



20 Holly Street, Suit 300 Toronto, Ontario M4S 3B1  
416-848-1019 • joyce@jwdental.com

Newsletter  
December 2004  
Issue 17

WELCOME!  
Joyce Weinman  
Welcomes Back  
Readers!

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Avoid a Law Suit  
- Part 2 1

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HARDTIMES  
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## Joyce Weinman Welcomes Back Readers!

In this issue we conclude How to Avoid a Law Suit Part 1. Revisit Issue 16 of **JW Dental Legal News** Part 1 to refresh your memory.

What do patients really want when they sue a dentist read the conclusion of I am Sorry! Check out our revamped Forum at [www.JWDental.com/forum/](http://www.JWDental.com/forum/) and post your questions. Exchange your positive and poor dental experiences with our readers.

We welcome your feedback comments and referrals. Contact us by email, or through the Forum.

J.W.

*The events depicted in any report in **JW Dental Legal News** are fiction. Any similarity between these events and the individuals described within are entirely coincidental.*

## "I AM SORRY" - Avoid a Law Suit - Part 2

In the last issue of **JW Dental Legal News** I reported the case of Dr. Stable and Frieda Fretter, the nervous dental patient. You will recall that Frieda was inconsolable when she awoke from general anaesthetic at the General Hospital. The nursing staff told her a small burn on her right cheek was caused by a freshly sterilized mouth prop, placed by Dr. Stable on her cheek during her dental procedures. Previously afraid to go to a dentist and be awake, she now became afraid to go to a dentist and be asleep.

Stable left the hospital that fateful day after assurances from the nursing and medical staff that the burn was inconsequential. Prior to his departure he didn't speak to Mrs. Fretter since she was still suffering from the disorienting effects of the general anaesthetic. The dime sized blister healed without incident. However, Frieda wanted

an explanation and an apology from Stable. She refused to pay Stable the balance owed on his account. Rather than speak with Mrs. Fretter directly about her treatment in the O.R. Suzy, Stable's office administrator fielded and screened all office calls from Mrs. Fretter.

Unfortunately Suzy was insensitive to Frieda. She treated Frieda's resistance to payment of the dental fee as only a money issue, without, having opened her mind to other possibilities. Suzy cut off Frieda's access to the professional advice and support she needed, all in the name of efficient collections. Suzy's lack of receptiveness to this injured patient's unique needs also led her to cut off a vital line of communication for Dr. Stable to his patient. As a result Frieda never did speak to Stable. She did not believe that Stable treated her with respect she deserved.

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*"Dr. Stable seeks justice."*

**Frieda argued: res ipsa loquitur the "thing speaks for itself" and the "thin skulled plaintiff", take the plaintiff as you find her.**



*"Judge Fair rules in Stable's favour."*

*continued from Page 1*  
*"I am Sorry" - Avoid a Law Suit - Part 2*

So Stable sued Frieda for her outstanding dental fee of \$2,128.00. Frieda counter claimed for professional negligence. Apparently Peter Fretter, Frieda's husband received the dental insurance cheque intended to pay for the Frieda's dental treatment however decided Frieda was wronged and didn't forward it to Stable.

So we rejoin Stable and Frieda at the local small claims court where the pair filed their lawsuits.

### **Dr. Stable's Collection Claim**

Both parties were represented by lawyers at the one-day trial. Suzy the office administrator testified. And Dr. Stable testified on his own behalf. Judge Fair listened carefully and observed the demeanor of the witnesses. Judge Fair heard that Stable and Frieda had an agreement or contract for services. They had agreed that Frieda's dental treatment was partially covered by Mr. Fretter's dental benefits plan. So Peter Fretter agreed to endorse his insurance cheque over to Stable. Judge concluded that the dental services were performed therefore Stable was entitled to payment of his outstanding dental fee.

However Judge Fair reduced the claim by \$575.00 to \$1,553.00. He determined that Suzy, the office administrator levied a fee of \$500.00 which was in fact a penalty. Suzy said that she arbitrarily chose the figure of \$500.00 not for its accuracy as an accounting benchmark. She felt it represented enough of a blow to a patient that he or she would likely be persuaded to try to negotiate it down in return for entering into prompt payment plans. All of Stable's patients also received a discount of \$75.00 for the cost of a visit to the General Hospital. Suzy decided to

take back the discount when the collection required a lawsuit. Judge Fair restored the \$75.00 discount to Frieda.

Fair found that the total charge of \$575.00 was not part of any agreement between Dr. Stable and Frieda. Judge Fair also determined that the understanding that a \$500.00 penalty for forcing a bill into collection could not be implied as a feature of the understanding between patient and dentist.

### **Frieda's Counterclaim**

Frieda and her husband testified. Dr. Stable testified in reply. Advancing the counterclaim for professional negligence, the Fretters' looked to two legal principles: res ipsa loquitur ("the thing speaks for itself") and that of the "thin skulled plaintiff" the notion that you must take a claimant as found, complete with unique susceptibilities to injury.

Frieda testified that she underwent dental surgery while under general anaesthesia. Fully aware that she was unable to alert Stable to any problems, Dr. Stable placed an instrument against her skin that was sufficiently hot to burn her. Frieda treated her scar diligently with sun block and natural skin care products and it responded well. She complained that she has a continuing, now heightened, fear and distrust of all things dental.

Fair conclude that it mattered not that to Stable's hand the instrument was not burning hot, for the evidence led one inexorably to the conclusion that it was hot enough to burn Mrs. Fretter's cheek. That the skin of this unconscious patient might be more susceptible to a burning injury than Dr. Stable's hand was his lookout, not hers.

Dr. Stable's answer was that, the principle of res ipsa loquitur only requires that he offer an explanation consistent with

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*"I am Sorry" - Avoid a Law Suit - Part 2*

no negligence on his part. As for the question of any unique susceptibility in Mrs. Fretter, he defended himself by asserting the principle of medical misadventure: that accidents can and do happen.

It is trite law that medical and dental professionals owe a duty of care to their patients. If the duty is breached and the patient suffers a loss, he or she may be entitled to compensation. Compensation is dependent on whether the nature of the loss is reasonably foreseeable. Some allowance is made for the individual's susceptibility to injury (the "thin skulled") patient. However the dental professional is assessed in relation to the norms of the average dentist or with reasonable ability in the same circumstances. He is not expected to be perfect nor will he be held accountable for mistakes that are apparent only after the fact.

Judge Fair then applied these principles of law to the evidence. It was obvious that Frieda was burned. However she did not present evidence that she was uniquely susceptible to being burned. Nor that she was aware of her special susceptibility prior to the surgery.

Dr. Stable's evidence portrayed a family dentist of considerable experience whose practice and routines were careful, responsible and professional. There was no doubt that he made a mistake in laying the mouth prop on Frieda's cheek. The instrument was too hot to be applied to the skin of this particular patient. As a result, when all was said and done, Judge Fair asked did the mistake constitute a breach of the dentist's duty of care to his patient or whether it was something less than that.

On all of the evidence before him, Judge Fair concluded that it was something less than a breach. Dr. Stable

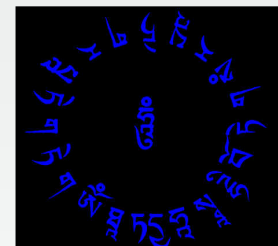
handled the instrument in his full hand before applying it. While it was true that he was wearing latex surgical gloves, the evidence was that they provide almost no insulation from heat. The feel of the mouth prop to his practiced hand was that, while warm, it was not too hot to be applied to Mrs. Fretter's facial skin. Hindsight proved him wrong; but hindsight did not prove him negligent.

Judge Fair dismissed the Counterclaim. He then stated that had he awarded compensation to Frieda he would have assessed general damages at \$2,000.00 and \$500.00 to Mr. Fretter for his Family Law Act claim.

Dr. Stable the winning party was entitled to his costs. Judge Fair considered his lawyer's argument regarding compensation for inconvenience and closure of his practice and loss of two office days. Judge Fair felt bound by the rules of court, which limit costs and awarded \$250.00 to Dr. Stable.

The financial cost to Dr. Stable and loss of trust in dental professionals by Mrs. Fretter could likely have been avoided. Dr. Stable now practices daily his mantra of forgiveness. Should a another disgruntled patient require consolation he is ready. He is prepared to avoid another law suit . With sincerity he will utter: "I am sorry!"

J.W. ❖




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**Dr. Stable now practices his daily mantra of forgiveness: "I am sorry!"**

## BUDDIES IN HARDTIMES or Dissolution of a Dental Partnership - Part 1

**It is trite to say a business partnership is a more complex arrangement than a marriage. And it may be as difficult or more so to extricate oneself from one. I think that Don and Joe might agree.**

Dentists Don and Joe enjoyed excellent personal relations at one time. Joe was godfather to Don's child. However Drs. Don and Joe were now involved in an unfortunate fight.

They practised dentistry together since graduation in the mid-1960's. Together with another dentist, Barry, they bought out their previous employer in 1972. They continued their practice as the Bright Dental Centre. In bad health Barry retired in 1981. Then Joe ran into difficulties. He suffered from depression in early 1985. He was diagnosed as having a disorder, which manifested in prominent avoidance and passive-aggressive personality traits. In March 1985 he was suspended from practice for nine months. The reasons were malpractice related to over-charging and poor record keeping. Don was stressing and wanted to exercise his buy-out option.

Don and Joe tried to sort things out on their own. They could not agree on a buy-out price. They reached an impasse and each hired a lawyer. Judge Fairmind heard the trial of the estranged "buddies" in September 1990.

The fight between Don and Joe centered on two issues. (i) whether their partnership had been dissolved in 1986 with the unresolved proposal for the buy-out; and (ii) whether the Property of Bright Dental Centre, which also included several residential apartments was an asset of the dental partnership or was owned in equal shares as tenants

in common by Don and Joe in their individual capacities outside the partnership.

The parties agreed that: the value of the Bright Dental Centre as of April, 1986 was \$446,125 and as of the trial date it was \$1,180,000; and the value of all other physical assets except the Bright Dental Centre as of the date of trial was \$47,500. They could not agree on a valuation for goodwill.

### Don's Position

Don claimed that the partnership was dissolved in 1986 when Joe misrepresented the amount of disability insurance he received. Joe failed to pay 50 % of the proceeds of his disability insurance to the partnership as required under the partnership agreement. Don asserted the building in which the dental practice was located was owned by the parties as tenants in common.

### Joe's Position

Joe counter-claimed, that the Bright Dental Centre continued as a partnership after the 1986 dates. He asked the court to declare that the dental practice and the Bright Dental Centre properties should sell and the net proceeds be divided equally.

### The Partnership Agreement

Don, Joe and Barry entered into a partnership agreement on September 1, 1972. Since that time there were several amendments and adjustments, some formally recorded and others merely understandings recognized by the three partners in their continuing operations. When Barry retired in 1981 Don and Joe purchased his interest. Don and

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*Don and Joe could not agree on a valuation of goodwill.*

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*Joe misrepresented the amount of disability insurance he received.*

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**BUDDIES IN HARDTIMES ....**

Joe continued as partners in the Bright Dental Centre employing dentist associates, a denturist and dental hygienist.

### **Partnership Asset or Not**

The three partners initially leased the Property. Then it was purchased in 1983. The lease contained an option to buy the Property and some adjacent properties (the adjacent properties were sold off at the time of acquisition). Barry, having retired in 1981, did not participate in the purchase. The Property was shown in the practice books as an asset of the partnership; revenues and expenses of the Property were reflected as that of the partnership. The parties had monthly (and other periodic) statements of the partnership showing this.

Judge Fairmind was satisfied the monies to purchase the Property (that is, the down payment and closing funds) came either directly from the partnership pot or were obtained by Don and Joe individually but in their capacity as partners with the intention that the monies be treated as partnership funds. These indirectly obtained funds were paid off by the partnership. Don and Joe obtained free life insurance by taking out "personal" loans as opposed to a partnership loan. Fairmind considered this a change in the form (in order to get an extra benefit) but not the substance of the financing as a partnership venture. The partnership continued to fund the ongoing expenses and payments concerning the property. While there was a "rent" charge to the Bright Dental Centre, this was not formally treated as such but merely used as a convenient internal handle on an in and out basis.

The Property deed was registered in the names of Don and Joe as tenants in common. The mortgage on the Property was drawn up consistent with that deed. Dr. Don indicated that the distinction

between registration as tenants in common or as a partnership property was not explained to the partners by their solicitor they retained. Joe did not seriously contest that fact. The solicitor testified that generally he would recommend the device of tenants in common as giving more flexibility in such situations. The various forms of recording an interest in property did not register in the minds of either of Don or Joe.

Fairmind found that neither of them focused on the point, leaving the processing of the documentation entirely as a mechanical matter to the solicitor. The reporting letter on this 1983 transaction was not in fact delivered until 1986 and it does not highlight this point. Certainly there was no recommendation in writing prior to closing. At the stage of acquiring the Property and up until the legal difficulties had arisen between them, they treated the Property as a partnership asset.

Given the method of purchase including its financing, the lack of instructions to their solicitor to the contrary but accepting in the rush of things the documents the way the solicitor felt they should be prepared, the fact that the Property was treated as a partnership asset on the books of the partnership and income there from included as a partnership receipt, Judge Fairmind found that the Property was a partnership asset.

### **Joe's Absence from the Bright Dental Centre**

Joe was investigated by the Dental College in 1984 and suspended following his March 1985 hearing. No doubt this suspension compounded the major depression he was experiencing. His suspension caused some work scheduling and overload problems for the Bright Dental Centre generally and his partner Don specifically; it also had financial repercussions for all concerned. In essence Joe did not attend the Bright Dental Centre during his suspension.

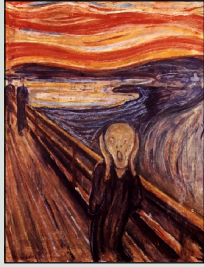
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*The partnership had dissolved!*

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*Joe was investigated by the Dental College and suspended following his March 1985 hearing.*



*"Don locked in his own world"*

*continued from Page 6*  
*BUDDIES IN HARDTIMES ....*

Communication in person, by phone or by correspondence appears to have occurred on only a couple of occasions in that period. Joe said that during 1985 he was locked in his own world; he did not want to see anyone or talk about dentistry. On two occasions during the trial Judge Fairmind raised with Joe's lawyer whether Joe lacked capacity during the relevant 1985-86 time periods as a result of his medical condition; he was advised each time that he did not wish to advance that proposition.

In December 1985 Joe went to see Don. He wanted to ease back into the practice and to hire an assistant. Don advised Joe that he did not look well at that time. Fairmind interpreted this observation as subtle advice to Joe against any early re-entry to the practice.

Don and Joe met in January 1986. A buy-out as of January 30, 1986 was discussed. This was apparently to follow the same procedure they had at the time of Barry's buy-out in 1981. Benny their trusted bookkeeper of some 30 years was to prepare financials and submit them to a chartered accountant who had advised Don, Joe and Barry from time to time. This was to establish a buy-out figure taking into account real asset valuations.

Don discussed buying out Joe as of the end of January 1986 and then changed that effective date to April 30, 1986. Joe was to obtain one appraisal for the Property and Don another. A third appraisal was to be obtained if there was too wide a spread in the first two appraisals. The magnitude of this gap was never specified. In any event, Joe's appraiser never picked up any material. Suffice to say Don and Joe could not agree on the value of the assets, the value of the goodwill or the date of dissolution of the partnership.

The parties did not have a mechanism

within the Partnership Agreement to help them reach a price, which would be accepted by both of them. The accountant came up with a figure, explained it to the parties and the parties then had the opportunity to accept or reject it. Joe did not accept. Joe appeared to have reserved the right to see what numbers resulted from the valuation as Barry did in his own buy-out. Don and Joe had a mutual intention to come to a determination of the amount in issue as quickly as possible but unfortunately they failed to do so.

### **The Disability Insurance Scam**

Or Just and Equitable Reasons for Partnership Dissolution

Fairmind found that Joe cheated Don out of part of the insurance proceeds and did so in a method, which he testified took some planning, and implementation over a relatively long period of time. It was not a spur of the moment matter. Joe also admitted that he was guilty of unprofessional conduct in his keeping of patient records and billings.

The parties did not have provision within the Partnership Agreement to terminate it. The partners had disability insurance, the premiums of which were paid as an expense of the Bright Dental Centre. Joe was collecting approximately \$7,500 a month which he apparently treated as a tax-free receipt. He advised that he was having difficulty making ends meet after paying very basic living expenses and his legal fees with the result that he was having to sleep on a mattress on the floor of his home. The partnership agreement called for half the proceeds of such disability insurance to be paid into the general pot in lieu of the earnings of the disabled partner. While the philosophy of such an arrangement appears clear, the arithmetic to implement the philosophy is unclear. However, it is clear that Joe did not pay in anything. When asked by

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**Judge Fairmind**  
*found Joe planned and cheated Don out of part of the insurance proceeds*

*continued to Page 7*

## WHEN IT'S OVER - Division of Family Property - Part 3

This is the conclusion of the saga of Dr. Nat and his wife nurse Mary. We find them in Divorce Court divvying up their net family property, with Madam Justice Steadfast. We also find out whether Nat pays Mary spousal support.

Now Nat, a hard working dentist had no assets to show for his efforts. At separation the couple had substantial joint family debts. So Nat sold his dental practice and all of the proceeds from the sale were used to pay down these debts. Nat's remaining debt of \$374,239 wiped out his assets of \$289,169. Nat was in a deficit position of \$85,305.

Mary on the other hand had \$272,057 in her own bank account. Over the years

Nat gave Mary financial information about his dental practice and the family finances. However Mary did not reciprocate. She refused to divulge her assets and investments and tax position for 7 years prior. Every time she went to the bank she found that the joint accounts were always overdrawn. Mary said she kept her assets separate from Nat's and the dental business since she could not understand how the family became so debt ridden.

Nat said he could not meet Mary's lifestyle expectations for the family on his income.

Both Nat and Mary asked Judge

*continued to Page 8*



*"Nat and Mary's equal Split"*

*continued from Page 6*  
**BUDDIES IN HARDTIMES ....**

Don how much he was getting, He responded "not much". Don apparently left this answer untouched at that time. He must have had some inkling of what the receipt would be since he had equivalent coverage. However, Joe determined that he would bolster his "plea of poverty" to support his failure to pay in part of the money to the partnership. He walked into the office of the insurance company and surreptitiously obtained some of the carrier's letterhead. By way of a newspaper advertisement he then sought out an independent typist to make up a letter which he requested she sign in the name of an employee of the carrier indicating that his disability receipts were \$19,000 as opposed to their actual amount some four times greater. This letter, dated March 3, 1986, was then given to Don. This charade was not a spur of the moment lapse; it was con-

ceived and executed over at least a week. Don said that he could not trust Joe as a partner after he was made aware of this deceit. Fairmind found that Joe's deceit entitled Don to treat the partnership as being at an end.

Clearly, the parties intended to negotiate the terms of such a termination and they did so without success. Since the parties were still negotiating for values of the assets as of April 30, 1986 Fairmind used this date to determine the amounts involved and to fix the date of the dissolution of the partnership.

Read the next issue of the JW Dental Legal News when Judge Fairfield will decide how the Property of the Bright Dental Centre will be valued!

JW.

*This is a synopsis and adaptation of an actual legal case. The names and other identifying facts have been changed to protect the anonymity of the parties. ♦♦*

***Nat did not recklessly incur debts during the marriage. The problem was family expenses and lifestyle exceeded Nat's income.***

*continued from Page 7*  
*WHEN IT'S OVER .....*

Steadfast to divide the net family property unequally in their own favour. Nat since he had a disproportionate amount of debt which he incurred to support the family. Mary wanted to keep all of her money. She claimed Nat depleted the assets of the marriage and needlessly incurred debts. Mary saved virtually all of her income earned during the last six or seven years of marriage. She shouldn't be asked to share the money she managed to save and invest in her own name.

Madame Justice Steadfast faced a difficult task. She patiently listened to the testimony of Nat and Mary. She carefully reviewed financial statements and sorted out the accountant's reports. She checked the bank statements. She listened to expert's testify about dental practice management and valuing dental practices.

After seven lengthy days of testimony and argument by lawyers for Nat and Mary, Judge Steadfast retired to her chambers to weigh the evidence and prepare her judgment.

In her decision Madame Justice Steadfast stated that Nat did not deplete the family assets in a reckless manner. The lifestyle adopted by the family simply resulted in expenses which were in excess of Nat's income. The family did not lead an extravagant lifestyle. Nat and Mary mutually agreed to educate the children at expensive American universities. Although Nat was in charge of the family finances, both he and Mary participated and benefited from their chosen lifestyle.

Nat did not recklessly incur debts during the marriage. Nat purchased his last dental practice for \$150,000 and sold it for \$200,000. The net proceeds of the sale were used to pay down debts of the practice and of the marriage. The judge found that the problem was the family's

expenses associated with their lifestyle they enjoyed were higher than Nat's income.

Judge Steadfast heard the evidence of expert dental assessor and accountant Mr. Truck. He testified that given Nat's age of 53, his decreasing future earning ability and the increasing competition from other dental practices in the area the decision to sell his dental practice was reasonable. The sale price was fair market value. Judge Steadfast accepted Mr. Truck's evidence. She found that Nat worked full-time in his dental practice and could not be expected to work any harder. She accepted that there was significant increasing competition in the region and the dental market place was declining. She found that Nat was a hard-working dentist and his decision to sell his practice was not ill advised and inappropriate.

Judge Steadfast concluded that in the circumstances there was no basis to penalize Nat. There would be an equal division of the net family property. Mary must share her \$272,057 with Nat.

Then Justice Steadfast dealt with Mary's claim for spousal support. Mary had asked the judge to impute a higher income to Nat than his present salary of \$83,000, which he earned as a Federal government employee. Mary worked as a nurse earning \$51,000 per year. She had achieved her maximum pay level. Mr. Truck testified that Nat could not expect to earn greater income in the future had he retained his private dental practice and in fact he could anticipate a decrease. Nat would likely have earned an income similar to his present income had he remained a private practitioner. Judge Steadfast rejected Mary's request to impute a higher income and ordered Nat to pay \$1000 per month in spousal support.

Judge Steadfast then considered Mary's entitlement for compensatory support.

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*continued from Page 8*  
*WHEN IT'S OVER .....*

She reviewed the Supreme Court of Canada case law and principles outlined in the Divorce Act to evaluate the economic consequences of the marriage breakdown on Mary. She concluded that Mary was entitled to additional support. She found that although Mary consented to relocate the family four times during the marriage, the prime mover was Nat. Mary had been financially disadvantaged to a small extent by the moves.

Mary was entitled to an additional \$200 per month for a period of two years and \$100 per month thereafter.

And thus, it was all over for Dr. Nat and Mary. They went their separate ways after 29 years of so so marital bliss. You ask, did Madam Justice Steadfast do the right thing? Did Nat win? Did Mary lose? Or vice versa? Was justice served? For the answers you would have to ask Nat or Mary.

JW. ❖

## **JWDental Legal News**

**20 Holly St.  
Suite 300  
Toronto, Ontario  
M4S 3B1**

Phone:  
**416-848-1019**

Fax  
**416-486-3309**

Email:  
[joyce@jwdental.com](mailto:joyce@jwdental.com)

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*see us at:*  
**[www.jwdental.com](http://www.jwdental.com)**

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