Court File No. CV-21-656040-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

FACTUM OF UNIVERSITÉ DE SUDBURY
(An interested party)

I. OVERVIEW

1. On March 14, 2022, Barbara Jean Robinson ("**Ms. Robinson**") commenced an action for damages against Université de Sudbury, alleging that a professor sexually assaulted her when she was enrolled at Laurentian University of Sudbury ("**LU**") in or about 1978 to 1980.

2. Ms. Robinson was already a creditor participating in the claims process established by the Amended and Restated Claims Process Order dated May 31, 2021 and had filed a Proof of Claim in the amount of $5 million on grounds of vicarious liability arising from historical sexual abuse.

3. Université de Sudbury only became aware of the allegations of historical sexual abuse when opposing counsel a copy of the Statement of Claim was provided to the Rector Serge Miville on or about March 14, 2022.

4. As such, Université de Sudbury's Proof of Claim, filed by the Claims Bar Date of July 30, 2021 does not include any claims for contribution and indemnity as against LU for the allegations of sexual abuse made by Ms. Robinson.

5. Université de Sudbury seeks an order pursuant to paragraph 20 of the Claims Process Order, to lift the stay of proceeding to move under Rule 5.03 of the *Rules of Civil Procedure R.R.O. 1990, Reg. 194 ("***the Rules***")* to either crossclaim or bring a third party claim as against LU.

6. In the alternative, Université de Sudbury seeks an order requiring that LU engage in (i) full documentary production and (ii) examinations for discovery all in respect of Ms. Robinson's claim for sexual assault in the interest of procedural fairness.

II. FACTUAL BACKGROUND

7. In or about 1978 to 1980, Ms. Robinson was a student duly enrolled at LU. It is alleged that Ms. Robinson was enrolled in several courses taught by the late Professor John Sahadat, who was employed by Université de Sudbury. Professor Sahadat passed away on May 3, 2021.

8. At all material times, Université de Sudbury was federated with Laurentian University of Sudbury.

9. Ms. Robinson has alleged that the late Professor Sahadat was duly authorized, appointed, and/or empowered by LU to occupy a position of trust and authority with respect to students enrolled by LU, including Ms. Robinson. It is further alleged that,

but for this position of trust and authority, she would not have sustained the damages claimed.

10. Ms. Robinson is presently a creditor participating in the claims process established by the Amended and Restated Claims Process Order dated May 31, 2021 ("**CCAA proceeding**"). It would appear that Ms. Robinson felt compelled to file a Proof of Claim due to the language of the Order which states that "*any creditor that does not file a Proof of Claim as provided for herein… shall be and is hereby forever barred from making or enforcing such Claim against the Applicant.*"[1]

11. The Monitor disallowed Ms. Robinson's Claim on or about February 1, 2022 and the matter was subsequently referred for determination to the Honourable Justice Cunningham, a Claims Officer appointed pursuant to paragraph 36 of the Amended and Restated Claims Process Order.

12. In the Statement of Claim, LU is a proper party within the meaning of Rule 5.03 of the *Rules of Civil Procedure* and its presence is indeed necessary to enable the court to adjudicate effectively and completely on the issues in that proceeding, including but not limited to liability, vicarious liability, the just apportionment of liability, and the quantification of damages.

III. ISSUES

13. Université de Sudbury states that the issues are as follows:

[1] Factum of the moving party, Barbara Robinson.

a. Should the stay of proceeding be lifted so as to allow Université de Sudbury to crossclaim or bring a third-party claim against LU in the civil action?

b. Is and/or can Ms. Robinson's claim be properly and fairly adjudicated within the *CCAA* proceeding?

c. In the circumstances, should LU be compelled to provide full documentary disclosure and to be examined for discovery on the allegations made in the Statement of Claim?

IV. LAW AND ARGUMENT

Part A: Sexual assault claims are not the proper subject of compromises or arrangements pursuant to the CCAA

a) Sexual assault claims are not captured by the **CCAA**

14. The *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36[2] ("**CCAA**") effectively provides that claims in respect of sexual assault are not the proper subject of a compromise or arrangement under section 19(2). It states:

> (2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities […]
>
> (b) any award of damages by a court in civil proceedings in respect of
>
> > (i) bodily harm intentionally inflicted, or sexual assault, or
> >
> > (ii) wrongful death resulting from an act referred to in subparagraph (i);[3]

[2] *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36. [*CCAA*]
[3] *CCAA, supra* note 2 at s. 19(2).

15. It is trite law that the proper approach to statutory interpretation is by reference to Driedger's approach as expressed in *Rizzo and Rizzo Shoes Ltd (Re)* [1998] 1 SCR 27:

> "[T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[4]

16. The first step in interpreting section 19(2) of the *CCAA* is to look at the context of the Act as a whole with particular attention to the provisions surrounding it. Sections 19 and 20 operate together to set out which types of claims are the proper subject of compromises or arrangements under the Act.

17. To qualify as a proper claim for proceedings under the *CCAA*, the claim must (i) have a value that is determinable under section 20 and (ii) not be caught by the exceptions under section 19(2) ("**Section 92 Exceptions**"). A sexual assault claim is a provable claim that must be valuated outside of the CCAA proceedings. It is also captured by section 19(2).

18. Section 19(1) states:

> *Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are*
>
> *(a) claims that relate to debts or liabilities, present or future, to which the company is [already] subject […], and*
>
> (b) *claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned*[5]

[4] [1998] 1 SCR 27 at para 21.
[5] *CCAA, supra* note 2 at s. 19(1).

19. Subsection 19(2) goes on to enumerate five situations where "*debt or liabilities*" are exceptions to the types of claims that may be dealt with under subsection 19(1).

20. The Section 19(2) Exceptions concern tortious claims that involve a substantial amount of morally reprehensible behaviour which ought not to be the subject of a *CCAA* compromise or arrangement.

21. We respectfully submit that a guiding reason for which the legislature made this distinction is because the enumerated torts require justice beyond mere compensation. Determining the measure of damages for sexual assault requires balancing retributive, compensatory, deterrent, and reformative theories of justice.

22. As such, these exceptions are not the proper subject of a compromise or arrangement pursuant to the *CCAA* because they cannot be compromised without accounting for the moral element of the reprehensible behaviour, which will only be achieved if the 'victim' of the reprehensible conduct consents to the compromise or arrangement.

23. An analysis of section 20 of the *CCAA,* entitled "*Determination of amount of claims*," provides another reason for which sexual assault is not the proper subject of a *CCAA* compromise or arrangement: the claim cannot be properly valuated within the *CCAA* proceedings.

24. Section 20 states:

> *For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:*
>
> *(a) the amount of an unsecured claim is the amount*

> *(i) in the case of a company in the course of being wound up under the Winding-up and Restructuring Act, proof of which has been made in accordance with that Act,*
>
> *(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, proof of which has been made in accordance with that Act, or*
>
> *(iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor;*[6]

25. Section 20, therefore, only seem to address unsecured claims that have either (i) been proven in accordance with another Act that forms part of the insolvency legislative scheme, or (ii) can be determined by the court on summary application.

26. Sexual assault claims do not fall into either of these categories. Only unsecured claims that can be proven under the mechanisms provided in other insolvency legislation and secured claims can be valuated within the *CCAA* process. However, it is exempt under section 178 of the *BIA* as detailed below.

27. Conversely, determining liability for sexual assault requires full documentary production, examinations for discovery, and the opportunity to test deponents on their evidence and credibility. Liability cannot be proven by reference to other insolvency legislation as there is no statutory basis to do so. For the same reasons, valuation and liability are also not determinable on a summary application.

[6] *Ibid* at s. 20.

28. Within the scheme of the Claims section of the *CCAA*, the reasoning behind removing the Section 19(2) Exceptions from *CCAA* proceedings is that they relate to morally reprehensible conduct which cannot be properly valuated as a provable claim.

b) Sexual assault claims are not captured by the legislative scheme concerning insolvency proceedings

a. <u>Section 19(2) of the CCAA should be interpreted by reference to section 178(1) of the Bankruptcy and Insolvency Act</u>

29. The second step after evaluating the Act as a whole is to look at the role section 19(2) plays in the legislative scheme to which it belongs. As such, it is to be interpreted in accordance with other statutes concerning insolvency, including the *Business and Insolvency Act,* R.S.C. 1985, c. B-3[7] ("***BIA***").

30. The *CCAA* and the *BIA* are *in para materia*. Professor Sullivan has explained this maxim of statutory interpretation as follows:

> *Statutes, or portions of statutes, that deal with the same subject or contribute to an integrated scheme are said to be in para materia [...] When statutes are related, a court may find it appropriate to rely on definitions or other interpretive provisions found in one statute to help interpret the other.*[8]

31. The Supreme Court of Canada has held that the *BIA* and the *CCAA* are pieces of related or complimentary legislation and are therefore *in para materia*. In *Montreal (Ville) c. Restructuration Deloitte Inc.,* 2021 SCC 53, the Court was tasked with determining

[7] *Business and Insolvency Act*, R.S.C. 1985, c. B-3. [*BIA*]
[8] *Sullivan, Ruth.* Statutory Interpretation 3 ed (Toronto: Irwin Law Inc, 2016) at 179-180.

whether a claim was the proper subject of a *CCAA* compromise or arrangement or if it was captured by section 19(2)(d) of the Act.

32. Wagner and Coté J.J. found that section 19(2) could be interpreted by reference to the similar wording in section 178(1) of the *BIA*. They observed:

> *[The issue] can be determined by referring to the case law and academic commentary on s. 178(1)(e) of the [BIA] which is analogous in every respect to s. 19(2)(d) of the CCAA. As this Court noted in Ted Leroy Trucking Ltd [...] these two statutes "for[m] part of an integrated body of insolvency law*."[9]

b. *Sexual assault claims are exempt from discharge under insolvency proceedings because of their immoral character*

33. Like Section 19(2) of the *CCAA,* 178(1) of the *BIA* enumerates claims that are not to be addressed under the insolvency process. Section 178 of the *BIA* provides for certain cases where a debt will survive a discharge of bankruptcy. The wording of the applicable part of this section is virtually identical to the wording of section 19(2) of the *BIA*.

> 178 (1) *An order of discharge does not release the bankrupt from*
>
> > *(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;*
> >
> > *(a.1) any award of damages by a court in civil proceedings in respect of*
> >
> > > *(i) bodily harm intentionally inflicted, or sexual assault, or*
> > >
> > > *(ii) wrongful death resulting therefrom*

[9] 2021 SCC 53 at para 24.

> *(d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others […]*
>
> *(e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim[.]*[10]

34. The Ontario Court of Appeal has stated that the exceptions contained in s. 178(1) of the *BIA* survive discharge of bankruptcy because they are too socially reprehensible to be forgiven by a blanket discharge under bankruptcy and insolvency proceedings.

35. In *Hoyle (Estate) v Gibson-Heath*, Mew J. commented:

> *The Ontario Court of Appeal has held that the exceptions contained in section 178(1) of the BIA are based on the overriding social policy that certain claims should be protected against the general discharge obtained by a bankrupt because of the reprehensible nature of the bankrupt's conduct. Parliament has clearly made a policy decision that a bankrupt should not be allowed to raise the shield of her general discharge against judgment creditors who hold judgments grounded on reprehensible conduct.*[11]

36. Master Groves provided a similar analysis of s. 178(1)(a.1)(i) of the *BIA* in *Sangha, Re*, 2004 BCSC 799. This case concerned a bankrupt who had driven his automobile into two pedestrians and subsequently pled guilty to two counts of aggravated assault.[12] In finding that society's interest in punishing such behaviour outweighs any benefits that might be gained from releasing the bankrupt from his obligations, Master Groves remarked:

> *The perpetrator of intentional vehicular violence should not be able to avoid the civil consequences thereof simply by declaring bankruptcy, as civil consequences may well provide an important deterrent to such behaviour. Society has an interest in delivering the message that such*

[10] *BIA*, *supra* note 8 at s. 178(1).
[11] 2017 ONSC 4481 at para 12.
[12] 2004 BCSC 799 at paras 5-7.

> *behaviour will not only lead to criminal sanction, but it will also hit the perpetrator "in the pocketbook". If [the bankrupt's] claim survives discharge, others may be deterred from similar behaviour through the realization that they will not be able to escape the financial consequences of their action simply by declaring bankruptcy.*[13]

37. Though this case, and most of the jurisprudence interpreting s. 178(1)(a.1)(i) of the *BIA*, concerns cases of physical assault, for the purposes of this section, there is no reason to distinguish sexual assault as its own category. As Master Schlosser observed in *JRB v Jimenez*:

> *Regardless of the more subtle distinctions made by the criminal law, assault, (or here assault and battery) on the civil side, is simply an intentional tort, (Klar, p. 2-17) and there is no separate category of sexual assault as a common law cause of action.*[14]

38. Therefore, the policy reasons enunciated by the Court for inclusion of physical assault claims under s. 178(1)(a.1)(i) of the *BIA* are the same as those for which sexual assault was included in the same provision.

39. It can be concluded by way of analogy through the statutory interpretation mechanism of *in para materia* that section 19(2)(b)(i) stands for the proposition that matters of sexual assault should be determined and valuated by the ordinary civil court and is not the proper subject of a compromise or arrangement under the *CCAA*. Under s. 178 of the *BIA,* sexual assault claims survive insolvency because of their morally reprehensible character.

40. Given the identical use of language in s. 19(2), it becomes clear that sexual assault claims are also not to be compromised because of their morally reprehensible nature.

[13] Ibid at para 19.
[14] 2018 ABQB 847 at para 10.

A sexual assault claim is therefore not properly dealt with in the current proceedings by virtue of the type of claim that the legislature has exempted from insolvency resolutions. Instead, the claim survives LU's restructuring.

c) Sexual assault claims are outside the competency of CCAA Proceedings

41. Determining liability and valuation for a sexual assault claim does not require any of the advantages afforded by the *CCAA*. Rather, it requires the procedure afforded by a full civil trial.

a. ***Addressing sexual assault claims within CCAA Proceedings does not accord with the purposes of the legislative scheme***

42. A debtor company may only avail itself of the *CCAA* if the total claims against it or affiliated debtor companies is more than $5,000,000.[15] Therefore, where a sexual assault claim is brought pursuant to the CCAA Proceedings, it will always be a claim against a corporation for vicarious liability.

43. However, the purpose of CCAA proceedings is not to shield the debtor company from liability, but rather to facilitate its restructuring by enabling it to make compromises or arrangements for its debts and liabilities. In cases of vicarious liability for sexual assault, the procedures afforded by a civil action will always be needed to determine liability which, if established, will require the valuation of the claim and the debtor companies' contribution.

[15] *CCAA* at s. 3(1).

44. In *9354-9186 Québec inc. v. Callidus Capital Corp.,* Wagner and Moldaver, J.J. surveyed the insolvency legislative regime in order to comment on the purposes of the *CCAA.* They commented:

> *Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have […] These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company* [Emphasis added].[16]

45. Allowing a sexual assault claim to be the subject of a compromise or arrangement under the *CCAA* does not meet these objectives. In particular, it prevents fair and equitable treatment of the sexual assault claim for both the plaintiff and any co-defendants by allowing the claim to settle as against only the debtor company without having been tested through the civil discovery process. Without the benefit of discovery or testing of the evidence given therein, the claimant loses the right to be believed as a matter of first instance. Moreover, any co-defendants lose their right to determine on the evidence what the apportionment of liability ought to be in the circumstances of the case.

46. As such, offering a compromise or arrangement to settle the sexual assault claim under the *CCAA* is not in the public interest. It is merely in the interest of the debtor company.

[16] 2020 SCC 10 at para 40.

b. The advantages of having one supervisory judge to govern all CCAA proceedings are not applicable to sexual assault claims

47. In *Cadillus Capital, supra,* the Court also discussed the role of the supervising judge in *CCAA* proceedings and the advantages that having one single just accords. Wagner and Moldaver J.J. remarked:

> One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges […] From beginning to end, each CCAA proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.[17]

48. The Court also observed that the judge that is overseeing *CCAA* proceedings has broad discretionary powers; however:

> The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above[18]

49. Sexual assault claims do not depend on the knowledge of stakeholder dynamics or business realties. Instead, they rely on documentary production and *viva voce* evidence. As Dickson J. of the British Columbia Court of Appeal observed in *Winfield v Lomas*:

> The question of whether a debt is released by operation of s. 178 of the [*BIA*] is not a question for the bankruptcy court. Rather, it is a question for the court with jurisdiction over the claim.[19]

[17] *Ibid* at para 47.
[18] *Ibid* at para 49.
[19] 2008 BCSC 1636 at para 9.

Part B: Ms. Robinson's sexual assault should be allowed to continue as a full civil action

a) Ms. Robinson's claim is a claim for sexual assault and requires a trial

50. Even though the claim is ostensibly provable under the Amended and Restated Claims Process Order, the stay should be lifted because the only way to evaluate the claim properly and fairly is by way of trial. The *CCAA* claims process does not address this type of claim in any meaningful way.

51. The valuation of a damages claim for sexual assault involves the careful consideration of several critical issues that are best addressed in ordinary civil proceedings, including the findings of liability (intention, negligence, vicarious etc.), quantum of damages, apportionment of liability and credibility. Each will be addressed in turn below.

i) <u>*Liability*</u>

52. Generally speaking, when a plaintiff sues a defendant for damages in a civil action, the first question is whether there is any basis for finding that the defendant is liable, or responsible for the harms flowing from the alleged sexual assault. There are several bases upon which defendants may be found liable in sexual assault cases, including vicarious liability.

ii) <u>*Damages*</u>

53. Once liability and causation are established, a plaintiff is entitled to be compensated for the injuries flowing from the sexual assault. Causality needs to be established. A

defendant is not liable for any injuries or difficulties that the plaintiff would have experienced in any event.

54. Non-pecuniary damages seek to compensate for intangible losses such as pain and suffering, and loss of amenities. It is difficult to put an exact dollar figure on these types of losses, a difficulty which is exacerbated in cases of sexual assault where the harm is largely psychological. As such, fixing an appropriate amount is essentially within the court's discretion based on the totality of the evidence.

55. Ms. Robinson alleges that she suffered damages and losses which include physical pain, mental anguish, nervous shock, depression, symptoms of post-traumatic stress disorder, suicidal ideation, sexual problems, and inability to develop and engage in normal human relations. In the circumstances, the quantification of damages can only be determined through medical reports, psychological evidence, expert reports from health care professionals, witness statements as well as viva voce evidence.

56. Turning to pecuniary damages, these are awarded for economic losses and seek to place the plaintiff in the same position she would have been in if she had not been injured. Ms. Robinson alleges *inter alia* that she suffered an impairment of her ability and opportunity to complete an education appropriate to her abilities, to earn an income, that she has suffered and continues to suffer economic losses included past and future loss of income. She further alleges that she has incurred significant out-of-pocket expenses and will require treatment indefinitely throughout her lifetime.

57. The quantification of these alleged pecuniary losses will be determined through forensic accounting and actuarial reports, a psycho-vocational assessment report, life

care planning report, academic and employment records, witness statements and viva voce evidence of lay witnesses, many of whom could face extensive cross-examination.

58. Lastly, it should be noted that Ms. Robinson also claims punitive damages. As the main function of the civil legal system is compensatory, punitive damages are awarded only where the court finds the defendant's conduct to be particularly reprehensible, malicious and oppressive in nature. Their objective is to punish the defendant rather than compensate a plaintiff, whose just compensation will already have been assessed.[20]

59. In the case at bar, the defendant Université de Sudbury (and LU) are academic institutions. In this context, punitive damages are usually awarded as a way of encouraging institution to change policies and processes in order to prevent future abuses from occurring. Suffice to say that the CCAA process has no jurisdiction to award punitive damages and is therefore unable to achieve the stated goal.

iii) *Credibility*

60. Credibility and reliability are critical factors in determining claims of this nature, and this is especially the case where there is no corroborating evidence (which we assume to be the case here, especially with the alleged perpetrator having recently passed away).

[20] *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, at para. 36.

61. General principles have been formulated that are designed to assist a judge or jury in evaluating credibility. In its decision, *R. v. A.M.*[21], the Ontario Court of Appeal helpfully summarized these principles at paras. 9-20 and identified one of the most valuable means of assessing witness credibility as the ability for the trial judge to examine the consistency between what the witness said at trial, and what she has said on other occasions, whether or not under oath.

62. In *R. v. Sanichar*[22], the Ontario Court of Appeal made a number of other observations which are of particular significance to cases such as this where the allegations are based entirely on allegations of historical abuse and where there may be serious reliability issues. In such cases, trial judges should be especially cautious in scrutinizing evidentiary reliability and in relying on adult memories of youthful impressions as memories become increasingly frail over time, evidence may become contaminated, and life experiences can colour and distort the memory of what occurred.[23]

63. Further, in *F.H. v. McDougall*[24], a case involving allegations of historical sexual abuse, the Supreme Court of Canada reiterated that the trial judge must not consider the plaintiff's evidence in isolation, but "must look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case".

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[21] 2014 ONCA 769.
[22] 2012 ONCA 117 [*Sanichar*] at paras. 34-35.
[23] *Ibid* at paras 38 and 39, citing Minden J in *R. v. McGrath* 2000 CarswellOnt 6560.
[24] 2008 SCC 53 at paras. 58, 86, 88.

64. It follows that viva voce evidence is by far one of, if not the most important elements in the determination of a claim for sexual assault. In this respect, the Supreme Court of Canada pointed out that a trial judge has "*the great advantage of seeing and hearing the witnesses, of observing demeanour, noting nuances of expression, detecting dissimulation. These are aids to judgment which cannot be reflected in the written record of a case"*[25].

65. The Statement of Claim already reveals credibility issues requiring close scrutiny of her allegations. To name just one example, Ms. Robinson claims that she suffered an "impairment of her ability and opportunity to experience a normal adolescence and adulthood" (our emphasis), even though the alleged tortious acts occurred when she was approximately 26 years old.

66. It is noteworthy, as previously states, that the alleged perpetrator passed away a few months ago, in May 2021, and his evidence is forever lost. Viva voce evidence, which is usually unavailable to the Monitor and/or Claims officer, will be critical in this case, in addition to complete discovery and testing of the evidence. Unfortunately, it is clear from the *CCAA* and the Claims Process Order that the evaluation process does not address these issues in any meaningful way. A trial cannot be avoided.

[25] *Taylor v Asody*, [1975] 2 SCR 414 at p. 423.

b) Vicarious liability of LU for the alleged tortious act of Professor Sahadat

67. In the context of her sexual assault claim, Ms. Robinson relies on the doctrine of vicarious liability to hold Université de Sudbury and LU accountable for sexual abuse allegedly perpetrated by the late Professor Sahadat.

68. Recent caselaw has established that parties can be held vicariously liable either for acts of individuals which they authorized, or for unauthorized acts which were so connected with authorized acts that they amount to modes of doing an authorized act.

69. In *Bazley v. Curry,* the Supreme Court of Canada cautioned that "the test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability"[26].

70. In the case at bar, the court will be tasked to work out whether there is a substantial connection between the individual's power and the sexual abuse that allegedly occurred. Echoing the various approaches to vicarious liability imposed on the Crown, churches, and other public and governmental institutions, the court will be required to conduct its analysis within the context of the 1960 Federation Agreement as between LU and Université de Sudbury, which defines their respective roles, duties and obligations. [27]

71. Furthermore, both Ms. Robinson's Proof of Claim and Statement of Claim are broadly worded and lacking in particulars, especially with respect to the surrounding

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[26] *Bazley v. Curry*, [1999] 2 SCR 534 at para 10.
[27] Affidavit of Andréa Baldy sworn April 5, 2022, Exhibit "C".

circumstances of the alleged sexual assault, including as it relates to time and place. A just and equitable determination on the issue of vicarious liability will require complete discovery and testing of the evidence, as well as viva voce evidence.

c) Université de Sudbury will be prejudiced if LU remains a non-party

72. The purpose of the *Negligence Act*[28] is to facilitate full recovery of the loss for the plaintiff, while at the same time providing a mechanism for each of those who contributed to the loss to share the financial responsibility in the proportions of their respective degrees of fault. It is noteworthy that there is normally no joint liability for aggravated or punitive damages, as these damages are assessed on the basis of the particular conduct of each joint tortfeasor.[29]

73. By operation of s. 1 of the *Negligence Act*, a plaintiff is not usually concerned about issues of apportionment of fault and liability among defendants or potential defendants. A plaintiff may recover the full amount of the damages from any defendant found jointly and severally liable, even if that person is only held to be 1 per cent responsible for the damage suffered. It is then the concern of the defendants to ensure that the trial judge correctly apportions responsibility among the parties at fault so that they can collect from each other in accordance with that apportionment.

74. At this time, LU is neither a defendant nor a third party. If Université de Sudbury cannot crossclaim or bring a third-party claim against LU, Université de Sudbury may unfairly be held liable for the negligent acts of LU and may bear 100 per cent of the

[28] *Negligence Act*, RSO 1990, c N.1.
[29] *Hill v. Church of Scientology*, [1995] 2 SCR 1130.

plaintiff's damages. In support of this contention, Université de Sudbury relies on the point made in *Athey v. Leonati,* 1996 CanLII 183 (SCC)[30] at paragraph 25, that where a plaintiff's injury is indivisible, any defendant who has negligently contributed to the injury will be fully liable for it.

75. As a general rule, a court cannot apportion fault under the *Negligence Act* against a person who is not a party to the action and then reduce the plaintiff's recovery accordingly[31]. In this regard, the Law Reform Commission, in its 1988 Report on Contribution Among Wrongdoers and Contributory Negligence, stated that it was its view and that it recommended that no degree of fault be apportioned under s. 1 of the *Negligence Act* to an "absent concurrent wrongdoer".

76. In *Endean v. St. Joseph's General Hospital,* 2019 ONCA 181, Zarnett J.A. made clear that *Taylor v. Health Canada,* 2009 ONCA 487 does not stand for a proposition that is so broad that it would entitle the court in any case to apportion fault to non-parties and then reduce the plaintiff's recovery by that apportioned share of fault[32]. The Court of Appeal held that such a proposition would be inconsistent with what the Supreme Court of Canada said in *Athey* and with s. 1 of the *Negligence Act.*

77. The facts of *Taylor* were unique. The plaintiff's pleading was amended, such that the exposure of the defendant was limited to the defendant's relative degree of fault. It was in that context that the court held that fault could be apportioned at trial to the proposed

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[30] *Athey v. Leonati*, [1996] 3 SCR 458 at para 25.
[31] 2019 ONCA 181.
[32] 2019 ONCA 181 at para. 69.

third parties even though they were non-parties. The approach in *Taylor* was context specific, and that context is not present in the case at bar.

78. In contrast with *Taylor*, Ms. Robinson's pleading is not circumscribed to Université de Sudbury's proportionate degree of fault. As such, Université de Sudbury should be entitled to exercise their right under the *Negligence Act* to either crossclaim or bring a third-party claim against LU, and by doing so, enable the court to apportion liability for the damages alleged by Ms. Robinson among the two potential tortfeasors:

> Wherever it appears that a person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant to the action upon terms as are considered just or may be made a third party to the action in the manner prescribed by the rules of court for adding third parties.
>
> Section 5 of the *Negligence Act.*

79. Apportionment of liability requires a trial. In fact, the Supreme Court of Canada has made clear that apportionment of liability is "primarily and properly" a matter within the province of the trial judge and as such, substantial deference is to be accorded to the trial judge:

> *"Apportionment of fault is primarily and properly a matter within the discretion of the trial judge who has, as has so often been pointed out, the <u>great advantage of seeing and hearing the witnesses, of observing demeanour, noting nuances of expression, detecting dissimulation. These are aids to judgment which cannot be reflected in the written record</u> of a case, and are, therefore aids denied to an appellate court."* [Our emphasis]
>
> See *Ingles v. Tutkaluk Construction LTD.,* 2000 SCC 12[33], and *Taylor v. Asody* (1974).

[33] 2000 SCC 12 at p. 338.

80. In light of the foregoing, it can be concluded that the CCAA evaluation process does not allow for a fair and proper adjudication of Ms. Robinson's Claim. These matters currently before the CCAA and the civil court are related and cannot be determined independently. The Monitor and/or Claims officer cannot value the claim without addressing liability, vicarious liability and the proportionate degree of fault of the potential tortfeasors. To make such a determination, evidence beyond the scope of the CCAA proceeding is required, failing which Université de Sudbury will be prejudiced in their defence of the main claim.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5TH DAY OF APRIL 2022.

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ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
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SUPERIOR COURT OF JUSTICE

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FACTUM OF UNIVERSITÉ DE SUDBURY

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