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## JW Dental Legal News

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## Welcome

## To JW Dental Legal News

**!Welcome 2003  
Readers!**

We're Back! I am pleased to report exciting news and the continuation of our legal cases. Read *How to Avoid a Law Suit – Part 1*. If you are a support recipient learn about a new tax savings ruling from Revenue Canada. Gain more helpful information about Informed Consent when carrying out root canals and much much more in this issue of **JW Dental Legal News**.

Your comments, feedback and support is appreciated. Contact us on by email at the Forum.

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, Part 2**

In the last issue of **JW Dental Legal News** I introduced you to Mary and Dr. Nat., the nurse and dentist headed for Divorce. When we left off, the task at hand for Nat was the appraisal of his dental practice. The division of all family assets acquired by them during their 29 year marriage would follow. Jack the process server had just served Nat with a Petition for Divorce.

In July 1997 Nat and Mary separated. Nat was 53 years of age, a licensed dentist, employed by the Federal government earning \$83,000 per year. Mary was a qualified nurse. She worked full time in the Kingston area earning \$51,000 per year.

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. Mary made insignificant contributions to the family expenses prior to their separation.

Mary claimed in her Petition for Divorce she was entitled to an unequal division of the net family property, spousal support and occupation rent. Nat lived in their matrimonial home since they separated. In response in his Answer and Counterpetition Nat claimed he

**Good News for  
Support Recipients!**

**You may now deduct the Legal  
Costs to Obtain Support**

The Canada Customs and Revenue Agency (CCRA) has reconsidered their position regarding the non-deductibility of legal costs incurred in establishing the right to spousal support, such as the costs of obtaining a divorce, a support order for spousal support under the Divorce Act or a separation agreement.

As a result, the CCRA now consider legal costs incurred to obtain spousal support under the *Divorce Act*, or under the applicable provincial legislation in a separation agreement, to have been incurred to enforce a pre-existing right to support.

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*See When it's Over, Continued on Page 3*

**“I AM SORRY” –Avoid  
a Law Suit –Part I**

Three critical little words. “I am sorry!” This simple expression of regret may help you avoid a lawsuit. Dr. Stable could have avoided his lawsuit if had he mustered these consoling words.

This is the case of a patient with a burnt cheek, a dentist with an outstanding account and a legal case, which should never have progressed to trial.

Frieda Fretter was a nervous dental patient. She feared the pain, the sights and the smells commonly associated with a trip to the dentist. When she visited Saul her family dentist in January 2000, he recommended that the best way to deal with her significant tooth decay and associated ailments was to have her teeth filled, extracted and treated under general anaesthetic. He sent her to Stuart Stable, an experienced local family dentist with hospital privileges. After examining her, Dr. Stable recommended that her treatment be carried out under general anaesthetic at the General Hospital. He then turned her over to Suzy, his office administrator. Together the two women discussed the cost of treatment, insurance coverage and payment schedules.

Most of the treatment was covered by a dental benefits plan that Peter Fretter, Frieda’s husband, was enrolled in through his employer. To recover the insurance proceeds, claims forms were to be submitted to the insurer after the treatment was completed. The insurer would then send payment to its named insured Peter Fretter. While the agreement for treatment was one between Stuart Stable and Frieda Fretter, Saul agreed to be paid for the insured portion of the cost by way of the endorsement of the insurance cheque over to him. As for the uninsured portion, Frieda made arrangements to pay it in modest installments.

The dental procedures were carried out at the General Hospital on January 8, 2000. The work on Frieda’s teeth went essentially as planned. What was not planned, however, was that Frieda Fretter should suffer a scarring burn on her right cheek.

The burn was caused by a mouth prop, a surgical instrument with scissor-like handles. When the handles are squeezed together the working end spreads apart the rubber prop to hold a sleeping patient’s mouth open. Once the mouth is propped open, the handle of the instrument is ordinarily laid flat alongside the patient’s cheek so that it will not twist out of position. During the January surgery, a mouth prop was delivered to Stuart Stable apparently fresh from having been sterilized in the heat of the hospital’s steam autoclave. Stuart Stable, using it in the prescribed fashion, positioned it against Mrs. Fretter’s right cheek. There it caused a burn.

What was there to be seen on Frieda Fretter’s cheek when the mouth prop was removed was a small water blister about the size of a dime and a pink mark extending across her cheek toward her ear. Concerned, Stuart Stable reported the incident to the hospital’s nursing supervisor. He also stayed around long enough to satisfy himself that Mrs. Fretter’s post-operative care was being followed by her anaesthetist, who had been made aware of the problem. Feeling assured by comments of some of the nursing and medical staff that the burn was an inconsequential one that would readily heal itself, Stuart Stable left the hospital for his office. He did not speak to Frieda Fretter before leaving as she was still suffering from the disorienting effects of a general anaesthetic; nor did he chart the incident.

When Frieda was fully conscious, the General Hospital nurses told her what had happened. She was understandably shocked and angered. Previously afraid to go to a dentist and be awake, she now became afraid to go to a dentist and be asleep. She wanted an explanation. She wanted an apology.

Once back to his office, Stuart Stable turned the operative notes over to Suzy. She, in turn, prepared a statement to be submitted to Peter Fretter’s insurer. Because this form required the insured’s signature, Administrator Suzy sent it off to the patient highlighting the places to be signed.

At home, Frieda Fretter waited for the explanatory and apologetic phone call from her dentist. It did

*Please see I am Sorry, Continued on Page 4*

*When it's Over, Continued from Page 1*

was entitled to an unequal division of net family property.

Nat retained an experienced appraisal firm to value his dental practice. The dental practice was valued at \$222,800. Commission estimated on the sale of the practice was the usual 10%. Nat liquidated his main asset. Nat sold the practice for the gross amount of \$200,000 without payment of commission. The purchase price comprised the sale of the practice for \$150,000 and two payments of \$25,000 each for consulting and a non-competition agreement. Nat renegotiated the repurchase of certain dental equipment from the purchaser for \$10,000.

The reality was that Nat and Mary had substantial joint family debts when they separated. All of the proceeds of the sale of the practice was used to pay down these debts.

In July 1997 Nat was in a deficit position. His net worth was 0. Mary's net work was \$272,057.

Nat and Mary agreed on the following amounts in their Net Family Property Statements.

1. Value of Assets Owned on the Valuation Date (Date of Separation)

	Nat	Mary
(a) Land	\$88,000	\$133,000
(b) Household Items and Vehicles	\$15,785	\$ 6,035
(c) Savings and Savings Plan	\$(-10,000)	\$130,518
(d) Securities	\$416.00	\$100,351
(e) Life and Disability Insurance	\$504.00	
(f) Account Receivables	\$7,591.00	
(g) Business Interests	\$176,881.	
(h) Other Property	\$10,000	
<b>Total Assets Owned on Valuation Date</b>	<b>\$289,169</b>	<b>\$369,905</b>
2. Value of Debts and Liabilities on Valuation Date	\$374,239	\$97,847
3. Net family Property	0	\$272,057

Nat based his claim for an unequal division of net family property on the disproportionate amount of debt existing at the date of separation which he said was incurred to support the family. Mary it appeared on the other hand saved virtually all of her income during the last six of seven years of marriage. Mary had personal savings and investments of \$130,518.

Mary claimed Nat depleted the resources of the marriage recklessly, reduced the family assets and needlessly incurred debts. As a result she felt that her savings should not be included in her net worth as an asset.

But you may recall that the family lived well during the years of marriage. Both Nat and Mary participated in a lifestyle adopted by the family. This included the education of both children at American universities, travel, building a home and cottage, and university career upgrading for the two of them. Mary benefited by Nat's efforts and did not object when Nat went into debt to support this lifestyle.

Although Mary and Nat agreed on the amounts owned and owed they wanted a judge to decide whether Nat was a reckless spendthrift or a diligent dentist fallen on hard times. Mary argued that Nat did not put in a full effort in his dental practice and could have been earning more if he tried harder. Nat argued he tried to better his family's lifestyle and should not be penalized for business decisions which he made in good faith.

A trial date was set. Find out whether Nat is dinged with spousal support payments and whether Mary can convince the judge that Nat acted in bad faith. See Part 3 of **WHEN IT'S OVER**- Division of Family Property!

*Good News, Continued from Page 1*

Consequently, these costs are deductible. Canada Customs and Revenue also now accept that legal costs of seeking to obtain an increase in support or to make child support non taxable under the Guidelines are also deductible. This change in position will be effective for future assessments and reassessments and will not apply retroactively (unless a notice of objection was filed and is still outstanding, or can still be filed).

*I am Sorry, Continued from Page 2*

not come. There were attempts by the dentist's office to reach her to set up a routine seven to ten day follow up appointment. The first date set for Frieda Fretter to visit Stuart Stable was at the end of February - not seven days, but seven weeks off! Even then, because the date was never fixed with any real certainty, Frieda Fretter did not go. As a result, the first significant post-operative contact between Stuart Stable's office and his patient did not come until mid-May, and then it was not about dental issues but about money.

The initial May calls were from Administrator Suzy to the Fretters to follow up on the matter of the insurance cheque. She spoke first with Frieda and, later, to Peter Fretter. Mr. Fretter said in rather earthy language, that he would not be paying the bill. Succinctly put, the Fretters' position was one of no explanation- no apology-, no payment. One of the May 2000 conversations between Frieda and Administrator Suzy was the result of Frieda's telephone call to the office asking to speak to Stuart Stable. Her intention was to talk with him about the burn. But Suzy took the call. She told Frieda that if it were a money issue there was no need to talk to Dr. Stable. Apparently Suzy decided Frieda's complaint did not require discussion with Dr. Stable. And so Frieda would have to deal with her.

Frieda felt herself wronged and believed that it was the duty of the professional she had been dealing with to come clean. Now had Stuart Stable offered his patient a timely explanation of what had happened in the operating room Frieda would have walked away satisfied that she had been treated with respect. But why did Frieda not get her apology. For one thing, Frieda Fretter did not out and out demand one. For another, Administrator Suzy's approach in her discussions with Frieda Fretter was to treat the patient's resistance as only a money issue without, opening her mind to other possibilities. Her insensitivity to the special needs of this particular patient had the effect of cutting off Mrs. Fretter's access to the professional advice and support she needed, all in the name of efficient collections. On the other side of this coin, her lack of receptiveness to this injured patient's unique needs also led her to cut off a vital line of communication for Stuart Stable to his patient.

However, while it may have been a feature in the spawning of this lawsuit, for Stuart Stable to have an office administrator who put dollars above dentistry and got patients' backs up. The question which Mrs. Fretter demanded an answer to was Saul's conduct in the operating room tantamount to professional negligence.

What ultimately brought the case to court was a claim by Stuart Stable for his dental fees of \$2,128.00 and a counterclaim by the Fretter's for professional negligence in causing the burn and resulting scar. It turns out that Peter Fretter did, indeed, get the insurance cheque but until an apology was forthcoming he decided not to forward it to Dr. Stable.

Visit the next issue of **JW Dental Legal News** for the conclusion of **Avoid a Law Suit- The Trial**

### Little Boy Jokes

A little boy was taken to the dentist. It was discovered that he had a cavity that would have to be filled. "Now, young man," asked the dentist, "what kind of filling would you like for that tooth?"

"Chocolate, please," replied the youngster

A boy was assigned a paper on childbirth and asked his parents "how was I born?"

"Well honey ..." said the slightly prudish parent, "the stork brought you to us."

"OH," said the boy. "Well, how did you and daddy get born?" he asked.

"Oh, the stork brought us too."

"Well how were grandpa and grandma born?" he persisted.

"Well darling, the stork brought them too!" said the parent, by now starting to squirm a little in the Lazy Boy recliner.

Several days later, the boy handed in his paper to the teacher who read with confusion the opening sentence:

"This report has been very difficult to write due to the fact that there hasn't been a natural childbirth in my family for three generations."

**The Broken Drill Bit**  
**a Case of Informed**  
**Consent**

In November 1998, Carol, visited Dr. Keith her family dentist. She had pain in her upper right bicuspid area. Keith recommended a root canal. He explained the procedure in some detail. He told Carol it involved removing the nerves in a tooth and then refilling the tooth. He did not inform her that there was a possibility that a drill bit might break during the procedure.

In December Carol returned to Dr. K. He exposed the two canals in the upper right second bicuspid (tooth #15) and prepared it for filling. Carol returned in January 1999. While Keith was filling one of the canals the drill bit broke and became tightly lodged there. Keith tried, without success, to remove it. He then completed the procedure. He used the drill bit as a portion of the filling. He did not advise Carol of the incident.

The tooth remained asymptomatic until June 2001. When Carol was planning a holiday to Washington, D.C. the tooth started aching. Carol consulted Dr. K about the pain. Because Carol wished to continue with her holiday plans, Keith prescribed penicillin. He told her if the tooth did not settle down to see him on her return. During the trip to Washington the pain became intense and while there Carol saw two dentists. The second dentist, an endodontist, took an X-ray of the tooth. It showed the drill bit embedded in the filling. On Carol's return home in July 2001 she saw Keith. She confronted him with the X-ray. Dr. K acknowledged that indeed the drill bit had broken off in the tooth and that he had sealed it in a canal. Carol went to see an endodontist. The endodontist removed the filling used in the root canal by Dr. K and removed the drill bit. He then refilled the tooth whereupon Carol's discomfort ended.

Most general practitioners know that drill bits occasionally, if not often, break when a root canal is performed. It takes considerable skill to remove a drill bit so lodged in a root canal. A tooth may be damaged beyond repair in the attempt to remove the drill bit. When a drill bit cannot be removed without damage to the tooth there are three available alternatives. The first and most common procedure

is to do as Dr. K did — leave the broken drill bit in the tooth and complete the filling. The second alternative would be referral to an endodontist in a further attempt to remove the drill bit. The third alternative is to refer the patient to an oral surgeon to perform, an apicoectomy. There is, of course, a fourth alternative, namely, to remove the tooth.

Carol had made it clear to Keith from the beginning that she was anxious for this fourth alternative not to happen. She wanted to retain her natural teeth. Dr. Keith believed that the endodontic procedure held a greater risk of damage to the tooth and that his procedure offered the greatest hope of saving the tooth.

Carol believed that Keith performed the first procedure competently. She said Keith was under no obligation when initially describing the procedure to inform her of the possibility of a drill bit breaking. So what was her main complaint? She felt that, once the drill bit broke the risk became material and then Dr. Keith was obliged to inform her of that fact and of the various treatment alternatives open to her. In other words, the situation evolved into one where there was a duty to disclose. Although she admitted that the risk is minimal when compared to cases involving death, stroke and paralysis, it was a material risk in the context of this case and ought to have been disclosed.

**Informed consent has two components. Two questions must be answered.**

1. Was the risk one which ought to have been disclosed to the patient and,
2. if so, would a reasonable person in Carol's position after having been fully informed of the risk have consented to the procedure if so informed?

Carol decided that a judge must help decide whether she had been given informed consent.

At the trial able counsel for Dr. Keith argued that the duty to disclose occurs before the procedure commences. If something occurs during the course of a procedure he submitted the question of liability does not arise provided the dentist exercised his

judgment in accordance with accepted dental practice.

Judge Scales found that Dr. Keith did act in accordance with accepted dental practice. However he decided that if the risk is one, which ought to have been disclosed, and the various alternatives can be discussed with an alert patient and these risks are material, they must be disclosed.

This case is distinguished from most, if not all, other recent informed consent cases in that, here it is alleged that a risk which initially need not have been disclosed occurred during the course of the procedure while the patient was fully alert and able to discuss the consequences with the dentist. In this case, something occurred, which would not ordinarily have to be disclosed, during the procedure when the patient is alert and able to be consulted about the alternatives, which are open. Judge Scales found no reason why Dr. K should not have told Carol of the incident so she could participate in the decision.

The test is said to be an objective one — on a balance of probabilities would a reasonable person in Carol's position and being fully informed of the risks have decided to leave the broken drill bit in place. But the test takes into account the circumstances of the particular case. Here we must consider the relationship between patient and dentist, her confidence in the dentist, which she demonstrated earlier by accepting his advice and the fact that the procedure, which he took on his own accord, was the one, which would most likely save the tooth.

Scales having decided that there was a duty on Dr. Keith to disclose, dealt with the question of causation. Namely, would a reasonable person in Carol's position, after being fully informed, have consented to the drill bit being left in the tooth? This would be determined on the basis of a reasonable person's choice being made based on a person being in Carol's position.

The judge reviewed the relationship between Carol and Dr. K. It was long-standing in that he had been her dentist and her children's dentist for five years.

Her confidence in Dr. K was illustrated from the following passages of her evidence:

- Q.** Do you know why he suggested a root canal
- A.** He looked at the x-ray and saw that it had had a filling previously. It was his professional judgment that that was the procedure that was required. I had never had a root canal before and I was trusting his professional judgment to give me the benefit of his expertise. And at that time I asked him, you know, what that implied, was he going to pull out the tooth, and he said no, that wasn't required. The idea was to allow the tooth to remain in place but it would be essentially a non-living tooth.
- Q.** And you elected to use the root canal procedure?
- A.** I elected to use that procedure on his recommendation.
- Q.** Why?
- A.** Well, for one thing I was in pain and I did not seek relief, and because it was his area of expertise and I took his advice for that reason.

Judge Scales concluded that a reasonable person in Carol's position would have accepted Keith's advice. The evidence cited above disclosed confidence in her dentist. The procedure adopted by Dr. K was the one most likely to save the tooth. By adopting this method he left open to Carol the other alternatives in the event that the tooth did flare up — although later it involved removing the filling and refilling the tooth. Thus it is likely that a reasonable person in Carol's position, if fully informed of the consequences, would have elected the alternative adopted by Dr. Keith.

So, Carole's claim was dismissed. Dr. Keith was exonerated by the wise Judge Scales! However Dr. Keith learned a lesson. He will from this day forward obtain informed consent in writing and authorization to proceed whenever his patient's are alert and conscious.

**Tax Penalty  
Cancellations by  
MNR**

## **Cancellation of Penalties and Interest on Canadian Income Tax Liability through Fairness**

### **What is Fairness?**

Fairness is the general term for provisions which were added to the *Income Tax Act* in 1991 giving the Minister of National Revenue the discretion to waive or cancel all or part of any penalty or interest on Canadian income tax which may otherwise be payable by a taxpayer.

The legislation itself gives no guidelines as to when this discretion may be exercised.

However when the provisions were introduced their purpose was stated as being to give Revenue Canada flexibility in dealing with situations where it would be fair to forgive interest or penalties.

The provisions are also applicable to interest and penalties charged pursuant to the *Employment Insurance Act*, the *Canada Pension Plan* and *GST* under the *Excise Tax Act*.

### **Information Circular 92-2**

The Department has published information Circular 92-2 which sets out Revenue Canada's view of when the discretion should be used.

### **Acts of God**

The circular indicates that penalties and interest may be waived or cancelled where they result in circumstances beyond a taxpayer's or employer's control. Where tax payments have not been made as a result of one of the following events, and interest or penalties thereby arise, such interest or penalties should normally be cancelled. Examples include the following:

- Natural or man-made disasters such as fire or flood

- Civil disturbances
- Disruptions in service such as postal strike
- Serious illness or accident
- Serious emotional or mental distress

### **Revenue Canada Actions**

Cancellation of penalties or interest may also be appropriate if the interest or penalties arose primarily due to the actions of Revenue Canada, such as:

- Processing delays which result in the taxpayer not being informed within a reasonable time period that an amount was owing
- Taxpayer's tax filing based on incorrect Revenue Canada published material
- Incorrect advice given to a taxpayer or employer by Revenue Canada
- Errors in processing
- Delays in providing necessary information to the taxpayer

### **Inability to Pay**

Another reason which may be considered by Revenue Canada in canceling interest or penalties is to facilitate collection where the taxpayer have an inability to pay the amount owing. This would include the following circumstances:

- When collection activities have been suspended due to an inability to pay
- When a taxpayer is unable to make a reasonable payment because interest charges absorb a significant portion of the payments

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