**CITATION:** *Zhang v. UWO*, 2018 ONSC 1770
**COURT FILE NO.:** CV-14-62210
**DATE:** 2018/03/15

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | ) | |
| | ) | |
| NAN ZHANG, by his Litigation Guardian CHENG ZHANG, CHENG ZHANG and QING LIAO | ) | Derek G. Nicholson, for the Plaintiffs |
| | ) | |
| Plaintiffs | ) | |
| | ) | Robert S. Sutherland, for the Defendants |
| **– and –** | ) | |
| | ) | |
| UNIVERSITY OF WESTERN ONTARIO, DARWIN SEMOTIUK and JOHN DOE | ) | |
| | ) | |
| Defendants | | |
| | ) | |
| | ) | |
| | ) | **HEARD:** January 18, 2018 at Ottawa |

## REASONS FOR JUDGMENT

**KERSHMAN J.**

**Overview:**

[1] The Defendants, University of Western Ontario ("UWO") and Dr. Darwin Semotiuk ("Dr. Semotiuk"), bring a motion for summary judgment to have the action against them dismissed.

[2] The action arises as a result of a motor vehicle striking the Plaintiff, Nan Zhang ("Nan"), while he was walking on a roadway in Cuba. He was in Cuba along with a number of other students to attend a university course.

[3] There is no doubt that Nan suffered a severe brain injury as a result of the accident. The question on this motion is whether, as a result of the accident, there is any liability on the part of the Defendants, UWO and Dr. Semotiuk.

**Factual Background:**

[4] The action arises from a motor vehicle accident that occurred on February 21, 2014 in Havana, Cuba. At the time of the accident, Nan was a third-year undergraduate student at UWO and was taking Kinesiology course no. 4473F/9077A, entitled "Sport and Physical Activity in Cuba". This was an academic credit course offered by the School of Kinesiology in the Faculty of Health Science of Western Ontario.

[5] Nan was one of 11 applicants accepted to the course, a portion of which was being held in Cuba.

[6] At the time of the accident, the Defendant, Dr. Semotiuk, was the course instructor. He had travelled to Cuba with the students for the purpose of instructing the course.

[7] The course had three components:

1) an on-campus component, which took place from September 10, 2013 to November 19, 2013;

2) on-campus pre-departure classes held on January 20, 2014, February 5, 2014 and February 10, 2014; and,

3) a study abroad course, which was held in Cuba on February 15-21, 2014.

[8] During the pre-departure classes discussed above, Dr. Semotiuk reviewed and discussed with the students the itinerary for the trip to Cuba, as well as the air, travel, departure and arrival times, the trip's organization and packing of humanitarian aid items for Cuba.

[9] The undisputed evidence of Dr. Semotiuk is that he reminded the students of the following:

a. the "Students' Rights and Responsibilities" and "Acknowledgement and Assumption of Risk" documents, which the Plaintiff signed and agreed to be bound by;

b. punctuality was important for the structured parts of the program;

c. the students were to serve as representatives and ambassadors of the UWO and Canada at all times;

d. during "free time" students were encouraged to go in groups and to be attendant and mindful of the environment that they found themselves in;

e. where possible, students should try to minimize walking, instead taking taxis due to the poor conditions of sidewalks and poor lighting conditions in Havana; and,

f. the students should "use good judgment" and were to act responsibly at all times in Cuba.

[10] Prior to departure, Dr. Semotiuk circulated a Government of Canada travel advisory for Cuba to the students along with an "International Course Experience Check List". This document was provided to the students for their own use to assist with preparing for the trip.

[11] The itinerary listed the times the students were required to participate in structured courses.

[12] During free time, there were no course activities planned and students were free to do what they chose. At the time of the accident, Nan was 20 years old and was approximately 2 months away from his 21st birthday. He lived in London, Ontario and had lived independently there for the previous three years.

[13] On the evening of February 20, 2014, the students, including Nan, had dinner with Dr. Semotiuk and his wife. At dinner each of the students was provided with one drink ticket for either an alcoholic or non-alcoholic beverage.

[14] After dinner, all of the students, including Nan, went to the hotel room of one of the students enrolled in the course. The students socialized and had some alcoholic drinks before going out for the night. At approximately 11:30 p.m. all of the students went to the "Melen Club" and hired two taxis to take them there.

[15] At approximately 3:00 a.m. all of the students agreed it was time to leave. Two of the students, Taylor Buenting ("Taylor") and Nikki Foster ("Nikki"), had just purchased drinks and wanted to finish them before leaving. Four of the students did not want to wait for Taylor and Nikki; they left and took a taxi cab back to the hotel. The other students stayed with Taylor and Nikki until they finished their drinks. Thereafter, the seven remaining students decided to walk back to the hotel as a group, as they did not want to split up and could not all fit into one cab.

[16] Nan and Taylor were in the front of the group as they walked back to the hotel. Nan and Taylor were ahead of the other students when they came upon a four lane highway divided by a median, which they had to cross to get back to the hotel.

[17] Both Nan and Taylor crossed the first two lanes and stepped onto the centre median. Taylor suggested to Nan that they wait for the balance of the group that was approaching the highway, because the traffic was busy with vehicles in the last two lanes they had to cross.

[18] Taylor turned back to see where the balance of the group was and when she turned around Nan had started to cross the highway to get to the other side. As Nan was crossing, he was struck by a vehicle that had no lights.

[19] The person driving the vehicle that struck the Plaintiff did not stop and their identity, as well as that of the vehicle owner, is unknown. They are identified in this claim as a "John Doe".

[20] When police arrived at the scene of the accident Nan was transported to the Cira Garcia Clinic where he received medical treatment.

[21] At the clinic the surgeon informed Dr. Semotiuk that Nan had a blood-alcohol content of 173% mg of alcohol in his blood.

[22] The Plaintiff suffered a traumatic brain injury. The Plaintiff and others commenced an action against all of the Defendants, including UWO and Dr. Semotiuk.

[23] The Defendants, UWO and Dr. Semotiuk, have brought this motion for summary judgment seeking to have the claims against them dismissed.

**On Consent:**

[24] On consent, a motion was brought by the Plaintiffs to allow the affidavit of Luisa Testa to be admitted for the purpose of the motion. Therefore, the Court orders that the affidavit of Luisa Testa be admitted for the purpose of the motion.

**Issues:**

[25] The issues are as follows:

1) Can the Plaintiffs rely on the "Expert Report" appended to the affidavit of Cheng Zhang, the Litigation Guardian for Nan?

2) Is the affidavit of Cheng Zhang admissible?

3) Did UWO owe the Plaintiff a duty of care in the circumstances?

4) If UWO did owe the Plaintiff a duty of care, did it breach that duty; and if so, is it liable?

5) Is this an appropriate case for summary judgment?

**Issue #1: Can the Plaintiffs rely on the "Expert Report" appended to the affidavit of Cheng Zhang, the Litigation Guardian for Nan?**

[26] In his responding affidavit, Cheng Zhang, the Plaintiff's Litigation Guardian, included a report from Lisbeth Claus ("Expert Report") as an exhibit together with a completed Form 53 in accordance with Rule 53.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Ms. Claus alleges that she is an expert in duty of care.

**Defendants' Position:**

[27] The Defendants argue that this Expert Report should have been in the affidavit sworn by Ms. Claus, as opposed to being attached to the affidavit of Mr. Zhang. This would have allowed the Defendants to cross-examine Ms. Claus on her affidavit. Since there was no sworn affidavit from Ms. Claus, the Defendants argue that the Expert Report should not be relied upon as evidence on the motion for summary judgment.

**Plaintiffs' Position:**

[28] The Plaintiffs argue that the Expert Report identifies the risks that the Defendant, UWO, failed to mitigate and will be brought out in trial to show that UWO failed to meet its duty of care.

[29] The Plaintiffs argue that the Defendants did not exercise their rights under Rule 39.03, which allows the Defendants to cross-examine an expert in relation to a motion. On that basis, the Plaintiffs claim that they should not be barred from relying on the Expert Report.

[30] The Plaintiffs acknowledged that they did not provide a *curriculum vitae* ("CV") of the proposed expert. The Plaintiffs were prepared to provide the CV while the motion was being argued. The Court declined to accept the CV as it was not part of the motion materials filed and it could have prejudiced the Defendants' position.

**Analysis:**

[31] The trial judge, or the judge hearing the motion, is the person who determines whether a person is qualified as an expert and, if so, in what area the person is qualified to give the expert evidence.

[32] The Honourable Justice Stephen T. Goudge prepared a report entitled *Report of the Inquiry into Pediatric Forensic Pathology in Ontario* (Toronto: Ministry of the Attorney General, 2008). In Volume 1 of that report, at p. 47, Justice Goudge made the following comments:

> [T]he judge must bear the heavy burden of being the ultimate gatekeeper in protecting the system from unreliable expert evidence...
> ...
> The case law I discuss in Volume 3 makes it clear that the judge must determine whether the expert scientific evidence has sufficient threshold reliability to be considered by the trier of fact. This exercise should not be confined to so called "novel science."

[33] At Volume 3 of the report at p. 620, as part of recommendation 130, Justice Goudge says:

> Trial judges should be vigilant in exercising their gatekeeping role with respect to the admissibility of such evidence [proposed expert evidence]. In particular, they should ensure that expert scientific evidence that does not satisfy standards of professional reliability be excluded, whether or not the science is classified as novel.

[34] At pp. 494-95 of Volume 3, Justice Goudge adds:

> Drawing on what I heard at the Inquiry, let me offer these concluding thoughts on the gatekeeper task of vetting any scientific evidence for threshold reliability. I recognize that simply reciting a laundry list of factors or questions is of limited utility. It may be helpful to distinguish between those questions that focus on the reliability of the witness and of the relevant scientific field in general and those that focus on the reliability of the particular opinion that the witness proposes to provide. Although some expert evidence can be excluded on the basis that the witness or the discipline, or both, are not sufficiently reliable to justify admission,

> expert evidence should not be admitted solely on the basis that the witness has impressive credentials and comes from a recognized discipline. In every case, the trial judge should drill down and determine whether the actual evidence to be given by the witness satisfies a standard of threshold reliability.
> ...
> The trial judge is to assess whether the particular conclusions and opinions offered by the expert are supportable by a body of specialized knowledge familiar to the expert, and whether the manner in which the expert proposes to present his or her testimony accurately reflects the science and any relevant controversies or uncertainties in it.

[35] The report states that the trial judge must make an independent assessment to determine whether a person is truly qualified as an expert.

[36] Rule 53.03 of the *Rules of Civil Procedure* deals with expert reports:

> **53**.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).
>
> (2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).
>
> (2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:
>
> 1. The expert's name, address and area of expertise.
> 2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
> 3. The instructions provided to the expert in relation to the proceeding.
> 4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
> 5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
> 6. The expert's reasons for his or her opinion, including,
>    i. a description of the factual assumptions on which the opinion is based,
>    ii. a description of any research conducted by the expert that led him or her to form the opinion, and
>    iii. a list of every document, if any, relied on by the expert in forming the opinion.
> 7. An acknowledgement of expert's duty (Form 53) signed by the expert.

[37] The principles governing the admissibility of evidence on a summary judgment motion are the same as those that apply at trial, except for Rule 20.02(1)'s exception permitting an affidavit made on information or belief. As a general rule, a party seeking to adduce expert evidence at a summary judgment motion must comply with Rule 53.03, including the requirements of Rule 53.03(2.1) (*Sanzone v. Schechter*, 2016 ONCA 566, at paras. 15-17, leave to appeal to S.C.C. refused , 37245 (February 23, 2017).

[38] The Expert Report is dated August 5, 2016. The Acknowledgement of Expert's Duty is dated September 30, 2016. This Report was served with the affidavit of Cheng Zhang on April 5, 2017.

[39] The Court has reviewed the Expert Report in relation to Rule 53.03 (2.1) and makes the following comments as to the deficiencies in it as it relates to particular requirements in this rule:

*Rule 53.03(2.1)1: The expert's name, address and area of expertise*

[40] The Court notes that the expert's name was included, but the civic address was not included (other than her city listed in Form 53). The expert's area of expertise is only briefly described on page 2, stating "My academic and professional expertise and publications in the area of duty of care". No CV is attached.

*Rule 53.03(2.1)2: The expert's qualifications and employment and educational experiences in his or her area of expertise*

[41] The Court notes that the expert lists her degrees in the footer of the document, but the acronyms are not explained and, again, no CV is enclosed.

[42] There are some areas in the report where Ms. Claus discusses her experience, but they are brief. For example, on page 2 she simply mentions that she is relying on:

> My academic and professional expertise and publications in the area of duty of care (including over 150 duty of care presentations and workshops on four continents from 2009 to present).

[43] On page 7, she discusses how she has spoken at university duty of care events in Toronto and her publications have been widely distributed to universities.

*Rule 53.03(2.1)3: The instructions provided to the expert in relation to the proceeding*

[44] While the report discusses the purpose of the report and the sources the expert relied upon (such as materials from counsel, duty of care scholarship and her expertise, at p. 2), it does not detail the expert's instructions or assumptions relied upon by the expert.

*Rule 53.03(2.1)6: The expert's reasons for his or her opinion, including,*
*i. a description of the factual assumptions on which the opinion is based*

[45] The expert's assumptions are not explicitly discussed. She simply discusses the sources she relied upon, including the evidence from the litigation to date.

[46] In addition to these deficiencies, the Court notes that the Expert Report should have been appended to the affidavit of Ms. Claus, not the affidavit of Cheng Zhang, which would have allowed the Defendants the opportunity to cross-examine Ms. Claus on her affidavit in relation to the report. Since this was not done, the Defendants were deprived of the opportunity to cross-examine Ms. Claus on her affidavit and the report.

[47] In this case, the Plaintiffs have not put forth any qualifications of the witness before the Court to show: 1) this person is an expert witness; and, 2) the area in which she is an expert.

[48] While the Plaintiffs argue that the Expert Report identifies the risks that the Defendant, UWO, failed to mitigate, the Court finds that the failure by the Plaintiffs to follow the *Rules of Civil Procedure* and enter the Report into evidence properly should not be sidestepped.

[49] The Expert Report is grossly inadequate and does not contain sufficient information or detail to permit an assessment of the witness' qualifications as an expert witness in the area alleged – "duty of care".

[50] For these reasons, the Court is deprived of the ability to determine if Ms. Claus is qualified to give expert evidence and determine the area in which she is qualified to give expert evidence. Therefore, the Court finds that the Expert Report from Ms. Claus, as appended to the affidavit of Cheng Zhang, will not be considered by the Court on the motion for summary judgment.

**Issue #2: Is the Affidavit of Cheng Zhang Admissible?**

**Defendants' Position:**

[51] The Defendants argue that the affidavit of Cheng Zhang appears to comment on the affidavits of other parties, for example, Dr. Semotiuk. The affidavit also makes assertions regarding UWO's policy and the night of the accident.

[52] The Defendants argue that Mr. Zhang, the father, was not a witness to the accident and, furthermore, that he has no expertise in academic planning or trips abroad.

[53] They argue that this is presumptively inadmissible hearsay and opinion evidence.

**Plaintiffs' Position:**

[54] The Plaintiffs argue that Rule 20.02(1) permits an affidavit in a summary judgment motion to be made on information and belief to show that there is a genuine issue for trial, which is what Mr. Zhang's evidence does and is therefore acceptable.

[55] They argue that because Nan has a brain injury he is not able to provide evidence by way of affidavit for the purpose of this motion, as opposed to his father providing the affidavit.

**Analysis:**

[56] The Court notes that Nan is represented by his father as his Litigation Guardian. The function of a Litigation Guardian is to act on behalf of a person under disability, in this case, Nan.

[57] The Court notes that in this case, because of Nan's brain injury his father is acting on his behalf and provided the affidavit in relation to the summary judgment motion. The Court does not take any issue with there being no affidavit of Nan Zhang because of his brain injury. The Court finds that the father providing an affidavit instead of Nan is appropriate under the circumstances.

[58] The father's affidavit is comprised of three parts:

a. the background and facts pertaining to the accident;

b. the allegations that UWO and the School of Kinesiology staff did not adequately plan for the trip in question; and

c. the allegations that UWO and its faculty breached its duty of care and acted negligently, and the reasons for those allegations.

[59] As to the background and facts pertaining to the accident, the Court notes that Mr. Zhang was not present in Cuba at the time of the accident and was not a witness. Therefore, he had no direct knowledge of what occurred. He is relying on information and belief without identifying the source of his information and belief. While Mr. Zhang has provided hearsay and opinion evidence which is presumptively inadmissible (*Halsbury's Laws of Canada*, "Evidence" (Toronto: LexisNexis Canada, 2014 Reissue), at HEV-84), pursuant to Rule 20.02(1), the Court finds that this portion of the affidavit by Mr. Zhang is being made on information and belief and is acceptable.

[60] As to the allegations that the Defendant UWO and its staff failed to have adequately planned for the trip, Mr. Zhang makes conclusory assertions without reasons for his conclusions.

[61] On cross-examination Mr. Zhang deposed that he had no expertise in event planning or risk assessment pertaining to study trips abroad. The evidence given by Mr. Zhang in relation to the second topic of his affidavit is accepted, however little weight is given to it.

[62] Furthermore, some of his comments are unrealistic. For example, as relates to the "free time" of the students, Mr. Zhang says that the university and the staff failed to adequately schedule events or supervise students who were not involved in course activities. He says that the university should have anticipated that the students would have free time during their trip, in which they would travel outside the boundaries of their hotel. He argues that this required the university and its faculty staff to have structured and organized plans for the students during "free time" as well.

[63] Mr. Zhang says that this could have essentially included, but would not be limited to:

a. complete supervision by the professor to any place outside the hotel, especially places where alcohol was being consumed abundantly;

b. full-time taxi or shuttle service for students and faculty throughout the trip; and,

c. operating cell phones with Cuban SIM cards for all students.

[64] Mr. Zhang's perspective is that the university should supervise adults for the full time of their stay in Cuba, even during free time. He contends that taxis should have been provided for free time periods, Cuban SIM cards for the students' phones, and they should have been supervised at all times. While asserting those as arguments, no evidence was introduced by the Plaintiffs to support those conclusions.

[65] During the period of time just prior to the accident, Nan and his fellow students chose to walk. The evidence is that they would not all fit into one taxi and there was no taxi waiting at the bar. Even if there had been a taxi at the bar, since the students did not want to split up, they would have not have been able to get seven people, plus the taxi driver, into the taxi.

[66] The evidence is that UWO and/or Dr. Semotiuk had provided the students with contact numbers for the hotel and the Cuba equivalent of 9-1-1. The argument that Nan was not able to use his cell phone to call either the hotel or 9-1-1 is not accepted by the Court. The students could have used available landlines or borrowed a cell phone from someone whose phone worked in Cuba.

[67] The Plaintiffs also argued that because they did not have working cell phones, they were unable to call an ambulance and that if they had a cell phone, the ambulance would have come sooner. There is no evidence that even if Nan or the other students had a working cell phone, the ambulance would have come earlier than it did.

[68] The third part of the father's affidavit deals with the Expert Report of Ms. Claus. The affidavit appears to repeat the comments from the Expert Report.

[69] Since the Court has found that the Expert Report is not admissible into evidence, the Court is unable to give any weight to the evidence in Mr. Zhang's affidavit in relation to the Report.

[70] In conclusion, the evidence given by Mr. Zhang in relation to the Expert Report is not admitted.

**Issue #3: Did UWO owe the Plaintiff a Duty of Care in the Circumstances?**

**Defendants' Position:**

[71] The Defendants argue that the first consideration is whether the relationship is analogous to a previously recognized duty of care. They suggest there is no existing duty of care in the case

law between a university and adult students independently partaking in non-academic activities while abroad on academically-related travels.

[72] Therefore, a new novel duty of care must be found.

[73] The test for a novel duty care is found in the *Anns* case, which the Defendants break down as follows:

1) Should the Defendants have contemplated that the Plaintiff would be affected by the Defendants' conduct?

2) Was there sufficient proximity, i.e. a relationship between the Plaintiff and the Defendants, to give rise to the duty of care? and,

3) Is there an absence of overriding policy considerations that should negative such duty?

[74] The Defendants argue that the factors in the *Anns* test have not been met and that there are many countervailing policy considerations against the imposition of a novel duty of care.

**Plaintiffs' Position:**

[75] The Plaintiffs argue that whether a duty of care exists or not should be determined at trial and not on a motion for summary judgment.

[76] The Plaintiffs agree that the *Anns* test is the leading test for establishing a novel duty of care.

[77] They argue that the students were not simply engaged in off-campus activities when they went drinking to the bar after the dinner, but rather were taking a course put on by the university abroad, much like employees on company business in a foreign country.

**Analysis:**

[78] The first step in the duty care analysis is to consider whether this situation is already captured by an established or an analogous category of duty of care.

[79] The Defendants indicated that there are only two circumstances in which Canadian courts have found that there is a duty of care owed by post-secondary institutions to students:

1) where the institution exercises control over the academically related activities; and,

2) where liability is extended to the institution by virtue of being an occupier.

Case citations provided for the two cases were not provided by counsel.

[80] At the time of the accident, was Nan engaged in academically-related activities while on academically-related travel, or was he engaging in a non-academic activity? The Court finds that he was engaged in non-academic activity.

[81] At the time of the accident, which was on February 21, 2014, between 2:00 a.m. and 3:00 a.m., Nan was on "free time". He was not on a course, nor was he involved in an activity related to the course. This was time when the students, during the day or evening, could do whatever they wanted, wherever they wanted, whenever they wanted.

[82] At the time of the accident, the Court finds that Nan was not involved in a university related activity. While the Plaintiffs argue that Nan was involved in an activity at the course put on by the UWO, the Court does not find this to be the case.

[83] The parties acknowledge that there is no Canadian case law that recognizes a duty of care owed by post-secondary institutions to adult students who are independently partaking in non-academic activities while abroad on academically-related travels.

[84] The Court therefore finds that the parties' relationship does not fall within an existing category of duty of care.

[85] Since the relationship has not been previously recognized as giving rise to a duty of care, the question is whether the law of negligence should be extended to reach this particular situation: *Cooper v. Hobart*, 2001 SCC 79, at para. 21.

[86] This involves using the two-stage *Anns* test, which is adapted from the case *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.). The two stages of the *Anns* test consider:

1) whether there is a *prima facie* duty of care between the parties; and,

2) whether there are broader policy considerations, outside of the relationship between the parties, that would negate the *prima facie* duty of care found in stage 1.

**Stage 1 of the *Anns* Test: Whether there is a *Prima Facie* Duty of Care:**

[87] The burden is on the plaintiff to establish this *prima facie* duty of care.

[88] In *Childs v. Desormeaux*, 2006 SCC 18, at paragraph 13, the Supreme Court held:

> 13. The plaintiff bears the ultimate legal burden of establishing a valid cause of action, and hence a duty of care: *Odhavji*. However, once the plaintiff establishes a *prima facie* duty of care, the evidentiary burden of showing countervailing policy considerations shifts to the defendant, following the general rule that the party asserting a point should be required to establish it.

[89] In the case of *Cooper v. Hobart*, at paragraph 30, the Court held:

> 30. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here?

Proximity:

[90] In stage 1 of the test, the first consideration is proximity, i.e. whether the parties were in such a "close and direct" relationship that it would be fair and just to impose a duty of care.

[91] The Court must consider all of the relevant factors arising from the relationship between the Plaintiff and the Defendant, including expectations, representations, reliance or any other interests involved (*Cooper v. Hobart*, at para. 34).

[92] The evidence before the Court is that UWO offered a course entitled "Sport and Physical Activity in Cuba". This was a sanctioned course and the university provided faculty to teach the course both in London, Ontario and in Cuba.

[93] Nan was a student at the university who applied for and was accepted into the course, having completed an application form prepared specifically for the "Sport and Physical Activity in Cuba" course. This course was available to third and fourth year honours students and graduate students in the School of Kinesiology. Nan had completed the application, which included a one-page statement highlighting his qualities and characteristics that would equip him to act as a worthy ambassador for the university and for Canada. The date of his application was July 15, 2013.

[94] In his statement, Nan says:

> "The purpose of life is to live it, to taste experience to the utmost, to reach out eagerly and without fear, for newer and richer experiences." Those were the words of the late Eleanor Roosevelt. For the past 20 years of my life, this statement could not have been more accurate. I've always loved new experiences whether it be new cultures, or new sports. Often times too many people are too scared or unwilling to leave their comfort zones and try new things. I am person who subscribes to the same quote, "No venture, no gain". Only when we take risks and leave our comfort zones do we really realize our full potential. A good ambassador must be open to new experiences and be willing to take the risks.

[95] The statement goes on to say that he was born in China in 1993 and moved to Singapore in 1996. In 2000 he moved to Vancouver and a few months later relocated to Ottawa.

[96] Later on in his statement, he says:

> Needless to say, I've experienced a lot of different lifestyles and cultures firsthand. Everywhere I've been, I've enjoyed all of the cultural differences and have integrated well into new cultures. Enjoying cultural diversity and integrating well into new cultures are essential qualities of a new ambassador.

[97] His statement ends with:

> If selected, I will represent Western University and Canada in the highest possible capacity and show it in a positive light.

[98] Nan was accepted into the course. A course syllabus was provided in September 2013. The on-campus component of the course took place from September 10, 2013 to November 19, 2013. In addition there were pre-departure classes held on January 20, 2014, February 5, 2014 and February 10, 2014.

[99] The university provided various documents to the students including Nan, on November 19, 2013 as follows:

1) International Course Experience Checklist;

2) Students' Rights and Responsibilities;

3) Acknowledgement and Assumption of Risk; and,

4) Permission to Release Information.

[100] The International Course Experience Checklist is a document that was provided to the students in the course for their own use to assist with preparation for the trip to Cuba.

[101] All students in the course were required to read, sign and return the Students' Rights and Responsibilities document. This document was signed by Nan and read in part as follows:

> I understand and agree to the following terms and conditions:
>
> 1) I will attend and participate in all pre-departure sessions as offered by the course professor;
>
> . . . .
>
> 4) I understand that I will be an ambassador for the University of Western Ontario while on International Course Experience. As such, I will conduct myself in a manner appropriate to that designation, and agree to abide by all local laws in my host country. While on my International Course Experience, I am subject to the Western Student Code of Conduct, as well as the Student Code of Conduct at my host site. Any violation of the code may result in the imposition of sanctions, such as removal or discontinuation of the International Experience.

[102] All students in the course were required to read, sign and return the Acknowledgement and Assumption of Risk document. This document was signed by Nan and read, in part, as follows:

> Participation in an International Course Experience may involve certain risks and dangers that are not inherent in completing an educational experience when

> attending the campus of The University of Western Ontario. These may include, but are not limited to, the hazards of traveling, accidents or illness in remote places without medical facilities, risk associated with living accommodations, the forces of nature and travel by air, train, automobile or other means as well as exposure to customs and practices of societies different from their own. It is important that students understand that The University of Western Ontario cannot be responsible for the personal safety and well being of students while on International Course Experiences and that the student must accept responsibility for the assumption of these risks.

[103] The acknowledgement also states that:

> The University of Western Ontario will not be responsible for injury to, or damages suffered by, the student while participating in the International Course Experience, except to the extent that such injury or damages are caused by the negligent act of The University of Western Ontario or its employees. Furthermore, the student must accept responsibility for his or her own actions and behaviour and agree to be responsible for any claim which may be made against The University of Western Ontario arising out of those actions.

[104] All students in the course were required to read, sign and return the Permission to Release Information document. This document was also signed by Nan.

[105] At the pre-departure classes Dr. Semotiuk reminded the students of the following:

a) the "Students' Rights and Responsibilities" and "Acknowledgement and Assumption of Risk" documents;

b) punctuality was important for the structured part of the program;

c) university students were to serve as representatives and ambassadors of Western University and Canada at all times;

d) during "free time", students were encouraged to go in groups and be attentive and mindful of the environments they found themselves in;

e) where possible, students were to try and minimize walking and instead take taxis due to the poor condition of sidewalks and poor street lighting conditions in Havana; and

f) the students should "use good judgment" as a reminder that they were to act responsibly at all times in Cuba.

[106] The university, through Dr. Semotiuk, circulated a Government of Canada travel advisory for Cuba. All of the students were advised by Dr. Semotiuk of additional pre-departure courses and information offered by the university at the International Learning Centre. Participation in those particular courses was optional.

[107] In terms of the parties' expectations, the university expected the students to attend the courses, both the in-class pre-course and the actual course in Cuba. At the same time, the university represented to students that there were challenges with going to Cuba in relation to the living standard of the people and the facilities available to the students and staff, as well as challenges with respect to crime and safety while in Cuba.

[108] Specifically, the students were provided with the travel advisory by the university.

[109] In turn, the students represented that they would comply with the International Course Experience Checklist. In addition, Nan signed the Students' Rights and Responsibilities form for attendance of the course in Cuba, as well as the Acknowledgement and Assumption of Risk form.

[110] The expectations of the students were that they were to have a positive learning experience in the course and that they would receive a credit, assuming they completed the course in accordance with all of the course requirements.

[111] The Court notes that the students, including Nan, were adults. While they were students at an educational institution, they were not children at an educational institution.

[112] The Plaintiffs rely on the case of *Munn v. Hotchkiss School*, 326 Conn. 540 (2017). At paragraph 10, the Court says:

> Although the law of negligence typically does not impose a duty on one party to act affirmatively in furtherance of the protection of another, there are certain exceptions to that general proposition. … One exception applies where there is a "special relationship" between those parties ... and one example of such a special relationship that has received wide recognition, along with a concomitant duty to protect, is the relationship between schools and their students.

[113] The Court notes that in the *Munn* case the student was 15 years old and she was attending a private high school. In the present case, we have an adult who was nearly 21, attending university.

[114] The Plaintiffs also rely on the case of *Fay v. Thiel College*, 2001 W.L. 1910037 (Pa. Com. Pl. 2001), in which a student, prior to departing on a trip to Peru, was required to sign certain documents, including a waiver of liability and a consent form. During the trip, the student became ill and was taken to a medical clinic where she was eventually admitted. She was left at the clinic alone with an adult, but one who was in no way related to Thiel College and was not acting as an agent and/or in a representative capacity. During her stay at the clinic the Plaintiff was subjected to unnecessary surgical removal of her appendix.

[115] On page 4 the Court said:

> Although it is true that a college does not owe its students an in *loco parentis* duty simply because of the college/student relationship, *Alumni Association v. Sullivan*, 524 Pa. 356, 364, 572 (A) 2d. 1209, 1213 (1990) (court refused to impose liability

> upon university for the negligent acts of one of its students, who had committed those acts after becoming intoxicated at a fraternity party where he had been openly served alcohol even though underage), it is true that a college can owe a particular student a special duty as a result of a special relationship that exists between the college and that particular student.

[116] In the case before this Court, while Nan was part of the course at the time of the accident, he was not engaged in an organized course activity. The evidence is that the students, including Nan, understood that they were on their own free time and were drinking alcohol which they were entitled to do. There is nothing before the Court to permit a finding that Nan's high blood alcohol was in any way the responsibility of the Defendants.

[117] On the basis of the evidence before me, the Court finds that at the time of the accident, there was no special relationship between Nan and the subject Defendants.

Reasonable Foreseeability:

[118] The question then arises as to whether the Plaintiff's injury was reasonably foreseeable as a consequence of the Defendants' actions. There is nothing in the evidence to permit the Court to conclude that the Plaintiff's injury was reasonably foreseeable. There is no demonstrable nexus between the injury sustained by the Plaintiff and conduct of the Defendants.

[119] Therefore, the Court does not find that the Plaintiff's injury was a reasonably foreseeable consequence of the Defendants' acts.

[120] The Court finds that there is no *prima facie* duty of care. Therefore, there is no need to deal with the second stage of the *Anns* test (see *Childs v. Desormeaux*, at para. 48).

**Issue #4: If UWO did owe the Plaintiff a Duty of Care, did it Breach that Duty; and if so, is it Liable?**

**Defendants' Position:**

[121] The Defendants argue that Nan has not shown that his injury was caused by the University of Western and/or Dr. Semotiuk' s behaviour or that they breached their standard of care.

**Plaintiffs' Position:**

[122] The Plaintiffs did not raise any argument in relation to this issue.

**Analysis:**

[123] Since the Court has found that the Defendants did not owe a duty of care to the Plaintiff there was no duty to breach. The Defendants are not liable to the Plaintiff.

**Other**

[124] If it is found that the Court was in error that there was no duty of care, in any event, the Court would have found that the damages sustained by the Plaintiff were too remote from the wrongful conduct. The remoteness inquiry asks whether the harm is too unrelated to the wrongful conduct to hold the Defendants fairly liable, and whether the actual injury sustained by Nan was reasonably foreseeable to the Defendants: see *Mustapha v. Culligan*, 2008 SCC 27, at para. 12. The injuries suffered by Nan, while serious, were not a reasonably foreseeable consequence of the Defendants' conduct.

**Issue #5: Is this an Appropriate Case for Summary Judgment?**

**Defendants' Position:**

[125] The Defendants argue that there is no genuine issue requiring a trial in relation to the liability Defendants, UWO and Dr. Semotiuk (Rules 20.02 and 20.04). They argue that any concerns about credibility or clarity can be resolved in a summary judgment given the Court's fact-finding power (*Hryniak v. Mauldin*, 2014 SCC 7, at para. 51).

**Plaintiffs' Position:**

[126] The Plaintiffs argue that the evidence of the case raises issues that clearly need to be determined at trial.

[127] The Plaintiffs argue that the affidavit of Cheng Zhang has provided sufficient material to show that there is a genuine issue that requires a trial.

**Analysis:**

[128] Rule 20.04(2) states that when a Court is satisfied that there is no genuine issue requiring a trial with respect to a claim or a defence, the Court shall grant summary judgment. The language in that rule is mandatory.

[129] In determining whether there is a genuine issue for trial, the Court must consider the evidence submitted by the parties. The motion judge may weigh the evidence, evaluate the credibility of a deponent or draw any reasonable inferences from the evidence (Rule 20.04(2.1)). The Court may also order that oral evidence be presented by one or more parties in order to consider the evidence (Rule 20.04(2.2)).

[130] In the case of *Hryniak v. Mauldin*, Karakatsanis J. outlined the test to be adopted when a determination is required with respect to the appropriateness of the summary judgment motion. She says at paragraph 49:

> [49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts,

> and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[131] In paragraph 66 of her judgment, Karakatsanis J. says:

> [66] On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[132] The Court notes that there are three Defendants in this case, the first being the unknown driver and owner, John Doe, while the other two Defendants are the university and Dr. Semotiuk.

[133] In this decision, the Court has previously found that the Expert Report is excluded from the evidence for the reasons set out above.

[134] The Court has also found that there is no duty of care owed by the two Defendants in question in relation to this matter.

[135] Based on those two findings, the Court does not see that there is any genuine issue related to the two Defendants, UWO and Dr. Semotiuk, that requires a trial.

[136] The Court finds that the summary judgment process has provided the Court with the evidence required to fairly and justly adjudicate this dispute. Furthermore, the summary judgment process in this case is a timely, affordable, and appropriate procedure under Rule 20.04(2)(a).

[137] As stated previously, Nan has suffered a severe brain injury. That is not the issue on this motion. The issue is whether a duty of care is owed by the Defendant university and Dr. Semotiuk to the Plaintiffs. The Court has found that there is no duty of care owing by these two Defendants to the Plaintiffs.

**Conclusions:**

[138] For the reasons set out above, the Court finds that the claims against the Defendants UWO and Dr. Semotiuk are dismissed.

**Costs:**

[139] The parties shall be allowed 14 days to resolve the issue of costs. If they are unable to do so, they shall contact the trial coordinator and obtain a date and time to argue the issue of costs. Each party will have 15 minutes to argue the issue of costs. Costs Outlines and any Rule 49 Offers to Settle shall be provided three days prior to the hearing of the costs argument. If counsel is from out of town that counsel can appear by phone, if he wishes.

[140] Order to issue accordingly.

Mr. Justice Stanley Kershman

**Released:** March 15, 2018

**CITATION:** *Zhang v. UWO*, 2018 ONSC 1770
**COURT FILE NO.:** CV-14-62210
**DATE:** 2018/03/15

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

NAN ZHANG, by his Litigation Guardian CHENG ZHANG, CHENG ZHANG and QING LIAO

Plaintiffs

**– and –**

UNIVERSITY OF WESTERN ONTARIO, DARWIN SEMOTIUK and JOHN DOE

Defendants

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**REASONS FOR JUDGMENT**

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KERSHMAN J.

**Released:** March 15, 2018