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Welcome

To JW Dental Legal News

Welcome!

JW Dental Legal News is back Online! In this electronic issue you will find exciting case updates from our legal files. We conclude the story of Hans and Gretel. You are introduced to dentist Nat and nurse Mary and the demise of their marriage in *When It's Over*, and much much more.

We welcome your input and include feedback from readers in this issue as always.

Your participation is encouraged. Please forward this issue to your colleagues and friends.

J.W.

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

When it's Over
Division of Family
Property

They agreed their relationship had grown stale. So after 29 years of marital bliss it was splitsville for nurse Mary and Dr. Nat.

Mary and Nat had had their good times. After tying the proverbial knot they traveled and worked in Switzerland. Their dreams and goals seemed to coalesce. In early 1971 after their wanderlust years ended they returned to Canada. On idyllic Vancouver Island Nat worked as a dentist for the province, Mary became his assistant.

In 1972 the couple came home to Ontario. Nat opened his first dental practice. Mary worked in local hospitals. Sue and David were born in 1974 and 1975. The family built a home and cottage. They acquired Nina the cat and Buddy a canine. Nat and Mary shared all expenses.

In 1981 the couple sold their home and cottage to relocate to Toronto. Nat and Mary both returned to school. He to complete a public health degree, she enrolled in a full time nursing program. Over the upgrading years they depleted their savings and used the proceeds from the matrimonial home to live on.

In 1985 the couple decided to move to Kingston. Nat associated in a dental practice in a nearby town. Mary worked as a nurse. In 1986 Nat opened his own practice. He then purchased another practice to supplement this income.

Justice is Done!
Conclusion of Piece
Work

A Dental Technologists
Worst Nightmare

In the spring issue of **JW Dental Legal News** I reported on the interesting case of Hans Torkelman and Gretel Weiss, two Dental Technologists who had immigrated to Canada from Switzerland.

Hans had obtained employment at Best Dental Laboratory in Vancouver, British Columbia at an annual salary of \$100,000. Gretel had also joined the lab as a Junior Dental Technologist.

Three months after starting work in Canada, Han's contract of employment was unilaterally changed by his employer from an annual salary to piecework.

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Jake, the Dental Tech's Dream

Jake, dental technician came to my office in January 1998. He asked me to review the terms of an employment contract he had signed with his former employer, Simpson's Laboratories.

Jake was hired by Simpson's Lab as a lab technician in 1986. However in 1987 the manager of Simpson's left and Jake was asked to take over. When Jake agreed to take on the job of manager of the lab he signed an employment contract, which was renewed from year to year. I undertook to evaluate the most recent employment contract and Jake's subsequent activities.

Jake told me that Simpson's operated a dental laboratory in Small Town Ontario. It was the only dental lab in the area. It served most dentists who practiced within a 100-mile radius of the Lab.

Jake was a hard worker. His co-workers found him fair and easy going. Jake was also well thought of by the Lab's clients, the dentists. Under his management Simpson's reputation amongst staff and their dental clientele flourished. He managed to convince three highly qualified dental technicians to relocate to Small Town to join the Simpson team.

It was Jake's job to speak directly to dentists about dental prescriptions and to convey the specifics about denture work, crown and bridge, ceramics and other dental functions to the technicians. As manager at Simpson's Laboratory Jake was fully responsible for the financial performance of the lab including pricing and purchasing. Jake hired and fired employees. In addition Jake was assigned the task of business promotion. After hours he was often seen, at the Floss and Pocket, the local bar and grill, schmoozing with dentists. The annual Christmas bash held at Big Bertha's Crab Shack was Jake's own invention. Here Jake and the member's of the dental community exchanged seasons cheer, over mulled wine and oysters. Mr. Simpson the lab owner felt Jake was dependable and trustworthy. Each year Jake's skills and efforts were rewarded with a generous bonus.

Jake knew he was a key player at Simpson's Lab. But he also had his own dream. In 1996 Jake started looking for a building where he could start up his own business.

He signed a lease for new premises in a choice location in Small Town. He purchased laboratory equipment.

On December 31, 1996 he went to Simpson's Lab and announced to the staff that he was resigning effective immediately. On January 2nd 1997 Mr. Simpson telephoned Jake. He said that he was surprised and disappointed that Jake was leaving. He arranged to meet Jake the next day hoping to persuade Jake to stay. Jake of course did not change his mind. The following day Jake received a cheque for vacation pay and a copy of his employment agreement "in case he had misplaced his copy" with a covering letter, in which Mr. Simpson drew attention to an important clause. According to the agreement Jake was restricted from working in the dental laboratory industry in Small Town for two years and within 80 miles of Small Town for one year commencing January 1, 1997. Mr. Simpson further made it clear that Jake was free to go anywhere outside of this boundary. He assured him he would be happy to use whatever resources were available to him to establish contact if Jake needed help to relocate.

Unfortunately Jake did not heed Mr. Simpson's advice. By early 1997 he had opened Jake's Dental Laboratory. By the end of 1997 his new dental laboratory was in full operation and his business was flourishing. In March 1997 Simpson's Lab employed six laboratory technicians. By the end of April 1997 four of them left to work for Jake.

Jake's monthly sales topped \$30,000 in 1997 and in the first month of 1998 he billed \$24,000. The loss of Jake and the establishment of a new laboratory brought financial disaster upon Simpson's Lab.

Mr. Simpson was not amused!

In the next issue of **JW Dental Legal News** I will report the outcome of this case. Find out if Jake the Dental Tech's Dream comes true!

J.W.

When it's Over, Continued from Page 1

From 1985 to 1997 Nat and Mary worked full time. He in his dental practice, she as a nurse. Nat paid for all family expenses from the revenue he generated from his dental practice. Mary kept her income separate and saved.

The family lived well. Some years too well. Their lifestyle exceeded Nat's income. So Nat drew more from his practice than his net income. Nat financed the family lifestyle through bank loans. His dad chipped in at times. But Nat fell in greater and greater arrears to the Feds for income tax. Mary refused to dip into her nest egg to help out.

Finally in 1995 Mary agreed it was necessary to consolidate the joint family debts. She signed on to increase the mortgage on the matrimonial home.

Over the years Mary expressed concern about the unhealthy state of the family finances. She said she could not understand why they were continually in debt. She seemed to relish their family lifestyle, and she approved of sending the kids away to attend American universities. So why did she say she didn't understand where their money went?

She reasoned that she must keep her savings separate and apart from Nat's.

Nat tried to explain that the well spring had run dry. He had Jerry his CA convene meetings to explain to Mary all information relating to his dental practice. Mary appeared incapable of understanding basic principles of book keeping. On the other hand she was sly. She wouldn't divulge her earnings. Her savings, her assets and investments and her tax position all remained a mystery to Nat. Mary was cunning or so she thought.

Nat knew he had big problems. He had to contend not only with his debt load. His age, and future earning potential from his dental practice worked against him. He knew that the flow of patients in his dental practice was not growing. There was new competition in the area from new dentists. His lease was up for renewal in the fall.

When Jack the process server served Nat with the Petition for Divorce it came as no surprise. Nat almost felt a sense of relief. He had long accepted that life with Mary

was all but over.

He was now forced to evaluate his financial position to divide the family property. So he would begin by arranging to have his dental practice appraised by an experienced appraisal firm.

In the next issue of **JW Dental Legal News** we will find out how Nat and Mary divide their family property.

Legal Tips for Those Considering a New Relationship

Before beginning a new relationship, you should consider the impact of this choice on your existing legal relationship and what may happen if your new marriage or common law relationship is unsuccessful. By understanding your legal rights and obligations with respect to your new partner and others, you can plan for the future and protect yourself from some of the possible consequences of separation.

1. Review Existing Agreements

Including: any separation agreement, court order or judgment relating to your previous marriage or common law relationship. These documents set out your rights and obligations with respect to your former partner and children and may even look into the future to consider the effect of a new relationship on those rights and responsibilities. For example, these documents commonly make provision for the termination of spousal support in the event that the recipient spouse remarries or cohabits with a new partner for a specified period of time

2. Domestic Contracts

These agreements commonly address support and property issue, and can deal with most issues that may arise on separation. In Ontario, Canada the property division provisions of Part 1 of the Family Law Act pertain only to married persons, an individual entering into a common law relationship may want to negotiate a cohabitation agreement which spells out how the couple will divide their property in the event of separation and which also protects her property from trust claims. A common law spouse can claim spousal support after three years in the relationship or after the birth or adoption of a child by the couple.

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Legal Tips, Continued from Page 3

3. Wills

Even successful relationships eventually end with the death of one of the spouses. Many people want to design their estate plan to balance the needs of their new partner with the interests of their children, including children from previous relationships. Prepare a Will and review it every four years to ensure it still reflects your current status and wishes.

Justice, Continued from Page 1

Hans was devastated. He had never worked in a piece work environment. His new employer had never told him that piecework would become part of the conditions of his job. He was deeply concerned that remuneration based on piecework, while increasing his production, would decrease the quality of his work.

Nevertheless Hans tried to work under the new regime but he couldn't keep up with the piece work demand. When he complained to his boss about the change in his working conditions he was told that all senior employees in the lab work on piece work and that if Hans didn't like it, his employer would deport him and Gretel back to Switzerland.

Hans tried again to work under the new regime but he simply could not. Two days later his boss, Peter Graves, confronted him at his workstation and Hans was fired.

Hans applied for Employment Insurance Benefits. An officer of the Employment Insurance Commission investigated the claim. Peter Graves told the officer that Hans had quit his job without notice after physically assaulting him.

Hans came to see me. He instructed me to sue his former employer for wrongful dismissal and defamation.

The lawsuit was hard fought. Hans's former employer maintained that he had quit after becoming physically violent in the workplace. Hans denied the allegations completely.

When the case could not be settled it proceeded to trial before a judge of the British Columbia Superior Court in June 2001.

The evidence at trial on behalf of Hans was uneventful and expected. He testified about his previous education and life in Switzerland and the reasons why he chose Canada to continue his work as a Dental Technologist. He provided the judge with a copy of his employment contract. The contract clearly stated that Hans was entitled to an annual salary of \$100,000 together with one month vacation, a pension plan and extended comprehensive health benefits.

Hans told the judge that he disagreed, fundamentally, with the change in the conditions of his work from an annual salary to piece work because he had never agreed to work under those conditions and it would affect the quality of his work. He denied the assault.

The trial evidence on behalf of Best Dental Laboratory was put forward by Peter Graves. He testified that it was the custom in his lab that Dental Technologists would work on a piecework basis after their probation had expired. He said that not only was this a custom in his lab but that all Dental Technologists trained in British Columbia knew and expected that they would work under a piece work regime. Peter Graves said nothing in his initial testimony about the alleged assault.

Upon being cross examined Peter Graves admitted to the court that no physical assaults had ever taken place. He confirmed that he did tell the officer from the Employment Insurance Commission that Hans had assaulted him because he was upset that he had spent a lot of money in recruiting Hans and Gretel from Switzerland and he wanted to get back at them in some way for what had happened.

After hearing all of the evidence presented at the three day trial Madam Justice Thrusch wrote the following:

Upon all of the evidence it is clear, on a balance of probability, that Hans Torkelman and Best Dental Technology Laboratory had agreed on the terms of the contract that provided for an annual salary in the amount of \$100,000 to be paid to the plaintiff.

It is also clear, on the evidence, that the plaintiff gave up secure employment and lifestyle in Switzerland to come to Canada upon the terms and conditions as set out in that contract.

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Despite the evidence of the defendant that the custom in British Columbia is to pay Dental Technologists on the basis of piece work, the plaintiff never agreed to those terms and conditions and indeed would not have the accepted employment on those terms.

I therefore find in favor of the plaintiff and award him the equivalent of three months notice in lieu of salary which amounts to damages for wrongful dismissal of \$25,000.00.

I also find that the plaintiff has suffered additional damages for defamation arising from the false statements made by Peter Graves to an officer of the Employment Insurance Commission. The defendant presented no evidence to this court that a physical assault occurred in the workplace. Those statements of Peter Graves were defamatory of the reputation and good standing in the community of the plaintiff, Hans Torkelman. I therefore award the equivalent of one month salary to the plaintiff, in the amount of \$8,333.00, in addition to damages for wrongful dismissal as set out above.

I also take note that the plaintiff has exceeded his offer to settle this lawsuit that he delivered to his former employer three months prior to the commencement of this trial. As a consequence the plaintiff is entitled, in addition to the damages a referred to above, his legal costs paid on a full compensation scale.

Both prejudgment and post judgment interest shall run on all amounts due and owing to the plaintiff at the rate of 6% per annum.

Following the decisions of the court there was rejoicing. Although Best Dental Laboratory did not rejoice, it subsequently satisfied the court order by paying Hans Torkelman \$33,333.00 for damages together with an additional \$14,250.00 for legal costs and disbursements.

Following the successful conclusion of the case, Hans and Gretel decided that they could no longer live and work as Dental Technologists in British Columbia. They had clearly heard the testimony of Peter Graves about that province being a piece work regime. They decided to relocate to a smaller community in Southwestern Ontario where both of them quickly found new employment as Dental Technologists.

Hans Torkelman reported to me recently, that in his new employer, he had found a lab that was excellent, upholding the highest standards of the profession and with a deep care and concern for the well being of it's employees. Hans and Gretel had finally found the happiness and security in their profession that they were originally looking for in Canada.

J.W.

Letter to the Editor

Which would you like to hear first? The good news, or the bad news?

I'll start with the good news. You've got a fantastic publication here, and I'm glad to see that you have decided to share it with those of us south of the border. The articles and photography are top notch!

The bad news is, I have an issue with your recent column, "Piecework- A technologist's worst nightmare" is misleading and inappropriate.

The story should have been titled, "Unethical Lab Owner- A technologists worst nightmare" or perhaps, "Miscommunication- A technologists worst nightmare." In no way was piecework the issue here. The issue was a breach of contract and a "bait and switch" scheme by an unethical scoundrel.

Piecework, or production based incentive systems are the most fair and just method for compensating technicians. Additional benefits of a production based incentive program are increased laboratory throughput and faster turn-around time. This gained time can be used to allow more time for quality control, which translates to an overall improvement in quality, or quicker return to the customer. Another little-appreciated benefit is improved consistency, gained as a result of the reduced likelihood that restorations may be "overworked" when trying to expand the work to fill an eight hour day.

Productivity based compensation systems have been one of the greatest tools given to dental technicians, and have helped empower us to take control of our careers and our livelihood. It's time to stop perpetuating the myth that "piecework" is a four-letter word!

Keep up the good work.

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Fighting Sexual Abuse

Ever since the Final Report of the Task Force on Sexual Abuse of Patients in November of 1991, governments have been trying to use legislation to prevent and more effectively prosecute sexual abuse within professions. That Task Force Report resulted in sweeping amendments to the *Regulated Health Professions Act* with the express goal of eradicating sexual abuse in the health professions. Three very recent developments demonstrate both the determination and difficulties of doing so.

The first development was a decision from the Supreme Court of Prince Edward Island in *A.B. v. College of Physicians*, 2001 PESCTD 75 released on August 22, 2001. Prince Edward Island has one of the most comprehensive legislative codes dealing with sexual abuse among physicians in the country. In this case a physician, AB became friends with a patient about three years after treatment ended. More than seven years after the end of treatment they became intimate. While the former patient had no complaint about the relationship, the College learned of the matter and began disciplinary proceedings.

The legislation prohibits a sexual relationship with a former patient if the patient was a minor at the time of the treatment, the patient suffered from a judgment-impairing disorder or the patient received psychotherapy or psychiatric counselling. The court was concerned that this provision did not permit the consideration of the fact that the personal relationship did not arise from the professional relationship or that it began years later. It did not permit the consideration of whether the former patient's consent to the relationship was genuine or whether the former patient opposed any disciplinary action. The legislation also required a mandatory revocation of the physician's license for a period of no less than five years regardless of the circumstances of the particular sexual abuse.

The Court held that this provision was overbroad in its application and violated the right to make fundamental personal choices protected by section 7 of the *Canadian Charter of Rights and Freedoms*. The Court cited the case of *R. v. Parker* (2000), 188 D.L.R. (4th) 385 (Ont. C.A.) where Rosenberg J.A. states at p. 429:

A blanket prohibition will be considered arbitrary or unfair and thus in breach of the principles of fundamental justice if it is unrelated to the state's interest in enacting the prohibition, and if it lacks a foundation in the legal tradition and societal beliefs that are said to be represented by the prohibition.

The Court concluded:

While a measure of deference must be shown to the legislature for the means in which they drafted the regulations, where it is shown that the legislation clearly infringes on the right of liberty in s. 7 of the Charter it must be declared in breach of s. 7. The legislation here is overly broad, going far beyond what is needed to accomplish the goals of the legislature.

It is far from clear that this approach would be accepted by other courts. In Ontario, section 7 of the Canadian Charter of Rights and Freedoms has not been applied to professional regulation. Also, some courts have accepted the principle that consent is no defence to sexual abuse where there is a power imbalance.

The second development is the official release on September 14, 2001, of a follow up report by the original 1991 Task Force on Sexual Abuse. The report recommended further adjustments to the Regulated Health Professions Act. Some of the recommendations of the Special Task Force are as follows:

- Requiring the posting of a Patient's Bill of Rights in every location where members practise.
- Creating a Public Access Centre to investigate sexual abuse complaints. Professional self-regulators would not investigate sexual abuse matters.
- The rules of evidence at discipline hearings be relaxed to those identified in the *Statutory Powers Procedure Act* (e.g., permitting hearsay evidence).
- Funding for therapy and counselling can be paid before the commencement of the hearing (rather than only after a finding), as determined by the Public Access Centre.
- Guidelines be established in the statute prohibiting sexual contact with former patients for two

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years after the conclusion of treatment and permanently in other circumstances (e.g., where there was psychotherapy).

- Alternative Dispute Resolution and mediation be prohibited in all sexual abuse cases.

- The Minister develop measures to deal with sexual abuse by unregistered persons.

An advisory Council for the Ontario Government, HPRAC, considered this Special Task Force Report along with other information and studies. It did not accept the above recommendations. An advisory Council for the Ontario Government, HPRAC, accepted recommendations made by the Task Force and in some other studies including the following:

- Increased public education by Minister.
- That the regulator's mandate expressly includes both preventing and dealing with sexual abuse.
- Tightening up of the mandatory reporting requirements.
- Requiring the appointing of an investigator in every case where Registrar has reasonable and probable grounds and reporting results to the Executive Committee.
- The Ministry provide support services to clients reporting sexual abuse including information about process and referral for treatment where necessary
- The Ministry maintain a roster of service providers who can support those reporting sexual abuse.
- The regulators pay for the support services program administered by the Ministry.
- Alternative grounds of funding for therapy and counselling be established in statute.
- The funding be expanded to include medication, child care and travelling expenses associated with the therapy and counselling.

- The funding be retroactive to include therapy and counselling taking place before the commencement of the discipline hearing.

- The regulators should not disclose an application for funding to the practitioner who is reported to have abused the patient. That is a controversial recommendation.

- Providing a discretion in the Discipline Committee to permit a complainant to testify by videotape or from behind a screen or through closed circuit television. Also, the individual may have a support person while testifying. Permitting the Discipline Committee to prevent the cross-examination of a complainant in sexual abuse cases in some circumstances.

- A central registry be developed for sexual abuse cases. Reports would have to be filed by police, crown attorneys and the courts in cases of alleged sexual abuse of patients. The central registry might be national in nature. Regulators would have access to information in the registry

Undoubtedly this tug of war between the courts and the legislatures on a comprehensive scheme for effectively preventing and dealing with sexual abuse will continue for some time.

Legal Humour

Q: Doctor, before you performed the autopsy, did you check for a pulse?

A: No.

Q: Did you check for blood pressure?

A: No.

Q: Did you check for breathing?

A: No.

Q: So, then it is possible that the patient was alive when you began the autopsy?

A: No.

Q: How can you be so sure, Doctor?

A: Because his brain was sitting on my desk in a jar.

Q: But could the patient have still been alive, nevertheless?

A: Yes, it is possible that he could have been alive and practicing law somewhere.

JOYCE R. WEINMAN BARRISTER AND SOLICITOR

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