Daigneault v. Canjet et al, 2016 ONSC78
COURT FILE NO.: 12-CV-470651
Heard: November 9, 2015

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Daigneault v. Canjet et al

BEFORE: Master Joan Haberman

COUNSEL: Singer, A. for the moving party

Park, T. for Canjet

Prise, M. for TGAS

REASONS

Master Haberman:

[1] In August 2014, I heard and resolved a motion for security for costs brought by Canjet pursuant to Rule 56.01(1)(a). At that time, in view of the very sparse evidentiary record put before the court, I found that the plaintiff failed to establish that he was impecunious. As a result, in order to avoid having to post security for costs as he proposed, he was required to show that he had a good chance of success in the litigation

[2] The plaintiff failed to meet that burden, and was therefore ordered to post $16,000 to the credit of the action in favour of Canjet at that time. This amount covered costs incurred to that point, as well as anticipated costs up to and including examinations for discovery. Discoveries are now complete and Canjet has returned for a security "top up" to the end of trial, this time, accompanied by their co-defendant, Toronto Ground Airport Services (TGAS). TGAS now seeks security for costs incurred from the inception of the action until the end of trial.

[3] The plaintiff filed no tax returns or notices of assessment for the first hearing. Though he appeared to own a large tract of farm land in Quebec, it was not clear, at that time, if the land was encumbered or what it was worth. It also appeared that he ran a business with his soon-to-be-ex-wife, but the fate of that enterprise was yet to be determined in the context of their lengthy divorce proceedings. As a result of these gaps in his evidence, his financial position was very hazy. This was an important factor in my deliberations at that time and impacted on my findings.

[4] A further factor that worked against the plaintiff at that time was the considerable debt that he had incurred for medical expenses in the US. The magnitude of this debt appeared likely to impair Canjet's ability to enforce a cost order if one was made in their favour at the end of the day.

[5] The plaintiff's explanation for that debt was less than satisfactory. The plaintiff has been a paraplegic for more than 30 years. He spends his time between his home in Quebec and a motor home in Florida. While in Florida, and less than two years after the accident that gave rise to this action, he elected to have significant orthopaedic surgery performed there, at great personal expense.

[6] As a result, instead of accessing Quebec's public health Medicare system, the plaintiff incurred a debt of $260,000, which apparently, he could ill afford. It appears that this debt is still outstanding. At the time of the first motion, there was no evidence as to why the surgery was performed in the US rather than in Quebec, and, in fact, why it was undertaken at all so soon after the accident.

[7] This debt and the lack of clarity surrounding the plaintiff's financial position were two red flags regarding the plaintiff's ability to meet a cost order when I first dealt with this matter in 2014.

[8] My order of last day reflects a "pay as you go" approach to security for costs, one used by this court for many years. Instead of requiring a plaintiff to post costs from the inception of an action until the conclusion of trial, they are, instead, ordered to post security in tranches. This approach reflects the court's recognition that many cases settle before trial. As a result, a security for costs order that takes the matter to and through trial is usually made only when it appears a trial is likely.

[9] Depending on the evidence filed, the court can either provide the precise amounts to be posted for each tranche in the first decision, or, as was the case here, provide a figure for the first tranche, such that the parties must return to fix the amount to be posted for subsequent tranches.

1. ARE THESE ISSUES *RES JUDICATA* (or issue estoppel) IN VIEW OF MY LAST ORDER?

[10] Discoveries are now complete and the action has not settled. Canjet has returned for the next tranche, this time, accompanied by their co-defendant. The second, or "top up" motion for security for costs is usually a very straightforward one, resolved by the parties on consent, without the need for further court intervention, as the foundation issues are generally fully resolved by the first order. As a result, the debate, at this stage, usually focuses on the quantum to be posted for the next stage of the litigation. As I stated in my last order:

At the conclusion of discoveries, the ***defendant is at liberty to move for further security*** *for costs* ***in the event that quantum cannot be agreed.***

[11] In that context, the response from the plaintiff in this case is an unusual one, and one which raises interesting issues. Having initially claimed he was impecunious, and having failed to establish that position, can both defendants now rely on *res judicata* or issue estoppel to prevent the plaintiff from returning to the issue of his financial situation, apart from new developments? Alternatively, is the plaintiff precluded from relying on evidence and documents that could and should have been available in first instance?

[12] I should note that I have framed the issue in this manner. Canjet simply put the concept of *res judicata* before the court, with little elaboration, while the plaintiff ignored it.

[13] The defendants take the position that the court has already considered the issue of the plaintiff's ability to pay a cost order, such that it is *res judiciata.* In that regard, they rely on Croll J's decision in *833809 Ontario Limited v. Lou Parsons Realty Inc.* [2001]OJ No. 96.

[14] The plaintiff really did not address this argument but proceeded as though there was nothing to impede him from filing new evidence and making submissions about his financial situation dating back to a time before the last motion. While it is clear that he has brought new developments to the table for consideration, he has also supplemented the record with evidence of his financial situation that fills in some of the gaps in the evidence that I identified in my earlier reasons.

[15] He has grouped his submissions into a three- pronged argument. The first portion of the argument involves the plaintiff's assets in Quebec. The plaintiff now claims that he has an income and owns sufficient assets in that province to meet a cost order if so required.

[16] In making this submission, the plaintiff has now filed tax returns, credit card statements and a title search, much of which was available at the time of the first hearing, up to the date of that hearing.

[17] The plaintiff was required to be fully transparent as to his financial situation at that time when claiming to be impecunious. Some of these documents now suggest that he was not as open as he ought to have been. No explanation for the late in the day appearance of these materials has been provided nor has leave been sought to file them at this time – they were simply included in the record.

[18] The plaintiff also asserts that, though Quebec is not a reciprocating jurisdiction for the purpose of enforcement of an Ontario judgment, enforcing a judgment in his home province would not be difficult. As sufficiency of assets was not raised by the plaintiff last day, this is not a submission that would have arisen last day.

[19] The second part of the plaintiff's argument rests on a policy of insurance he acquired to deal with legal costs. Adverse Cost Protection policies are a relatively new phenomenon in this jurisdiction, and the courts have only recently begun to consider them and comment on their role in motions of this kind. Having such a policy, therefore, cannot be viewed as an automatic response that is determinative of the outcome to this motion. Each policy of this kind must be carefully examined to determine if it has the necessary attributes to ensure that it would be in place if called upon at the end of the day. There is nothing in my earlier Reasons that would preclude submissions based on this new development.

[20] The third aspect of the plaintiff's position is his assertion that there is considerable merit to his claim, such that the only just order the court can make is to dismiss these motions. As the action had not yet gone to oral discovery before the first hearing, I formed the view that it was premature for the court to assess the plaintiff's likelihood of success at that time. Further, my decision at that time dealt with the merits vis a vis Canjet, only. TGAS is now moving, as well, and the status of the action has changed as discoveries have taken place. As a result, this issue, too, is open for reconsideration at this stage.

[21] In *833809 Ontario Ltd.*, relied on by the moving parties, two previous orders for security for costs had already been made, on the basis of the finding, in first instance, that the plaintiff was a shell corporation. Though there was no discussion of the evidence before the court in that case, in view of how the decision was written, it appears that it was the finding that the plaintiff was a shell corporation that the plaintiff sought to reopen at the third hearing. The court there refused to allow the submission on the basis of *res judicata*. In my view, that was perfectly appropriate.

[22] In this case, it seems to me that we are dealing with issue estoppel, rather than *res* judicata. Though neither party argued this, it seems to me that the answer to whether the plaintiff can seek to reopen issues decided at an earlier phase of a security for costs motion depends on whether he is trying to put forward evidence and arguments that were available to him at the time of the first hearing which he neglected to bring to the court's attention or whether he brings new developments to the table.

[23] I accept that an examination of a plaintiff's assets may lead to a different result at a second attendance, if the evidence filed for that hearing demonstrates that there have been new developments which reflect a change in circumstances since the original

hearing. I also accept that the court's view of the merits may change over time, particularly after the action has been through discoveries. Both factors could lead to a different result than was obtained at the first hearing.

[24] However, both of these factors can be distinguished from attempting to re-litigate what has been already decided by embellishing the record with documents and information that were available, but not filed, for the first hearing. A party must seek leave before filing new evidence that impacts on an order already made and must establish why leave should be granted.

[25] Here, I had already decided that the plaintiff had not established that he was impecunious nor was I satisfied that he had sufficient assets in the jurisdiction to meet a cost order. It was therefore not appropriate for the plaintiff to suddenly file financial documents pertaining to his income and debts that were available at the time of the first hearing.

[26] A court should not be expected to consider the same question twice because a party failed to make full and proper disclosure for the first hearing barring exceptional and fully explained circumstances. As a result, a large part of what has been filed at this stage to demonstrate sufficiency of assets was not properly before the court.

[27] I also note that, though TGAS was not a party to the original motion, the issues raised at that time and my findings about the plaintiff's financial position would have been the same vis a vis that party and Canjet. As this is a case of issue estoppel rather than *res judicata*, it is immaterial that TGAS was not a party to the initial proceeding, as this finding was based entirely on the plaintiff's own evidence.

[28] As a result, I cannot now permit the plaintiff to file evidence about his finances at this hearing that was available but not raised against Canjet in first instance. Allowing the plaintiff to rely on those documents now as against TGAS, but not Canjet, would lead to a perverse result.

[29] Having said that, I have considered all that has been filed as the evidence pertaining to the past was bundled together with more current records and I note that the new materials do not advance the plaintiff's position in any event.

[30] I have also considered, for the sake of completeness, the plaintiff's argument that having sufficient assets in Quebec is enough to allow him to avoid posting further security, though, in my view, he does not appear to have met the "sufficient assets" threshold. Again, I note that the evidence filed to support this argument does not change my overall view of what should happen here.

[31] Accordingly, on the basis of the foregoing, though I have considered all of the evidence and arguments raised, in my view, those arguments that rely on information that ought to have been before the court in first instance was not properly before the court and did not impact on the result. In any event, as I point out, this evidence, for the most part, was not helpful to the plaintiff. In the end, nothing would have turned on it had it been permitted.

2. A BIT ABOUT THE PLAINTIFF.

[32] The plaintiff is 56 year of age and became a paraplegic following a car accident in 1984 (the first accident). As a result of the injuries sustained in the accident, he lost the use of his legs. He began using a manual wheelchair as he states he had full function of his upper body at that time.

[33] I was taken to no evidence as to the level of the plaintiff's spinal cord fracture but the plaintiff states that he was able to control the chair himself and that he was highly independent in daily tasks and personal care before the accident giving rise to this litigation.

[34] According to the evidence of his companion, Sylvie Lefebvre, the plaintiff is still in a manual chair, though he cannot wheel himself for prolonged periods of time. She stated that she is also required to help him more than before the accident, for which she is now paid $175 per week. She added that *there are times when he has not had enough money to pay me.*

[35] Sylvie is not an FLA claimant. The plaintiff claims she is his assistant and a friend but that they are not romantically involved at this time, but could be one day. The plaintiff resides on a farm in rural Quebec but spends most of his winters in Florida. He was not working at the time of this accident but it is not clear if he has worked at any time after his first accident. He supports himself with what he refers to as "some funding" from SAAQ (the Quebec no-fault insurance scheme) but he does not explain if this involves only a standard monthly amount; if it is indexed to inflation; if any other expenses are also covered through this system, and if so, what those would be. He states that he also has "some rental income from a farmer using my land." It is not clear what the famer uses the land for.

3. A BIT ABOUT THIS ACCIDENT AND WHAT FOLLOWED

[36] On January 13, 2011, the plaintiff was traveling on a Canjet flight from Fort Lauderdale, Florida to Toronto for a meeting of an association which supports disabled farmers. He has been a member of it for some time. He had asked Canjet for assistance in disembarking the plane, and they then made arrangements through TGAS. According to the plaintiff, TGAS had to transfer him from his airplane seat

onto a wheelchair that would fit through an airplane aisle (not his own); wheel the chair down the aisle and lift it over the threshold at the plane door unto the bridge; wheel it into the terminal; and then transfer him to his own wheelchair.

[37] According to the plaintiff, three female TGAS representatives appeared to affect this series of steps. They began by belting his legs but not his upper body. Although the plaintiff's evidence is that he has full use of and feeling in his upper body, he claims he did not realize his upper body had not been secured before the transfer. His companion, Sylvie Lefebvre, however, states in her affidavit that she saw they did not strap him around his upper body. It seems, however, that she failed to alert anyone to this omission.

[38] The plaintiff states the accident occurred at the lip between the plane and the bridge, which is a bit higher than the plane. As a result of the height differential, the wheelchair had to be lifted. Two female TGAS staff positioned themselves with one in front of the chair, the other behind it, with the plaintiff facing forward. Although they counted to three, presumably to lift together, the plaintiff alleges that their timing was off. As a result, the plaintiff states that "they dropped me to my left side".

[39] Sylvie Lefebvre, was already on the bridge at the time and watched this transpire. Her evidence suggests that all three female attendants were involved in this lift. She does not explain who did what.

[40] The plaintiff claims that TGAS staff failed to secure him properly and then failed to lift in unison. It seems that he did not notice that his upper body had not been secured before this event. Both defendants have therefore pleaded contributory negligence.

[41] The plaintiff claims, that during the lift, he was thrown out of the wheelchair, onto his left side and that he was immediately aware of neck and upper left arm pain, followed by tingling in his fingers the following day.

[42] It is not clear how long he stayed in Toronto, nor what medical treatment he had here, aside from attending the emergency department at the William Osler Health System. They prescribed a muscle relaxant and noted that the plaintiff was going to Florida. He did so and apparently saw *various doctors* and had some undefined treatments, including injections, but still felt pain and experienced functional limitations.

[43] As a result, the plaintiff underwent spinal surgery in Florida in May 2012. This consisted of a discectomy and fusion at the C5-C6 and C6-C7 levels to repair disc herniations. His surgeon concluded he would do very well following these procedures. The plaintiff states that he believes that *the medical system (in Florida) is faster and better than that in Quebec* and that he why he had this work done there. No evidence as to whether he sought out the treatment in Quebec was filed.

[44] Despite having received a very positive prognosis, the plaintiff feels he needs far more assistance than he did before this accident.

4. QUEBEC INCOME and ASSETS

What is the plaintiff's income and assets in Quebec?

[45] Income and assets cannot be viewed in a vacuum. In order to have a clear picture of their import, the court must also review a plaintiff's expenses and liabilities to arrive at his financial worth.

[46] The enquiry must therefore include a review of the plaintiff's income and expenses; an examination of what he owns in Quebec; an assessment of the value of his assets; a detailed examination of the debt he owes and if (and if so, how) he is reducing that debt. The onus is on the plaintiff to assist the court in putting a value on his property, as he is in the best position to do this. If there is sufficient value to meet two cost orders, the court can then consider the basis for the plaintiff's submission that it would not be difficult to access his assets for the purpose of executing on a judgment.

[47] Three affidavits were filed by the plaintiff for this motion: one from his counsel, one from the plaintiff, himself and one from Sylvie Lefebvre. The evidence regarding the plaintiff's financial information and assets snakes back and forth through these affidavits and was not clearly presented, nor was much of it referred to at the hearing. I was essentially left on my own to review these materials and to ferret out both the details and the figures.

[48] To further complicate matters, the majority of the supporting documentation has been filed in its original French, without translation. Much of it was just presented, without commentary, so it is, at times, not clear what it is intended to establish. On other occasions, the documents raise new issues that were then not discussed. My knowledge of the civil law and French legal terms is now more 35 years out of date and it is unclear if either responding counsel has any expertise in these areas. This was not an appropriate way to present evidence to a court.

[49] The plaintiff's counsel, Mr. Singer (not the same Mr, Singer that attended the hearing) began his evidence by indicating that he believes that the plaintiff owns a home and a property located in Ormston, Quebec. He attached a title search as an exhibit to establish this. The title search is not entirely legible and is one of many documents that was not translated from French to English. There are also differences in terminology to explain what I am told is the same kind of transaction, but the variation in terms has not been explained. The evidence has simply been put in the record without explanation.

[50] The title search seems to suggest that the property in issue was transferred to the plaintiff at some point, but I am unable to read from whom or when that occurred, though the plaintiff claims, in his evidence, that he is the 4th generation of this land.

[51] It appears that there was a hypothec registered against the property to secure $25,000 on July 17, 2009, which was later discharged. In that transaction, the plaintiff is described as the debtor ("débiteur"). On August 22, 2011, a further hypothec was registered against the property to secure a $60,000 loan, which also appears to have been discharged. Both hypothecs appear to have been granted solely by the plaintiff, which would suggest he was the sole owner on the dates of those transactions.

[52] It is difficult to understand how the plaintiff was able to charge the property as sole owner in view of his evidence to the effect that it was only after his divorce became final in the fall of 2014 that he became the sole owner of this house. It is also unclear how he was able to charge the property though he claims he was only able to move in after several years of apparently having no right of abode. None of the deponents discuss how the plaintiff was able to raise money against the property in 2009 and again in 2011, when he was not the sole owner and though he had no occupancy rights.

[53] On December 18, 2014, after the divorce was completed, a further loan of $450,000 was secured by hypothec against the property. This charge appears to still be in place and there is no evidence to suggest any part of the capital portion of the loan has been repaid or what the plan is for repayment.

[54] It is important to note that, this time, for the first time, it appears that the charge was granted by the plaintiff and by La Ferme du Domaine du Reve, Inc. This company is not discussed at all in the affidavits, though it appears in a balance sheet for the company later in the evidence. I will discuss this further below.

[55] In the 2011 and 2014 transactions, the plaintiff (and the company in the latter) is described as the charger ("constituant") rather than the debtor, as was the case in 2009. This difference in terminology is not explained though consistency of terminology is a hallmark of most legal systems, including Quebec Civil Law.

[56] There is no evidence to indicate why the title search was not part of the record when the motion was first heard. However, the fact that the plaintiff is shown as sole owner for both the earlier loans may have impeded his argument that he was impecunious at that time.

[57] The plaintiff states that because of his disability and "disability-related income", it is hard for him to qualify for standard credit, but that he was able to mortgage his home through "secondary sources." He does not explain what these secondary sources are,

though it appears he did this three times between 2009 and 2014. Generally, this term refers to non-traditional private lenders, those prepared to take on more risky borrowers in exchange for charging higher interest rates. Somehow, the plaintiff felt the need to do this three times in 5 years. This is not explained.

[58] There is no evidence before the court regarding monthly mortgage payments (I am using the terms "mortgage" and hypothec" interchangeably. Though they are different forms of security, they achieve the same end for the purpose of this motion).

[59] The plaintiff also fails to explain why he again borrowed funds - $450,000 this time - against the property in December 2014. There is no indication what those funds were needed or used for. Were the funds used to renovate the property, for day to day living expenses or put towards his US medical debt?

[60] There is no explanation of whether the property is now owned by the company, and if so, if the plaintiff is a co-debtor or a guarantor on the loan. In his evidence, Singer claims that the plaintiff and the company co-own the property, but he does not state what proportion of it each owns. This seems to conflict with the plaintiff's evidence as to his ownership. It is also unclear if the company is only a holding company. These are all critical issues when assessing the plaintiff's net worth.

[61] The terms agreed to by the plaintiff and his former wife in the context of their divorce were appended to Canjet's record, also in French only and in the original handwritten version. On page 63 of their record, the two parties (the plaintiff and his about to be ex-wife) declared that their company was comprised of the following property: 481 Upper Concession (the land in issue); the winabago; the furniture located at 481 Upper Concession and other items. According to their agreement, the plaintiff's wife agreed to give up her rights to 481 Upper Concession along with the clients and employees no later than June 1, 2015 and without compensation from either the plaintiff or the company, aside from the cost of insurance, hydro, gas and telephone. It is unclear how the company acquired a portion of the property.

[62] Though the plaintiff refers to the farming income in his affidavit, he does not explain where it came from, other than to say he has rental income from a farmer as he rents out the farm on the property. Does he rent out fields or the out buildings? Does he let other farmers graze their stock or raise crops on his land? Again, we don't know where this money comes from so it is difficult to assess if this is a steady and reliable source of income for the life of the action. The plaintiff also fails to explain why these funds paid to him, though the property is apparently co-owned by the plaintiff and the company.

[63] The plaintiff concludes his discussion about his property by stating that *the farm serves special needs and disabled persons by providing them with a home, activities*

and support. He does not say if he runs this operation for profit; if so, if he does so through this company and, if so, if he is the sole shareholder; if another private enterprise does so; or if it is run by a non-profit organization. The real issue, for the purpose of this motion, is whether or not it generates income for the plaintiff and, if so, how much? None of this is clear and no income is reflected in the plaintiff's tax returns, aside from the rental income. Does the company file separate tax returns? If it is a private "for profit" company, how does the plaintiff benefit?

[64] All the plaintiff has to say about the company is the following: *Attached at Exhibit O is a copy of my corporate balance sheet for 2013 and 2014.* There does not appear to be any reference to this corporation elsewhere in the plaintiff's evidence (aside from on the title search, where it is not explained) and the balance sheet, itself, provides little help.

[65] The balance sheet appears to have been created in June, 2014, so before the first motion hearing and before the loan of $450,000 was advanced. It is not signed by an accountant. There is no reference to the plaintiff or to the nature of the business it operates. It suggests that the company apparently owns a 2007 Winebago, presumably the plaintiff's mobile home that he uses to travel to and from Florida. It also appears to own his home and farm, as well as the rolling stock, such that the hypothec he placed against the property is registered against the plaintiff, personally, and against the corporation. None of this is explained. At the end of the day, it appears it is the company that owns the assets used by the plaintiff so it is unclear how a cost award made against the plaintiff could be collected from the company.

[66] The plaintiff has also produced VISA statements, which run from July 16 –September 16, 2015. Again, poor copies, untranslated, have been included as an exhibit. All they demonstrate is that the plaintiff appears to have been doing work or having some work done on his house (not $450,000 worth), as many of the purchases are from the hardware store, and there have also been purchases of paint and plumbing supplies. No labour appears to be charged against the card so it is unclear who did the work, what it consisted of or when it was done.

[67] In terms of establishing that the plaintiff pays his debts, this evidence actually suggests otherwise. Though monthly payments appear to be made towards this debt, the plaintiff has continued to incur more debt on the card each month, so his outstanding balance has actually increased considerably over the course of the three months for which statements have been produced. The outstanding balance on the statement ending August 11, 2015 was $10,756.97. This climbed to $15,027.44 by the last statement only two months later because he continues to make purchases and take cash advances against the card. I am at a loss to see how this helps him establish that his financial situation is stable

[68] The plaintiff states that he has two sources of income. The first involves "funds" from SAAQ (the Quebec no-fault insurer), which he claims amounts to a payment of $1049 every second week. The second is the rental income of the farm located on the property. Contrary to what is alleged in the affidavit (that his reported income from farming was between $20,000 and $30,000 per year from farming activities), he reported having earned more than $22,000 only once – in 2008 – and even then, he did not earn as much as $30,000. IT is unclear how the plaintiff came up with this number.

[69] The plaintiff also refers to income of $17,766.58 paid *for my disability by the Quebec government.* It is not clear if this is a separate disability pension or part of the monies coming from SAAQ. The tax returns are all in French, and not translated.

[70] The plaintiff has now provided his tax returns from 2008 to 2013. There is no explanation for why 2014 returns were not provided as well, nor are notices of assessment among the evidence. As the notice of assessment is the government's response to what a taxpayer submits in his tax return, it provides a more accurate picture of a party's financial position for the year. There is also no explanation why these returns were not provided for the first motion in August 2014.

[71] The plaintiff refiled for the tax year 2013 in May 2014. None of this is explained

[72] Aside from the insurance policy, which I will discuss below, the plaintiff gave evidence of no other assets or income. In view of the conflicting and unexplained evidence, it is not clear if the plaintiff actually has any interest at all in the farm property, and if so, what percentage of it he owns.

Is there sufficient value in the assets and income to meet two possible cost orders?

[73] It is difficult to get a handle on the plaintiff's financial status as the evidence is not organized in a straightforward manner nor has it been tied together in the factum. The plaintiff's evidence is rife with inconsistencies and large parts of it are simply there, without comment or explanation. I am left with the sense that the plaintiff simply hoped the court would not look too closely at what he filed.

[74] The plaintiff claims he has two sources of income (SAAQ pension and farm rental) but then speaks of a disability pension from the Quebec government. It seems a corporation owns his major assets, though there is no evidence about this corporation and no explanation as to how he has been able to raise money against this property – which, until his divorce in the fall of 2014, was not even solely his, and which now appears to be owned by this company. There is no also discussion of his expenses to weigh against his income.

[75] What is clear is that the plaintiff:

- pays Sylvie an income and, according to her, he cannot always manage to pay her $175 per week;
- has a debt of $450,000 secured against this property, which appears to be owned by a corporation, possibly along with him, but that is not clear. Alternatively, he has guaranteed this debt. It is not clear if the plaintiff makes monthly payments towards this debt and if so, how much he pays. There is no suggestion in the evidence, however, that there has been any reduction in the capital amount of the loan;
- is in debt in the amount to about $260,000 in the US. These debts are secured by Letters of Protection provided by the plaintiff's Florida counsel to his medical service providers in that state. There are 12 of them, along with 4 liens letters and one assignment of insurance benefits. Apparently, these Letters amount to an undertaking by the plaintiff to reimburse his medical service providers from any settlement he enters into or judgment he obtains, but there is recourse directly against him if these funds do not cover all debt; and
- that he had an outstanding and growing VISA card debt of about $15,000 at the time this motion record was prepared. The plaintiff says he makes monthly payments towards that debt, as well. That debt increased for each of the three months for which statements were provided.

[76] Though not mentioned in the plaintiff's evidence, it appears that, as a term of his divorce, he agreed to pay a sum of $230,000 to his now former spouse, within 30 days. The 30-day period began to run on November 19, 2014 so expired about a year ago. This could partially explain the loan he took out in December 2014 for $ 450,000 but he says nothing about it in his affidavit.

[77] All I can conclude from all of this is that the plaintiff, though not impecunious, has a small income against which he has racked up considerable debt. As he has not listed his expenses, particularly what he pays monthly to repay this significant loan or his plan to cover his medical expenses if he does not recover enough from this litigation to allow him to do so, I am not able to conclude he could pay cost orders based on his income.

[78] That takes us to his assets: the property. The plaintiff took me to no description of property aside from the reference to it encompassing a house and farmland. It is not clear if these fields are used for grazing or if they produce crops. Of more significance is the plaintiff's failure to file an actual expert's valuation of the property.

[79] The plaintiff is adamant that he intends to remain in this house, having only returned to it after a 7-year divorce proceeding. The issue, however, is not solely about his desire, but also involves his ability. It is conceded that there is debt against the property - $450,000 worth. That is clear from the title search. Further, despite the sworn evidence, his counsel concedes that the property is owned by the plaintiff and his company, though he seemed to treat them as interchangeable.

[80] The evidence about the property's value is far less satisfactory. According to the plaintiff:

> *By notarized letter dated August 19, 2015, Mr. Pierre Duquette, a Notary in the Province of Quebec, stated that the subject is valued at at least $1.5 million and has a first ranking mortgage in the amount of $450,000 to Jean-Paul Gendron. Otherwise the property does not have any other encumbrances or limitations.* ***I verily believe that Mr. Duquette frequently works in the real estate market in Quebec and is familiar with local prices.***

[81] A letter from the notary is included as an exhibit. In order to qualify as a notary in Quebec, an individual attends law school to obtain a B.C.L. degree, then qualifies as a member of the Notarial Bar. None of this is in the evidence, but I am prepared to take judicial notice of it, having obtained my legal qualifications in Quebec.

[82] I query how Mr. Duquette is any better placed to evaluate a piece of farm property in Quebec than an Ontario real estate lawyer would be to do so here. He does not describe either the property or his own qualifications to provide this opinion and he says nothing about how he arrived at this number. The opinion, such as it is, is one short paragraph, preceded by reference to his the fact that he is replying to a request from the plaintiff's counsel made about a week earlier. It is effectively the plaintiff who seeks to qualify Mr. Duquette, by saying he works in the real estate market and is familiar with local prices. This description by the plaintiff is not sufficient to qualify the notary as an expert in real estate valuations of farm land in this part of Quebec.

[83] There is a further problem with the evidence regarding this issue. In his letter, the notary also states, and the title search confirms, that the hypothec registered against the property is in favour of Gestion Jean-Pierre Robidoux Inc., not Jean-Paul Gendron, as alleged by the plaintiff in his sworn evidence.

[84] On the whole I am unable to attribute any weight to this letter.

[85] The plaintiff then goes on to discuss an earlier appraisal as further confirmation of the current value of his property. This report assists as it, at least, describes the property as it was at the time it was prepared:

An appraisal of the property had been performed by Mr. Gendron, almost 7 years ago, at which time the property was valued ***at $625,000.***

[86] This report, attached as an exhibit, but not discussed during oral submissions, resembles an appraisal in the form we are accustomed to seeing in this court. It, too, is appended in its original French version, without translation. It is dated March 6, 2009, so it was prepared less than 7 years ago, presumably in the context of evaluating assets during plaintiff's divorce proceedings, though there is no evidence to confirm this. This report describes the property as consisting of 162 acres, with a two-storey single family home, built in 1989. The area is rural and stable, with neighbouring properties ranging from 40-100 years of age. Municipal taxes at that time totaled a little over $2000 per year.

[87] The report consists of a very detailed description of all significant aspects of the property and the home, photos of both and a detailed examination of comparable properties listed for sale in the area.

[88] There is no evidence from the plaintiff to the effect that he accepts this description as accurate. There is also no evidence before the court to explain how the value of farm property in rural Quebec jumped from $625,000, a number arrived at after careful consideration of the usual factors, to $1.5 million less than 7 years later. There is no discussion about whether the work done on the property since the plaintiff moved back in was to renovate it or was simply usual upkeep. This only confirms my concern about the minimalist approach taken by the plaintiff to establish the current value of the property.

[89] I also have difficulty with the plaintiff's position that the two reports, taken together, means that the property must be worth *at least* $625,000. Living in Toronto, we have a somewhat skewed version of how the real estate market behaves. I cannot say with certainty that this property has held its value, particularly as the plaintiff states that he was not able to reside there for the 7 years during which he divorce wended its way through the court. The plaintiff does not say if the property was rented or left empty, or what state he found it in when he resumed occupancy. For all of the above reasons, I am not in a position to assess the value of this property.

[90] Even if I did accept that the property was worth $625,000 at a minimum, as the plaintiff proposes, that would mean the plaintiff's (or the corporation's) equity in it is less than $200,000 in view of the mortgage. He still has a debt of over $260,000 to US medical providers. If he is in the position of having to pay costs of this action after trial, it will be because he did not recover what he had hoped to in this action. As a result, he will likely have to reimburse those medical providers at that time. That

would put them at odds with the moving parties, all competing for the same assets, such as they are.

The law with respect to sufficiency of assets

[91] The law is clear that the onus is on a plaintiff who claims that he has sufficient assets to demonstrate this, with clear and detailed evidence, supported by documentary proof.

[92] In my decision in *Shuter v. TD Bank*, [2007] O.J. No. 3435, I referred to *Uribe v. Sanchez* [2006] O.J. No. 2370, where the court held that as the plaintiff's financial capabilities are solely within his knowledge, it is incumbent on him to *provide evidence* ***with supporting documentation as to his income, expenses, assets and liabilities***", and that assets should be described with particularity.

[93] In *Uribe*, the master cited Quinn J's decision in *Morton v. HMQ Canada* 75 O.R. (3d) 63, where the learned judge stated that "the financial evidence of the plaintiff must be set out with robust particularity", leaving "no unanswered questions." He went on to list what should be included:

> *Full financial disclosure is required and should include the following: the amount and source of all income; a description of all assets (including value); a list of all liabilities and other significant expenses; and indication of the extent of the ability of the plaintiffs to borrow funds; and details of any assets disposed of or encumbered since the action arose.*

[94] As I noted in *Shuter,* It appears from these passages that there is a high evidentiary threshold that must be met before a court can find that a plaintiff is impecunious, and that this threshold can only be reached by tendering complete and accurate disclosure of the plaintiff's income, assets, expenses, liabilities and borrowing ability, with full supporting documentation for each category where available or an explanation where not available. At the very least, this would require an individual plaintiff to submit his most recent tax return, complete banking records and records attesting to income and expenses, and a corporation to submit its last financial statement and current financial projections.

[95] I am of the view that when a plaintiff indicates he does have sufficient assets to meet a cost order, the onus remains on him to show how he can do so, with a similar level of particularity. This means he must provide the court with a clear picture of his income and his expenses, his assets and his liabilities. If the evidence is vague, the plaintiff has failed to meet his burden.

[96] I am not satisfied that this onus has been met, in the context of the plaintiff's income or his assets.

Enforcement of an Ontario judgment in Quebec

[97] In view of my finding, above, this is now academic, but I believe I should address it, if only briefly.

[98] Once again, the plaintiff has adopted a minimalist approach. Although it is conceded that Quebec is not a reciprocating jurisdiction, plaintiff's counsel has taken it upon himself to express his own view in an affidavit.

[99] Mr. Singer (not the same Mr. Singer who appeared at the hearing) states that he believes that a court order in Ontario for costs from these proceeding would be enforceable in Quebec.

[100] Of that, I have no doubt. The issue before the court, however is how easily, expeditiously and reasonably, from a cost perspective, this can happen.

[101] Instead of retaining an expert on Quebec Civil Law to address the issue, Mr. Singer puts himself forward as such an expert, on the basis of his having *reviewed various case law and articles regarding the enforceability of a foreign or Ontario Judgment in Quebec.* From his reading, he concludes that *the Plaintiff. ..will have no difficulty enforcing it (a cost order) in Quebec.* He adds that while the procedure for recognition of a foreign judgment is different under the Civil Code than it would be at common law, *the procedure is straightforward* and he believes that *a judgment can be enforced in Quebec in approximately two months if the proper documentation is filed.*

[102] There is no evidence before the court to qualify Mr. Singer as someone with the expertise to offer this opinion. He does not say he was educated in Quebec; that he possesses a B.C.L. degree or that he ever worked in the Quebec legal system, let alone ever attempted to get a Quebec court to recognize an Ontario judgment. I am unable to say that this evidence is convincing.

[103] Plaintiff's counsel follows this up by saying Canjet operates out of Quebec and hires lawyers there, so that it is *very familiar with the legal system in Quebec.* He adds that they have retained a law firm in that province that has written on the subject of enforcement of judgments in Quebec.

[104] Mr. Singer concludes by saying that he believes a judgment could be enforced in Quebec by *seizing Claude's (the plaintiff's) property.* The only property the court has been told about is the heavily mortgaged farm property, which may be owned in whole or part by a corporation; and for which I have been unable to attribute a value in view of the nature of the evidence filed.

[105] Further, if the moving parties are in the position of enforcing a cost order, that means they have not settled the action and either succeeded in mounting an effective defence

to the action or have offered more to settle it than was awarded at trial. In any of these scenarios, the moving parties would be joined by other creditors of the plaintiffs – those holding the Letters of Protection and who have filed liens in the US - and possibly, by VISA. What equity is left in the property would be sought by all the plaintiff's debtors. As a result, this could become a lengthy, cumbersome, complex and expensive proceeding.

Conclusion

[106] I am not satisfied that the plaintiff has been thorough and meticulous in presenting an accurate picture of his financial position. As a result, I have little sense of his income, his expenses, his assets or liability, his net worth or his ability to raise funds against what he owns. He has provided only snippets of information, some of it contained in documents that are simply appended as exhibits, their contents not discussed. Some of the evidence conflicts with other evidence filed by the plaintiff. This has all led to more questions.

[107] Some of those documents are not legible at all and most are in French. Counsel did not ask for a bilingual master for this hearing so I have been left to my own devices to translate what I am reading.

[108] The approach taken by counsel to this area also ignores that the plaintiff is seeking to reargue issues that arose at the last hearing, when his record was even thinner and less helpful. He has done so by relying on documents that were created before the last hearing that could and should have been made available at that time. No explanation for any of this has been provided. In view of when they were created and the lack of explanation for why they were not produced before, I cannot conclude that they reflect a change in circumstances, aside from what the plaintiff says about owning his farm property. But even there, however, the evidence is unclear if he or the company own it.

[109] The plaintiff was able to use the property as security to enable him to raise funds in 2009 and 2011. When he did so again in 2014, after the divorce, his name in the registry is accompanied by that of a corporation with which he apparently has ties. All he has filed to explain any this is his lawyer's evidence indicating that he and the company own the farm property.

[110] On the basis of the above, none of the documents filed by the plaintiff that were created before the first hearing would have been admitted had the plaintiff sought leave to file them. As I have now reviewed them, I find nothing turns on them, aside from a lot of time spent reviewing materials that ought not to have been before the court and on which, at the end of the day, nothing turns.

[111] To exacerbate matters, the plaintiff has provided his own opinion as to the expertise of his notary to provide a valuation for the property and that of his Ontario lawyer regarding the process of recognition of foreign judgments in Quebec. For the reasons set out above, I cannot attribute much weight to any of this.

5. THE INSURANCE POLICY

[112] The plaintiff states that when these motions arose, he obtained an adverse cost protection policy in the amount of $100,000 from Bridgepoint Indemnity Company. He views this as putting him in a position to pay a cost award if ordered to do so.

[113] There is nothing straightforward about this policy, a relatively new form of coverage and one, as far as I am aware, that has not yet been tested by the court in an action brought by an insured against an insurer on the strength of it. The plaintiff had little to say about the policy is his evidence and it was not front and centre in his counsel's submissions. Again, it was there to be read, with little comment, so I was left mostly to my own devices to review it and analyze its import.

[114] Yet again, illegibility was an issue, though in this case, while the policy was produced more or less intact, the signing page, which contains the plaintiff's confirmation and declaration, as well as his counsel's acknowledgment, declaration and undertaking was not. I am therefore missing an essential aspect of the agreement between the plaintiff and his insurer.

[115] It is clear that the costs covered by the policy are on a party-party, partial indemnity basis, only, and there are 9 events that could result in the plaintiff losing protection and justify the insurer's cancelation of the policy. They range from the plaintiff's failure to take his counsel's advice or to cooperate with him, to parting company with his counsel. There are also 21 exclusions from the policy. Payment is subject to the insurer's investigation and no payment will be made if the insured abandons the claim without the insurer's approval.

[116] After reviewed the moving parties' response to this policy, the plaintiff sought to address the concerns raised. An addendum to the policy was obtained on September 29, 2015. It states that the plaintiff/his counsel cannot cancel his coverage after the commencement date of the indemnity and, though it still allows the insurer to cancel the indemnity agreement at any time in accordance with the terms and conditions of the policy, if they do so, they are required to pay legal costs incurred up to the "effective date set out in Section 11.3". That section states that the effective date is the 3rd day after giving written notice of cancellation by mail, fax or courier or the 1st day after written notice of cancellation sent by email.

[117] The addendum does not extend to exclusions, of which there are many. Some of them are subjective. For example, the insurer will not cover costs if the insured acts *unreasonably with, or fail or delay to provide instructions to, or* ***more generally fail to cooperate with your legal counsel*** or *where (the insurer) determines, acting reasonably, that (the plaintiff's) costs are the result of legal counsel's delay, conduct or failure to comply with orders.* Payment is also excluded *in circumstances where (the plaintiff) has not adhere strictly to the terms and conditions* of the Agreement or where payment arises out of the plaintiff's *misrepresentation, omission to disclose a material fact.* The latter is of particular concern as I am unable to read the page of the agreement that sets out the plaintiff's representations.

[118] These are only a handful of potential pitfalls that could apparently void the insurer's obligation to make payment. Mr. Singer made no submissions at all about any of them.

[119] There is little law to guide me in this area. The plaintiff relies on the decision of Mulligan J. in *Stamp v. Sun Life Assurance Co. of Canada* [2015] OJ No. 2324 where the discussion of litigation protection insurance occurred in a different context. There, the court was dealing with an order for costs thrown away on a full indemnity basis that had not complied with.

[120] In response to a motion for payment, the responding party noted that he had obtained this form of protection about a year earlier, but for some reason, had not availed himself of it when faced with this cost order, which totalled all of $5,282.75. The motion was adjourned to allow counsel to pursue coverage. The presiding judge stayed the action pending payment in full of the outstanding amount, stating only that the policy **may be** of assistance but not concluding as such.

[121] In the context of that motion, involving a relatively small sum, his Honour concluded that the presence of the policy, along with a letter from the insurer confirming that it was in force, would provide **further** comfort to the moving party, thereby suggesting that he derived comfort from other sources, as well.. As noted, the action was stayed pending payment. I don't really see this as being of much help to the plaintiff.

[122] Canjet counsel took me to another case that deals with these policies. In *Alary v. Brown* [2015] ONSC 3021, Smith J. concluded that the existence of such a policy, even without a term that the insurer would pay costs up until cancelation, was a factor to be considered in these motions.

[123] As his Honour stated:

> *I find that the adverse costs insurance policy without a term that it would pay costs incurred by a defendant up until the policy was cancelled is not equivalent*

or an adequate substitute for the payment of sectary into Court but it is a factor to be considered.

[124] In *Alary*, as in the case at Bar, the policy referred to a number of circumstances where proceeds would not be paid out. Unlike a case cited that was decided in Ireland, where it appeared the insurer would remain liable for paying costs incurred up to the time of cancellation, there was no such policy term in *Alary*.

[125] Finally, the impact of cost protection insurance was discussed again by Lemon J. in *Shaw v. Loblaw Companies Limited*, 2015 ONSC 5987. There, the plaintiff also asserted that his insurance plan would provide sufficient security for the defendant. Lemon J. disagreed. His view that whether or not these policies should be considered as a factor really depended on the *circumstances of the case and the terms of the policy.*

[126] In *Shaw*, the court discussed the various issues that could lead to cancelation of the policy. While that may not be a concern in this case, in that here, in view of the addendum, costs will be paid up to cancelation. But what happens if the insurer cancels the policy for any of several reasons that are also listed as exclusions from payment under the policy? Can the insurer refuse to pay up to cancelation in such cases?

[127] I was taken to no case law in this area which also includes an addendum such as was obtained by the plaintiff here. I was taken to no case law interpreting this policy in the context of an action by a plaintiff against his own insurer defended on the basis of any of these exclusions. I don't know if there is no case law yet in this area or if counsel failed to include this is his search – I was not advised. Seeing how the courts apply these exclusions is, in my view, critical, before these policies can be viewed as adequate stand-alone comfort for costs.

[128] Absent some experience with these policies, I believe our court must tread carefully. There are two defendants here. One seeks additional security to be posted in the amount of at least $60,000, the other seeks security for costs incurred and to be incurred, totalling $130,000, although I view this quantum to be on the high side. The policy provides coverage is for up to $100,000 costs, only.

[129] If the policy were to be cancelled by the insurer, the defendants are at the mercy of the plaintiff to alert them to that fact forthwith, before any further costs are incurred. Even if he is ordered to do so and if he complies, the ramifications could be very costly.

[130] I am also concerned that only the signature page out of the entire policy, with its declarations and representations, is not legible. As misrepresentations and omissions are a ground for excluding coverage, knowing what the plaintiff and his counsel have

and have not said to the insurer is critical in assessing the likelihood that an exclusion could come into play.

[131] It also appears that, cancellation of the policy aside, the insurer can stiff legitimately refuse to pay out on the policy if any of the 20+ exclusions come into play. Many of these appear to involve a subjective assessment.

[132] I therefore find that the existence of this policy, along with the addendum, is a factor to be included in my deliberations, but in view of the terms of the policy I also find that it is not dispositive of the issues I must deal with. In view of the fact that there are two defendants and the total quantum they seek exceeds the policy, a consideration of the merits is needed to assess if the policy would be adequate protection for the defendants' costs.

6. THE MERITS

[133] Since Kitely J's decision in *Padnos v. Lumimart,*(1996), 32 OR (3d) 120, the court is expected to consider the merits of all motions brought under Rule 56.01(1). Their significance to the outcome of the motion will increase, on a descending basis, moving through the subsections of that Rule.

[134] When this matter was last before me, we were at an early stage in the litigation. Oral disclosure had no yet occurred so there was little information as to the events giving rise to the plaintiff's injuries, the nature and extent of the injuries, or the plaintiff's past medical history and current status. Since then, oral and documentary disclosure has taken place, so the record from which to assess merits is far more complete.

[135] Mr. Singer has approached the merits of the action on the basis that the plaintiff has an "open and shut" case. As he presented the argument, the plaintiff fell while being transferred so it must be as a result of fault of those involved in that event. As the plaintiff suffered injuries as a result of that fall, they must pay. On that basis, he asserts that the plaintiff cannot lose.

[136] There are three general issues to consider when assessing the merits. The first is liability, the second, damages. The third is causation, or the connection between the two. This leads to three separate questions:

1) Is either defendant responsible for this accident, either as a result of negligence or because there is a statutory regime that imposes absolute liability?
2) If so, did the accident cause the plaintiff to sustain injuries?
3) If it did, what is the nature and extent of the injuries caused by this accident, as distinct from the plaintiff's physical condition just before the accident?

[137] In other words, even if liability is a given, a plaintiff must also address causation and damages and if he fails on either front, the court cannot conclude that the plaintiff has a good chance of success on the merits.

[138] In terms of liability, several versions of how or if this accident occurred emerged from discoveries. Daigneault, himself, stated that two of the three TGAS attendants participated in the lift, while Sylvie, who was looking right at him while standing on the bridge, was of the view that all three were involved.

[139] TGAS presented one of the three attendants involved in these events as their witness at discoveries. She advised that she completed an incident report immediately after the incident, but TGAS has refused to produce it on the basis of privilege. Canjet appears to have no paperwork about this incident, nor does any of the staff involved on the plane that day seem to recall it.

[140] In view of what the plaintiff, his companion and the TGAS witness stated, something appears to have occurred on that plane as Daigneault was being transferred to the bridge. In view of TGAS's refusals to produce their paperwork about this event and Canjet's apparent lack of documentation, the defendants are not well positioned to refute that the plaintiff fell while being lifted by TGAS staff.

[141] However, the two defendants are in two different positions in the litigation, and they have claimed over against one another. It was TGAS that actually affected the transfer, on the basis of a contract with Canjet. It is therefore open for a court to find that TGAS, but not Canjet, bears some responsibility for this accident.

[142] The plaintiff maintains that Canjet cannot escape liability even if no negligence can be found against them, in view of the Montreal Convention. In his submission, Canjet bears strict liability for the accident, for up to $211,000 in damages. Canjet disputes this.

[143] The plaintiff argues that he was involved in an accident while disembarking the plane, so that article 17 of the Warsaw Convention was triggered. He then explains the two-tiered system created by article 21 of the Montreal Convention. In his factum:

> *If an individual suffers bodily injury from an accident on a flight, the airline is strictly liable.* ***Subject to proof of damages and contributory negligence*** *they are liable up to the financial cap of 113,000SDR (100,000 subject to inflation). There are no liability defences. After the cap of 113,000, there is a reverse onus-presumed liability on the carrier, but defences exist, including blaming a 3rd party for their apportionment of responsibility.*

[144] I was taken to no definition of "SDR" and provided with no explanation as to how this relates to the $211,000 referred to by the plaintiff earlier in the factum so it is unclear, in terms of dollars and cents, what Canjet's strict liability exposure would be.

[145] Canjet also makes the point that the case law the plaintiff relies on all arises in the context of Rule 21 motions, where the facts, as pleaded, are accepted as true for the purpose of those motions. All were also motions brought by airlines, seeking to have the article apply, in order to limit their liability.

[146] The case currently before the court raises very different issues, as here, the plaintiff relies on this regime in order to impose absolute liability. The plaintiff has not established that there is no doubt as to the application of the provision, which I understand is hotly contested by Canjet. I am therefore not in a position to assume that Canjet will be subject to an absolute liability regime.

[147] Further, the plaintiff concedes that, even if this regime does apply, he must still prove his damages and that this regime remains subject to contributory negligence.

[148] Contributory negligence is therefore an issue that must be discussed. As noted, the plaintiff and Sylvie described the event differently. The fact that their versions of events vary, in terms of how many attendants were involved, is the first problem. The second is that Sylvie noticed that the attendants failed to strap the plaintiff's torso to the chair. The third is that the plaintiff failed to notice this omission.

[149] In her evidence, Sylvie states:

> *Three women came on board the plane to get Claude. They moved him from his airplane seat into a chair called a Wellington chair which fits in the plane's aisle. They sat him in the chair and* ***only belted a strap around his legs. I saw that they did not strap him around his upper body.***

[150] The plaintiff's evidence, however, was as follows:

> *The women transferred me from my seat into the aisle chair. They placed a belt around my legs but not around my upper body. At that time I did not realize that they had not secured my upper body.*

[151] It is difficult to understand why the plaintiff failed to notice and to remark that his upper torso was not strapped in. Earlier in his evidence, he says he gave the attendants instruction on how to move him. Clearly, he viewed himself as being in the best position to look out for his own safety and security. There is also no evidence to suggest that there was any physical reason for him to have been unaware that his upper body had not been strapped in.

[152] The plaintiff has described himself as a very strong man, who was fully capable of using his upper body strength to manipulate his manual wheelchair on his own before the accident. He had been doing that for thirty years, after losing the use of his legs. During that time, the muscles in his lower torso would have atrophied from non-use over such a long period of time, while his upper body would have increased in musculature from manipulating the wheelchair. As a result, his torso would have become considerably heavier than the lower portion of his body. This would have created an imbalance.

[153] The plaintiff should have known that lifting him in a chair without tethering his upper torso to that chair was likely to throw him off balance, and that due to his disability, he would not be able to correct for that by shifting his posture. He was not an infrequent flyer, as he had been attending meetings of the disabled farmers' association, which take place all over the country, for many years. He would have known what was usually done to secure him for his safety. In fact, his evidence at discovery was to the effect that his chest was usually strapped. This is something he was aware of.

[154] On this occasion, he says he didn't notice that it was not done – though Sylvie did. She apparently said nothing. The fact that the plaintiff appears to have abdicated responsibility for this part of the transfer also raises issues. He was very involved in giving instruction earlier on, when being moved from his plane seat to the chair used for the transfer. He explained to the TGAS staff how they should go about lifting him and it appears they were receptive to his input.

[155] The plaintiff, along with Sylvie, were in the best position to advise the attendants about the nature and extent of his disability; about how these transfers were usually done; and why it was important to strap his chest to the back of the chair. It is entirely unclear why Sylvie did not address this omission and why the plaintiff failed to look out for his own safety by paying attention to how he was secured before being lifted. He appears to function well in English – he was examined for discovery in that language – so language was not an issue. He gave instruction for the first part of the transfer and his advice was taken.

[156] As a result, for now, there appears to be a genuine basis for a court to find that the plaintiff contributed to this accident, such that any damages he may prove could be reduced.

[157] The plaintiff's own evidence about the accident also varies. On discoveries, he says he and the chair fell to the ground. As he put it *I went right down with the chair on the side*. He does not say this in his supporting affidavit, however, instead saying that after the fall he was *placed back in the chair*, suggesting that he fell off the chair.

[158] That takes me to the second issue: damages. Even if the plaintiff does establish that one or both defendants are at fault or partially at fault for the accident, he must then prove that the injuries for which he advances a claim in this action were caused by this accident. If he fails to do so, he has nothing more than a Pyric victory, which could lead to his having to pay costs to both defendants.

[159] The plaintiff is a man with a significant medical history – it is because he is a paraplegic that he found himself in this unfortunate situation to start with. It is not uncommon for people with this form of disability to develop other physical problems. Ongoing confinement to a wheelchair or any chair can affect alignment of the spine at all levels. Propelling oneself in a manual wheelchair for such s significant period of time places strain on the shoulder area - on rotator cuffs, scapulae, cervical vertebrae and surrounding muscles. Daigneault was no longer a young man, and had been managing in this situation for over 30 years.

[160] As a result, in order to establish that none of these issues contributed to his injuries or his surgery, one would expect the plaintiff to have made full disclosure of the clinical notes and records from all his treating physicians as he has the burden of proof.

[161] Although this accident occurred in January 2011, the plaintiff has only made medical disclosure back to 2008 – the standard three-year period one would expect to find in a run- of- the- mill personal injury action where there are no pre-existing conditions or injuries that could impact on how a trial judge could view damages. The fact that the plaintiff was involved in yet another accident in August 2001 should certainly have given him reason to provide a clear picture of his situation, as least as far back as immediately following that incident. The trial judge could well be asked to draw an inference from the plaintiff's failure to provide medical documentation back to that point and having those records before the court for the purpose of this motion would have assisted in my exploration of the merits of the case.

[162] In view of the gap in the evidentiary record, it is not possible for me to conclude that the injuries of which the plaintiff now complains and the damages which he claims are the direct result of this 2011 accident on the plane.

[163] As the plaintiff failed to establish impecuniosity on his first try and now seeks to show he does have sufficient assets to avoid having to post security, he must meet the higher onus of showing that he has a good chance of success in order to maintain that the "just order" for the court to make in this case is one where no security need be posted.

[164] When the evidence that has and has not been produced regarding damages and causation is placed beside the concerns I have already raised regarding liability, I am unable to say that the plaintiff has met his onus of showing that he has a good chance of succeeding with this litigation, as against either defendant.

7. THE ORDER

[165] I have considered the evidence from each defendant regarding what they view as appropriate security for their costs. Both are reminded that security for costs are normally ordered on a partial indemnity basis, barring contractual terms that provide otherwise. On the basis of all of the foregoing, security for costs must be paid to both defendants, as follows:

Canjet:

The plaintiff shall post further security to the credit of this action in favour of Canjet in the amount of $60,000, within 45 days. This action is stayed, save and except for the parties' rights of appeal, until such time as such security has been posted.

TGAS:

The plaintiff shall post security for costs to the credit of this action in favour of TGAS in the amount of $80,000, within 45 days. This action is stayed, save and except for the parties rights of appeal, until such time as such security has been posted.

[166] I can be spoken to regarding the costs of this motion, within 30 days, if the parties are unable to agree as to quantum.

(original signed)

Master Joan M. Haberman

Released: January 7, 2016