Appellant had ever examined his medical records, and this is the first time that the Appellant had known or ought to have known, *as a lay person*, that he was injured by an error by the Defendant.

27. The health authority had also responded to Attorney Meldrum's Request either within the 30 days required or around the time of the 30 day requirement. This is also when the Appellant (Plaintiff) had first known or ought reasonably to have known, *as a layman*, that an error by the Defendant had occurred and injury was suffered as a result.

28. In this matter of *Sutherland v. Alatishe 2016 NBQB 105*, the decision found therein the Appellant's Appeal Book: **TAB: F:15**, where the Honorable Justice George S. Rideout states:

> [11] **Mr. Sutherland** says that he **only saw his medical records in 2014**, "which for the 1st time in my life, I was able to review my health records and deduce my medical history [...]." **He commenced the action on January 20th 2015.**
>
> **[Emphasis Added]**

29. The Appellant submits that, as a lay person, **the first time that the Appellant had ever reviewed his medical records was in 2014, which is when the Appellant first knew or ought reasonably to have known that wrongful acts and/or omissions had been committed by the Defendant**, and that injury and damage was suffered as a result. The action was commenced on January 20th 2015, by the Appellant taking reasonable steps, *as a lay person*, and was well within 2 years of the claim being discovered, pursuant to Section 2, paragraph 5(1)(a). This is also proof that the Appellant did give an account to the learned motions judge on the motion for summary judgment regarding the LAA.

30. In the alternative, for the reasons described herein this section *Medical Records*, the Appellant submits that this section shows the Court that without the Appellant being able to review his medical records until 2014, this is a provided reasonable explanation for why he did not know or could not have reasonably known about the factual issues.

Allegations:

31. Despite the Appellant first seeing his medical records in 2014 and being the first time, as a lay person, that he knew or ought reasonably to have known that an error by the Respondent had occurred, and that the act or omission committed by the Defendant had caused and resulted in damages to the Plaintiff, there is still an underlying reason why the limitation period cannot be established until after all of the evidence has been heard at a full trial, which is addressed hereunder.

32. The Appellant (Plaintiff) has alleged various Breaches of Contract therein his Statement of Claim, filed on January 20th 2015. None of the evidence has yet been heard for there has been no trial on the matter and issues yet. I am directing your attention to the Appellant's Appeal Book (gray) **TAB E:8**: which is the Appellant's Further Notice of Action with Statement of Claim attached (Form 16A) beginning at **page 29**. Specifically, I am directing your attention to paragraph 79, which reads:

> 79. After the eight months (approximately), the Plaintiff, Mr. Bryan Sutherland hired a lawyer to get the withheld personal health records from the Defendant. **The Defendant did not give the Plaintiff, Mr. Bryan Sutherland's attorney the amount of information requested by the attorneys own writing.**
>
> **[Emphasis Added]**

33. The Appellant has alleged that the Defendant withheld some of the personal health information, from Attorney Meldrum, at the Defendant's private office, which was later confirmed when the Defence had filed their first motion and included documents which were not disclosed to the Plaintiff by the Defendant and **had belonged to no other *custodian of records*.**

34. Furthermore, the Appellant submits that he had still not discovered the medical errors, in part, or as a whole, prior to commencing the action on January 20th 2015, for he was refused his complete medical records from the Defendant's private office which will be established and proved at a full trial.

35. The Appellant submits that in this specific case **this is clearly a factual determination which must be made after hearing all the evidence** and **that can only be determined once all the evidence is heard and the Court can evaluate this evidence** at trial. The Appellant agrees **that the Court should only decide when Mr. Sutherland first knew or ought to have known** … **after a fulsome examination of all of the evidence** at trial.

36. In the alternative, for the reasons described herein this section *Allegations*, the Appellant submits that this section shows the Court that without being able to obtain his **complete medical records** and medical chart from Dr. Alatishe's private office until after litigation was

commenced, this is a provided reasonable explanation for why he did not know or could not have reasonably known about the factual issues.

Disability:

37. Despite the LAA limitation period, it is still a reality that the Appellant was placed under disability by the Defendant, and that disability was terminated after the Plaintiff had first seen his medical records in 2014.

38. The Defendant is a member of the Canadian Medical Protective Association (the CMPA hereinafter). I am directing your attention to the Appellant's Book of Essential References (light blue) **TAB 10**: which is A Medico-Legal Handbook for Physicians in Canada fifth edition produced by the CMPA. More specifically, the limitation period carries a **postponement until termination of disability, then action must be commenced within 1 year**, in New Brunswick.

39. After the Appellant reviewed his medical chart in 2014 and realized that he was not disabled or terminally sick with a genetic brain disease, the disability was terminated thereafter. The medical records from the Defendant's private office were disclosed, in part, as of February 11th 2014, and the Hospital Records obtained by the lawyer were disclosed after April 2014, the action was then commenced January 20th 2015, well within 1 year of the postponement, and in which the action was commenced within 1 year of the termination of disability.

40. In the alternative, for the reasons described herein this section *Disability*, the Appellant submits that this section shows the Court that he was under disability for years, and this is a provided reasonable explanation for why he did not know or could not have reasonably known about the factual issues.

41. It is also worth mentioning that it is true that the professional relationship between the Appellant and Respondent was established in March 2006, and the Appellant was discharged from the Hospital in April 2006. Since there has been no trial, none of the evidence has been heard yet. Further submitted, that the material facts therein the Statement of Claim has not been proved yet. While the Respondent's Submission has argued "on the contrary" time of the material

facts alleged in the claim from 2006 and compared this to the action being commenced in 2015, it will be heard at trial that:

(a) The Appellant was heavily sedated by the Defendant in 2006 and forward;

(b) The sedating drugs prescribed by the Defendant caused serious side effects and dangerous adverse reactions to the Appellant (including hallucinations, body aches and pains, and muscle spasms); and

(c) The Appellant and his family were told by the Respondent that the drug effects were caused by a genetic brain disease, as opposed to the drug products themselves.

42. Without the Appellant having been provided informed consent as to the risks and dangers of the Respondent's prescription products and experiencing heavy sedation, and side effects and adverse reactions to the Defendant's prescription products, over a longstanding period of time, these are additional reasons as to why the Appellant did not know or could not have known about the factual issues.

Complexity:

43. In the matter of *Sutherland v. Alatishe 2015 NBQB* the Honorable Justice Rideout states:

> [1] **This matter raises complex issues in the field of mental illness** wherein the Plaintiff, Mr. Bryan Sutherland (Sutherland) may or may not be suffering a mental illness which could affect his mental capacity to commence or continue the action. The other plaintiffs in this action are parents and grand-parents of Mr. Sutherland. The Defendant, Dr. Moses Alatishe (Alatishe), is a psychiatrist who was one of the treating psychiatrist of Mr. Sutherland.
>
> [...]
>
> [39] **Mr. Sutherland has prepared his claim and it is a complex one. While he is competent to bring this action on his own, he is dealing with complex issues which will require the hiring of expert witnesses to support his allegations**. Rather than a litigation guardian he, as would any non-legally educated person, need advice on what he must prove and how it must be proved. But this, in my mind, does not point to Mr. Sutherland requiring a litigation guardian under Rule 7.01(d).
>
> **[Emphasis Added]**

44. While the Appellant has long argued that anybody can see negligence on its face and that an expert witness is not mandatory, the Appellant submits that **any potential complexity is in regards to complex issues in the area of medicine**, not complex issues in the area of mental illness. No matter, the arguments of this matter and its potential complex issues has been held over the Appellant's head, since the beginning, and has repeatedly haunted the Appellant, by some way, at every preliminary hearing.

45. The degree of **medicolegal complexity v. the lay status of the appellant** has been so overly judged, and has beat the life out of the Appellant's claim so bad, that this was the reason that the Appellant's claim was tossed out on a technical and preliminary summary judgment, for not having enough expert evidence to discover the merit of the Appellant (Plaintiff)'s claim, which is why the Appellant has brought his Appeal before your 3 Justices today.

46. The most doublethink and double-standard argument by the Respondent is the **no merit with little experts v. the claim statue-barred and out of time**. It doesn't hold both ways, the action is either complex or it is simple.

47. The Appellant is untrained in law and in medicine. If medicine and medical records are a complex area, in which the merit can only be discovered by a medical expert (Rule 52.03), then it holds same that the medical error can only be discovered by hiring a medical expert (Rule 52.03). To be clear the negligent actions and conduct of the Respondent (Defendant) can only be discovered upon the hiring of a medical expert (Rule 52.03), which only came after the action was commenced.

48. It is completely unreasonable for the Appellant to be forced into obtaining medical expert (Rule 52.03) evidence to discover the merit of his claim, but then for the Defence to spin around on a cross-appeal and argue that the claim is statute-barred and out of time, when the negligent acts and/or omissions could only be discovered upon the opinion of a medical expert (Rule 52.03).

49. I reiterate that the general limitation period (Part 2) is clear by *Limitation of Actions Act, SNB 2009, c L-8.5* ("LAA") set forth as follows:

> **General limitation periods**
>
> 5(1) Unless otherwise provided in this Act, **no claim shall be brought after the earlier of**
>
> (a) **two years from the day on which the claim is discovered**, and
>
> [...]
>
> 5(2) A claim is **discovered on the day on which the claimant first knew or ought reasonably to have known**
>
> [...]
>
> (c) that the **act or omission was that of the defendant**.
>
> **[Emphasis Added]**

50. If this is a complex medicolegal case, as has been long argued by the Defence, then there was no way for the lay **Appellant (Plaintiff) to discover the day on which he first knew or ought reasonably to have known** that malpractice had occurred **and that the acts and/or omissions was that of the Defendant** without the opinion of a medical expert (Rule 52.03), pursuant to the LAA section 2, paragraph 5(2)(c). For if the merit could only be discovered by the opinion of a medical expert (Rule 52.03), then the malpractice could only be discovered by the opinion of a medical expert (Rule 52.03) on that same day conjoined – *merit/malpractice.*

51. The Appellant submits that if the Court sees the discovery of the merit to the claim upon provided expert opinion, then the Court should also see that the negligent actions and conduct of the Defendant were also discovered upon provided expert opinion. Furthermore, if this Court sees this claim as a complex matter and/or issues, then it is respectfully submitted that the claim was discovered upon the provided medical expert (Rule 52.03) evidence, to deduce the medical error, at the same time that the merit was discovered with obtaining hired expert opinion.

52. If this is a complex medicolegal case, then I am directing your attention to the Appellant's Book of Essential References (light blue) **TAB 2**: which is the Expert Report of Neurologist Dr.

Fred Baughman which is dated for July 14th 2016. The Appellant submits that the *merit/malpractice* was discovered, either in whole, or in part, upon this date of July 14th 2016.

53. If this is a complex medicolegal case, then I am directing your attention to the Appellant's Book of Essential References (light blue) **TAB 3**: which is the Expert Report of Psychiatrist Dr. Robert Carroll which is dated for December 20th 2016. The Appellant submits that the *merit/malpractice* was discovered, either in whole, or in part, upon this date of December 20th 2016.

54. If this is a complex medicolegal case, then I am directing your attention to the Appellant's Book of Essential References (light blue) **TAB 4**: which is the Amended Expert Report of Neurologist Dr. Fred Baughman which is dated for January 3rd 2017. The Appellant submits that the *merit/malpractice* was discovered, either in whole, or in part, upon this date of January 3rd 2017.

55. If this is a complex medicolegal case, then I am directing your attention to the Appellant's Book of Essential References (light blue) **TAB 5**: which is the Expert Report of Psychologist Dr. Brenda LeFrancois which is dated for October 11th 2017. The Appellant submits that the *merit/malpractice* was discovered, either in whole, or in part, upon this date of October 11th 2017.

56. While I have already explained the relevance and credibility of each expert report on the Motion for Further/Fresh Evidence, the dates of the Expert Reports still hold and share common existence in time, being all of which came after the action was commenced, and therefore is plain and obvious that the *merit/malpractice* was discovered within 2 years of the action being commenced.

57. In the alternative, for the reasons described herein this section *Complexity*, the Appellant submits that this section shows the Court that without a medical expert to discover a medical error, and discover the medical merit, there was no way to discover the medical malpractice claim, which provides a reasonable explanation for why he did not know or could not have reasonably known about the factual issues.

Limitation Period:

58. The Appellant submits:

(a) The sole fact is that the action was commenced on January 20th 2015;

(b) The issues are that there is no computable limitation period prior to a full trial and all of the evidence being heard for the reasons set forth in this Further Submission;

(c) However, if this Court finds that there is a computable time in which the Plaintiff first knew or ought to have known, then with respect to the Appellant's 4 argued grounds, the Appellant was within time of the LAA and/or the postponement of termination of disability; and

(d) The action was commenced well within the LAA time of 2 years of the claim being discovered and/or within 1 year of the termination of disability.

59. In summation, the Appellant Mr. Bryan Sutherland's concise 4 arguments and final submissions on this cross-appeal are as follows:

(a) The Appellant (Plaintiff) reiterates that, as a lay person, **the first time that the Appellant had ever reviewed his medical records was in 2014, which is when the Appellant first knew or ought reasonably to have known that wrongful acts and/or omissions had been committed by the Defendant**, then commenced the action January 20th 2015, within 2 years of the claim being discovered. Prior to reviewing his medical records, there was no way for the Appellant to know that there was longstanding errors that had occurred;

(b) For clarification on known and knowable, the Appellant (Plaintiff) was clear therein his Statement of Claim, paragraph 79, that the Defendant did not give the Plaintiff's attorney the amount of information requested (being the complete and full file of the Plaintiff from the Defendant's private office), the emerging documents from the Defendant's custody after litigation was commenced was foretelling, for the documents **had belonged to no other *custodian of records***. It was not an err or unreasonable for the Honorable Justice George S. Rideout to decide that **this is clearly a factual determination which must be made after hearing all the evidence** and **that can only be determined once all the evidence is heard**

and the Court can evaluate this evidence at trial. The Appellant agrees **that the Court should only decide when Mr. Sutherland first knew or ought to have known** ... **after a fulsome examination of all of the evidence** at trial before computing and deciding the limitation period, for the Appellant was not provided all of his medical information, which contained the negligent acts/omissions of the Respondent (Defendant);

(c) Despite any question of when the Appellant (Plaintiff) first knew or ought reasonably to have known that the injury, loss, or damage had occurred, and was caused by an act or omission, and was an act or omission of the Respondent (Defendant), the limitation period carried a **postponement until termination of disability, then the action was commenced within 1 year**, after termination of the Appellant's disability; and

(d) In the case of any potential complexity, there was no way for the lay **Appellant (Plaintiff) to discover the day on which he first knew or ought reasonably to have known** that malpractice had occurred **and that the acts and/or omissions was that of the Defendant** without the opinion of a medical expert (Rule 52.03). The Respondent should not be able to have it both ways; if the Appellant cannot discover medical errors without the opinion of a medical expert (Rule 52.03), then the Appellant cannot discover the medicolegal claim (and/or Cause of Action) without the opinion of a medical expert (Rule 52.03). In the case of any potential complexity, the *merit/malpractice* was discovered conjoined upon the production of the medical experts (Rule 52.03), all medical expert (Rule 52.03) evidence came after the action was commenced, and all expert reports being within time of 2 years from the action being commenced.

60. Clearly, there was no err of the Honorable Justice George S. Rideout concluding that a full trial is necessary to establish the limitation period, pursuant to the LAA.

61. In addition, the Appellant has given many lively reasons of either why he is within time of the LAA (discovered the claim within the 2 years in which the action was commenced) and/or has

explained/provided many vigorous reasons as to why he did not know or could not have discovered the claim.

62. The Appellant (Plaintiff) Mr. Bryan Sutherland respectfully submits that the cross-appeal is frivolous and vexatious, and without merit.

PART V: RELIEF SOUGHT:

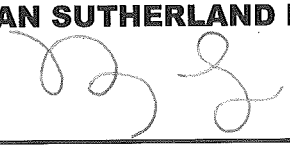
63. The Appellant (Plaintiff) Mr. Bryan Sutherland requests that this Honorable Court grant an Order that:

A: The cross-appeal of the Respondent (Defendant) be dismissed on the grounds that there is no computable limitation period, prior to the evidence being heard at a full trial; and

B: In the alternative, the cross-appeal of the Respondent (Defendant) be dismissed on the grounds that the Appellant (Plaintiff) commenced the action within time, pursuant to section 2 of the *Limitation of Actions Act, SNB 2009, c L-8.5* ("LAA") and/or within the 1 year postponement granted after termination of disability.

ALL OF WHICH is respectfully submitted this 24th Day in the Month of January in the Year of 2018.

BRYAN SUTHERLAND PI.



The Appellant (Plaintiff): Bryan Sutherland
Initials: B. S.

Prepared By: Bryan Sutherland PI.
Telephone Number: 1 (506) 536-0748
Preferred Mailing Address:
25 Lorne Street
Sackville, New Brunswick, Canada
Postal Code: (E4L 3Z8)

SCHEDULE A: LIST OF AUTHORITIES:

1. *Sutherland v. Alatishe 2015 NBQB*
2. *Sutherland v. Alatishe 2016 NBQB 105*

SCHEDULE B: STATUTES OR REGULATIONS:

3. *Limitation of Actions Act, SNB 2009, c L-8.5*
4. *Personal Health Information Privacy and Access Act*