NOVA SCOTIA COURT OF APPEAL

Citation: MacIntyre v. Cape Breton District Health Authority, 2011 NSCA 3

Date: 20110118
Docket: CA 317064
Registry: Halifax

Between:

Duncan F. MacIntyre

Appellant

v.

Cape Breton District Health Authority

Respondent

Revised decision: The text of the original decision has been corrected according to the erratum dated February 8, 2011. The text of the erratum is appended to this decision.

Judge(s): Saunders, Oland and Beveridge, JJ.A.

Appeal Heard: October 13, 2010 at Halifax, Nova Scotia

Held: Appeal is dismissed and the Cape Breton District Health Authority is awarded costs of $20,000 together with disbursements as agreed or taxed, per reasons for judgment of Oland, J.A.; Saunders and Beveridge, JJ.A. concurring.

Counsel: George W. MacDonald, Q.C. and Michelle C. Awad, Q.C., for the appellant
Nancy G. Rubin and Shelley A. Wood, for the respondent

Reasons for judgment:

Overview

[1] In 2003, the appellant, Dr. Duncan F. MacIntyre, stopped working as an oral and maxillofacial surgeon. He claims that he was disabled by hazardous materials released into his working environment during renovations at the New Waterford Consolidated Hospital.

[2] Dr. MacIntyre had conducted his very successful practice from leased premises in the Hospital, which is owned and operated by the respondent, the Cape Breton District Health Authority (CBDHA). He brought an action against the CBDHA alleging breach of contract, the Occupiers Liability Act, 1996, c. 27 ("*OLA*") and the Occupational Health and Safety Act, 1996, c. 7 ("*OHSA*"), negligence and unauthorized release of his confidential medical records.

[3] The trial before Justice Douglas L. MacLellan of the Nova Scotia Supreme Court consumed 17 days. Forty-four witnesses testified. There were numerous reports prepared by experts. In his decision dated June 30, 2009 and order dated August 12, 2009, the trial judge dismissed Dr. MacIntyre's claim and awarded the CBDHA costs and disbursements. His decision on the merits of the claim is reported in 2009 NSSC 202 and that on costs as 2010 NSSC 170. Dr. MacIntyre appeals.

Background

[4] In order to provide context for the issues at trial, the reasons for the decisions of the trial judge, the grounds of appeal and my analysis of those grounds, I must set out the background and the judge's reasons in some detail.

[5] After Dr. MacIntyre graduated from Dalhousie Dental School in 1992, he completed a four year residency in oral and maxillofacial surgery at the University of Illinois. He moved back to Cape Breton to start his practice. In 1997 he leased space on the second floor of the Hospital. His specialized and demanding work, performed in his office or in the Hospital operating room, included minor and major surgery, implant surgery, reconstructive or corrective facial surgery, and

major trauma cases. By all accounts, Dr. MacIntyre was highly skilled and regarded by his professional colleagues and patients.

[6] Renovations were done at the Hospital over several months to facilitate the move of long-term patients, then located on the second floor, to the third floor. The CBDHA did not assess the structures to be demolished, identify any hazardous material prior to the demolition or obtain any building or occupancy permit. These renovations included demolition and construction near Dr. MacIntyre's premises on the second floor, followed by work on the third floor. The material which was demolished or replaced was removed from the Hospital during the course of the work, and discarded.

[7] At trial, the judge heard conflicting evidence as to the dates and duration of the renovations on the second and third floors and the extent of the dust created by the work. According to Dr. MacIntyre, the renovations started in the late summer or early fall of 2001.

[8] Dr. MacIntyre testified that on the Victoria Day weekend in May 2002, he became very disoriented, dizzy and extremely weak. He saw Dr. Phil Curry who thought it might be a viral infection which could take some months to resolve and who arranged for tests. By July 2002 Dr. MacIntyre reported to his family physician that he was feeling "80% - 90% better", but that summer he started having weakness, fatigue, massive headaches, crushing pain in his left ear, and persistent nausea. Dr. Richard Leckey, a neurologist, saw him and scheduled more tests. All test results, including MRI and CAT scan, came back negative.

[9] Dr. MacIntyre continued working, but reduced the number of patients he was seeing. According to his evidence, he became weaker and weaker, had difficulty finishing his longer procedures, and started to lose track of the medication given to patients. On April 23, 2003 Dr. MacIntyre stopped practising. He was not more than 40 years old. He has not worked in his profession since.

[10] That same month, tests were done of Dr. MacIntyre's blood and urine. On April 30, 2003 he had normal blood cadmium, lead, mercury, thallium, antimony, nickel and arsenic. His urine levels were all normal except for mildly elevated antimony.

[11] A naturopathic doctor he was seeing referred Dr. MacIntyre to Dr. Benjamin Boucher, a general practitioner in Port Hawkesbury. In May 2003 Dr. Boucher diagnosed Dr. MacIntyre as suffering from heavy metal toxicity and recommended a treatment known as chelation to remove the metal from his body. I will describe this treatment in more detail later. The doctor had taken a course on chelation in 1990. Dr. MacIntyre commenced chelation therapy with Dr. Boucher and continued with him over the next six years.

[12] In June 2003, tests were done of the urine of Dr. MacIntyre's wife and the hair and urine of his three children, then ages 6 to 10. The urine results showed high levels of several metals, such as antimony, nickel and uranium. However his wife and children did not experience any symptoms.

[13] Dr. MacIntyre continued his search for assistance. In the fall of 2003, he travelled to the Sanoviv Medical Institute in Mexico. During 18 or 19 days there, among other things, he had chelation therapy, colonic therapy, and hyperbaric oxygen therapy.

[14] Dr. MacIntyre's disability insurers arranged an independent medical examination. Dr. Beth Baker performed this in Minnesota in November 2003. She concluded that he was not suffering from heavy metal toxicity and could return to work.

[15] In January 2004, Dr. MacIntyre went to the New York Rescue Workers Detox Program in Lower Manhatten. That clinic had been established to treat rescue workers following the 9/11 attack on the World Trade Centre. There, for over 60 days, he took high grade vitamins, exercise therapy and sauna therapy.

[16] In late summer 2006, Dr. MacIntyre had a telephone consultation with Dr. David Perlmutter. This neurologist then saw him in Naples, Florida. Dr. Perlmutter diagnosed Dr. MacIntyre as suffering from heavy metal toxicity and recommended chelation therapy, hyperbaric oxygen treatments and vitamin injections.

[17] In October 2008 Dr. MacIntyre returned to the Sanoviv Medical Institute for some five and a half weeks. In Mexico, he did pretty much the same treatments as he had in 2003. In January 2009 he saw Dr. Perlmutter again.

[18] Before he stopped working in April 2003, Dr. MacIntyre had contacted the administration of the Hospital and suggested that his medical symptoms were related to conditions there. James MacLellan, the CBDHA's Director of Occupation Health and Safety, testified that initially the main concern was the ventilation in Dr. MacIntyre's office. In February 2003, he arranged for an air assessment. Helen Mersereau, an occupational hygienist, was then hired to do a further, more extensive air assessment.

[19] After receiving her report, Mr. MacLellan became aware that Dr. MacIntyre was suggesting that he had been exposed to heavy metals during the Hospital renovations. Between April 2003 and August 2003 the Hospital engaged Helen Mersereau to conduct a series of tests. In addition to air quality tests, these included testing of water, laundry lint, ventilation dust and building materials. As mentioned earlier, the building materials demolished or replaced during the renovation which Dr. MacIntyre claimed was the source of the heavy metals ingested by him had been discarded months ago. Ms. Mersereau sought materials similar to those that had been disturbed in the renovations. She collected samples of building materials from the Hospital, chipping off and taking pieces of the floor, wall, piping, insulation, ceiling tile or from ceiling spaces.

[20] Her July 8, 2003 metal analysis of these building materials determined that all of the samples contained toxic metals at less than 1% (<10,000 ppm). Ms. Mersereau concluded that the concentrations did not exceed the guidelines for toxic metals in building materials, and the construction activity was unlikely to have been the cause of health concerns with respect to toxic metal content.

[21] During 2003 a number of the staff at the Hospital raised health concerns. The Hospital advised staff that, if they wished, they could be tested for heavy metals in their systems. In his August 11, 2003 report, Dr. Everette Niebor, a professor of toxicology at McMaster University, concluded that the urinalysis results did not reflect any unusual exposure to heavy metals. Later, more testing of staff took place. In his December 1, 2003 report, Dr. Niebor opined that the symptoms noted by staff were associated with inadequate ventilation.

[22] The Hospital's Occupational Health and Safety Committee sought a further review. Dr. Ted Haines, a medical doctor who worked in occupational health and

environmental medicine, interviewed some 30 workers by telephone and in person. In his December 24, 2003 report, he wrote that, with the exception of cadmium in long-term smokers, no one had metals that would be expected to be associated with significant risks of toxicity. Dr. Haines also stated that, even though a mechanism to account for the development of symptoms of a neurological nature during and following exposure to the renovations was not apparent, the development of this pattern in relation to the exposure was clear cut.

[23] The Hospital then contacted the Department of Health, which retained Dr. Lesbia Smith, an environmental and occupational health consultant, to review its investigations regarding the claims of heavy metal toxicity. In her report dated January 23, 2004, Dr. Smith indicated that "without a documented exposure at the Hospital, and with normal or explainable concentrations of metals in the urine of staff tested, it was not possible to attribute unusual metal exposure from the hospital environment to those who are experiencing illness." She suggested that staff be encouraged to seek second opinions regarding their diagnosis of metal toxicity.

[24] Thereafter, attention was refocused on the ventilation at the Hospital. Extensive work was done on the ventilation system in 2005.

[25] Dr. MacIntyre testified that, compared to how he felt when he left work in April 23, 2003, he had improved. He can move around a lot more. Most of the treatments that he is following are diet, exercise, sauna therapy, colonic therapy and very infrequent chelation. According to Dr. Boucher, while he has improved considerably, Dr. MacIntyre is not back to his pre-illness state. He still has pain in his jaw and the side of his head. Dr. Perlmutter spoke of Dr. MacIntyre continuing to have persistent pain in and about his head and, as well, having compromised cognitive function.

[26] According to Dr. MacIntyre, even if he fully recovered, he would have to retrain for an unspecified time in order to return to practice as an oral and maxillofacial surgeon. He added that he did not know if he would ever recover the confidence necessary to do the complex and delicate surgeries he had performed earlier.

The Trial Judge's Decision

[27] Dr. MacIntyre claimed that as a result of exposure to various heavy metals contained in the significant amounts of dust released into the Hospital atmosphere including in and near his premises during the second and third floor renovations, he had suffered bodily harm such that he was forced to stop working in his profession. In support of his claims, among other things, he presented evidence by medical experts and others who worked at the Hospital and who experienced similar symptoms after the renovations.

[28] The timing and extent of the renovations done at the Hospital and dust during the work were in serious dispute. After hearing conflicting evidence from many witnesses, including Dr. MacIntyre and his staff, Hospital administrators, housekeeping staff, physicians and nurses, the fire marshall, and two men who had worked on the renovation, the trial judge concluded that dust was probably released on the second floor between July 19 and July 31, 2001, during the demolition phase of the renovations. He further found that, during the third floor renovations, "very little if any dust" came down through the floor to the second floor.

[29] The judge then considered whether the CBDHA owed a duty to Dr. MacIntyre as a tenant of the Hospital that the renovations were carried out in a manner that did not unreasonably endanger his health, and whether it breached its duty of care to him in the manner in which its employees carried out the renovations, namely, without having conducted a proper assessment of the materials to be demolished and by not taking adequate precautions. He reviewed the *OLA*, s. 4(1), and the *OHSA*, s. 19(a). The judge determined that the CBDHA did not do a proper investigation into the potential release of hazardous materials when it decided to renovate. He concluded that it breached its duty of care to Dr. MacIntyre in how it carried out the renovations on the second and third floors of the Hospital.

[30] After stating that the mere breach of a duty of care does not make a defendant liable for damages unless it can be shown that it created a situation that caused the plaintiff injury, the trial judge turned to the issue of whether heavy metals were released by the renovations at the Hospital. He recounted the

investigations undertaken by the Hospital, including the reports by Ms. Mersereau, and Drs. Niebor and Smith. According to the judge, the Hospital's response to the claim of illness arising from the work place, poor air quality and heavy metal toxicity was completely appropriate and the tests ordered and done went well beyond what could be expected in the circumstances.

[31] The judge then considered the symptoms experienced by other Hospital staff and their testimony. A number reported similar symptoms of dizziness, nausea, and weakness following the renovations. In his decision, he stated that while this might be "some evidence" that their problems were connected to their common workplace, no direct correlation could be drawn to the renovations and the alleged release of heavy metals.

[32] The trial judge continued:

> [200] To properly assess whether heavy metals were released by the construction at the hospital I believe it is important to consider whether in fact the plaintiff has heavy metal toxicity.
>
> [201] If he has heavy metal toxicity that would be some evidence that he ingested them from the hospital dust. If he does not have heavy metal toxicity then obviously it would be strong evidence to support the suggestion that no heavy metals were released by the construction work.

[33] Dust and debris, undisturbed since the renovation, had been collected from above the ceiling tiles in Dr. MacIntyre's office. This material was tested by Dalhousie University and Maxxam Analytics. The judge wrote that while the Maxxam results showed the presence of a number of elements, no explanation had been given as to whether the levels detected were unusual or high. He was not prepared to conclude that those results helped show that heavy metals were present in the dust generated by the renovations at the Hospital.

[34] At trial, each of the parties presented reports and testimony by doctors and medical experts on the central issue of whether Dr. MacIntyre was suffering from heavy metal poisoning. Dr. MacIntyre called Dr. Vasken Aposhian, an expert in toxicology; Dr. Benjamin Boucher; and Dr. David Perlmutter. The CBDHA called Dr. Beth Baker; and Dr. Richard Parent, an expert in toxicology. Drs. Boucher, Aposhian and Perlmutter were all of the opinion that Dr. MacIntyre suffers from

heavy metal toxicity caused by exposure to dust from the Hospital renovations, while Drs. Baker and Parent questioned whether he does in fact suffer from heavy metal toxicity. After assessing the conflicting medical opinions, the trial judge preferred that of Dr. Baker.

[35] The trial judge concluded that Dr. MacIntyre had not proven that heavy metals were released by the 2001 renovations at the Hospital and that heavy metals are the cause of his medical condition. I will elaborate as to the factors he relied upon to reach this conclusion further on in my decision.

[36] The trial judge decided that Dr. MacIntyre had not met the "but for" test for causation, dismissed his claim against the CBDHA, and awarded the respondent costs. He made a provisional assessment of damages. I will discuss that and his costs award later. Here I would simply add that in estimating loss of future income, the judge was not prepared to conclude that Dr. MacIntyre would be disabled until age 65. He stated that based on his present medical condition, Dr. MacIntyre should be able to return to work within the next three years.

[37] Dr. MacIntyre appeals the trial judge's dismissal of his claim against the CBDHA, his award of costs, and his provisional assessment of damages.

Issues

[38] At the hearing of the appeal, Dr. MacIntyre made a motion for the introduction of fresh evidence. In his argument pertaining to the merits of the trial judge's decision, he raised five grounds of appeal:

1. Did the Trial Judge err by not finding that the burden of proving causation shifted to the Respondent as a result of the Respondent's breach of statute and resulting destruction of necessary evidence? In the alternative, did the Trial Judge err in not relaxing the burden to prove causation to reflect the particular knowledge and legal positions of the parties?

2. Did the Trial Judge err by applying the wrong legal test for causation?

3. Did the Trial Judge err by failing to address Dr. MacIntyre's allegations of breach of contract, the Respondent's breach of the *Occupational Health and Safety Act*, and in failing to find the cause of Dr. MacIntyre's disabling illness?

4. Did the Trial Judge err in admitting expert evidence from Dr. Richard Parent? Did the Learned Trial Judge err in allowing the Respondent to recover any of the amounts paid to Dr. Parent?

5. Did the Trial Judge err in fact by finding that

   (a) dust was released for a relatively short period of time during the Renovations, and that Dr. MacIntyre was exposed to such dust for only about one week?

   (b) heavy metals were not released into the air at the Hospital as a result of the Renovations?

   (c) Dr. MacIntyre has not suffered from, and is not continuing to suffer from, heavy metal toxicity?

   (d) the opinion of Dr. Beth Baker that Dr. MacIntyre was always able to practice as an oral maxillofacial surgeon, and that he did not suffer from heavy metal toxicity, was to be accepted, while at the same time making a finding of fact that Dr. MacIntyre was correct in deciding to cease practicing as an oral maxillofacial surgeon in 2003, and that he would not be able to carry on such a practice at least until 2012?

   (e) Dr. MacIntyre should be able to return to work within the next three years, and that his claim for lost income should be reduced on that basis?

[39] In his submission pertaining to the provisional assessment of damages and award of costs to the CBDHA, Dr. MacIntyre addressed two grounds of appeal:

6. Did the Trial Judge err in his provisional assessment of damages? In particular, did the Trial Judge err by:

   (a) reducing Dr. MacIntyre's claim for special damages?

   (b) reducing Dr. MacIntyre's claim for general damages?

   (c) reducing Dr. MacIntyre's claim for future care costs?

7. Did the Trial Judge err in allowing the Respondent to recover increased costs as a result of its January 15, 2009 Offer To Settle?

[40] Before addressing the standards of review and his grounds of appeal, I will consider Dr. MacIntyre's fresh evidence motion.

Fresh Evidence Motion

[41] Dr. MacIntyre moved for admission of his January 28, 2010 affidavit as fresh evidence. He deposed that the CBDHA had never disclosed to him or his lawyers the 2005 discovery of an uncapped sewer pipe behind the wall of a room used by him at the Hospital, and he learned of it only when advised by a Hospital employee after the trial had begun and four days of testimony had been heard. Dr. MacIntyre further deposed that rather than requesting an adjournment to investigate the sewer gas which emitted from that pipe, he chose to continue the trial which was scheduled for the following three weeks. He contended that the proposed fresh evidence is relevant to the issues of the appropriate burden and causation, and meets the requirements for admissibility.

[42] I would dismiss the motion to adduce fresh evidence.

[43] The record is clear that Dr. MacIntyre's action against the CBDHA was founded on his having been disabled by heavy metal poisoning resulting from renovations at the Hospital. While it is true that his statement of claim spoke of "a hazardous work environment" and "hazardous substances", it described in detail the various toxic materials or metals allegedly acquired by Dr. MacIntyre. Moreover, all of the evidence marshalled and presented at trial in support of his case focussed on heavy metal toxicity as the health condition caused by the Hospital's alleged negligence and diagnosed by his treating physicians. That was the theory of the case advanced before the trial judge.

[44] The proposed fresh evidence suggesting that sewer gas emitted from the uncapped pipe could have caused Dr. MacIntyre's illness and further investigations are needed, puts forward a whole new theory of the case. This does not accord with the purpose of fresh evidence. In *Osborne v. Pavlick*, 2000 BCCA 11, the appellant sought to introduce fresh evidence which did not fall within the parameters of in the pleadings. I agree with Southin, J.A., for the Court who, in dismissing that application to admit fresh evidence, stated:

> *Fresh evidence is permitted so that the interests of justice will be properly served. But the interests of justice are not properly served when litigants go to trial on certain issues and those issues are resolved in a way that one litigant considers unsatisfactory, and he or she then seeks to put before this Court a wholly new theory and to raise evidence in support of a theory that is completely different from that which engaged the learned trial judge.*

[45] Furthermore, here the existence of the discovered pipe had actually been raised at trial. The manager of engineering and environmental services at the Hospital testified that the pipe had been uncapped while Dr. MacIntyre occupied his leased premises, and there had been no complaints of foul odours. In response to a question from the judge, Dr. MacIntyre's counsel acknowledged that it was not suggested that sewer gas would cause heavy metal toxicity. The trial judge identified the discovery of the pipe as an issue that arose during the trial and wrote:

> [266] I am not able to conclude from the discovery of this uncapped vent pipe that it had anything to do with the problems experienced by the plaintiff. No attempt has been made by the plaintiff to establish a causal connection between sewer gases and the plaintiff's condition.

[46] The proffered fresh evidence is not relevant as it does not bear on the decisive issue relating to the claim of heavy metal toxicity resulting from the renovations at the Hospital. That is sufficient to dispose of this motion.

[47] I would add that it also does not satisfy all the elements for the admission of fresh evidence set out in *Palmer v. R.*, [1980] 1 S.C.R. 759. This is not a case where new evidence was discovered after trial and judgment. Rather, it is one where the appellant learned of it during trial and the evidence could have been adduced at trial. Dr. MacIntyre made a strategic choice to proceed with the trial so as not to cause delay.

Standard of Review

[48] I will here set out the standard of review pertaining to the grounds of appeal relating to the merits of the decision under appeal. Those relating to provisional damages and costs will be identified and considered in my analysis of those grounds.

[49] In *White v. E.B.F.*, 2005 NSCA 167, Saunders, J.A. wrote:

> [15] In Housen v. Nikolaisen, [2002] 2 S.C.R. 235, the Supreme Court of Canada considered the standard of review on appeal from a trial court. Iacobucci and Major J.J., writing for the majority, summarized the standard as follows:
>
> (a) The standard of review for a question of law is one of correctness (¶ 8);
>
> (b) The standard of review for findings of fact is one of "palpable and overriding error," meaning that the error must be readily or plainly seen (¶ 10);
>
> (c) Factual inferences from underlying findings of fact are subject to a "palpably wrong" test as well (¶ 25);
>
> (d) The standard of review for mixed questions of fact and law can vary depending on the circumstances. An incorrect application of the legal standard can expose the mixed question of fact and law to a correctness standard of review (¶ 31).

[50] I will identify the applicable standard of review in my consideration of each of the grounds of appeal.

Analysis

1. The Burden of Proving Causation

[51] In his first ground of appeal, Dr. MacIntyre argues that the trial judge erred by not finding that the burden of proving causation shifted from him to the CBDHA. He says that his "power of proof" was adversely affected by the CBDHA's failure to fulfill its statutory obligations to comply with the requirements of the *OHSA* and its regulations pertaining to pre-demolition assessments and investigations. Had that been done, he submits, whether the demolished materials actually contained hazardous materials would have been known. It is his position that the CBDHA's statutory breaches, followed by the removal of the demolished building material before he became ill, made it impossible or nearly impossible for him to prove causation.

[52] This issue relates to the burden of proof, which is a legal question reviewable on the standard of correctness. See *Nova Scotia (Minister of*

Community Services) v. F.M., 2010 NSCA 37 at ¶ 22. However, its resolution depends on whether the trial judge applied the appropriate burden to the facts. Since this is a question of mixed fact and law, the standard of review is palpable and overriding error.

[53] In support of his argument, Dr. MacIntyre relies upon *Cook v. Lewis*, [1951] S.C.R. 830 and *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634. In *Cook*, the plaintiff was shot in the face by bird shot. Two defendants admitted shooting in his direction at almost the same time, but not at the same bird. Rand, J. for the Court stated at p. 832 that in certain circumstances, the ordinary burden of proof can be shifted:

> What, then, the culpable actor has done by his initial negligent act is, first, to have set in motion a dangerous force which embraces the injured person within the scope of its probable mischief; and next, in conjunction with circumstances which he must be held to contemplate, to have made more difficult if not impossible the means of proving the possible damaging results of his own act or the similar results of the act of another. He has violated not only the victim's substantive right to security, but he has also culpably impaired the latter's remedial right of establishing liability. By confusing his act with environmental conditions, he has, in effect, destroyed the victim's power of proof.
>
> The legal consequence of that is, I should say, that the onus is then shifted to the wrongdoer to exculpate himself; it becomes in fact a question of proof between him and the other and innocent member of the alternatives, the burden of which he must bear. The onus attaches to culpability, and if both acts bear that taint, the onus or prima facie transmission of responsibility attaches to both, and the question of the sole responsibility of one is a matter between them. [emphasis added]

Once the plaintiff provided that he had been shot by one of the defendants, the onus was on both of them to establish absence of negligence. If unable to do so, both would be liable.

[54] The plaintiff in *Hollis* was also relieved of the burden to prove causation. Her doctor had not warned her of the possibility that breast implants might rupture inside her body. She claimed that the manufacturer was liable to her for failing to adequately warn the doctor of that risk. The manufacturer argued that the plaintiff must establish that the doctor would have informed her if he had known. In rejecting this submission, LaForest, J. for the majority found the reasoning in *Cook*

helpful. While the victim's power of proof was not destroyed in the same sense, it was seriously undermined if the onus remained on her to establish what a doctor would do in a hypothetical situation.

[55] With respect, I do not find these authorities to be of substantial assistance. Neither dealt with the breach of a statute. Nor is this a case of multiple actors or one involving a hypothetical of the magnitude in *Hollis*. More importantly, the law is clear that the burden of proving causation remains on the plaintiff although, in exceptional circumstances, an inference of causation may be drawn.

[56] The Supreme Court of Canada in *Snell v. Farrell*, [1990] 2 S.C.R. 311 stated at ¶ 33 (Quicklaw):

> 33 The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. If some evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept. This is, I believe, what Lord Bridge had in mind in Wilsher when he referred to a "robust and pragmatic approach to the ... facts" (p. 569).

In his decision, the trial judge referred to *Snell*, including that causation need not be determined with scientific precision and that in some circumstances an inference of causation may be drawn from the evidence.

[57] In *Bigcharles v. Dawson Creek and District Health Care Society*, 2001 BCCA 350, as here, the appellant used *Cook* and *Hollis* to support his submission that the trial judge erred in failing to properly apply the correct legal principle for determining causation and should have shifted the burden of proof to the defendant. His argument was that it was not the accident itself, but the surgeon who had tended to him afterwards that caused his paralysis, and the surgeon's negligent failure to have x-rays taken immediately on admission to hospital had left him in a position of not being able to establish causation. The Court of Appeal relying on *Snell* held that the trial judge had been correct to maintain the burden on the plaintiff. Hollinroke, J.A., writing for the majority, did not see the case as one where "some evidence to the contrary had been adduced" whereupon the judge was entitled to take "a robust and pragmatic approach" to the facts. Rather, the respondents had adduced substantial expert evidence on the issue of causation, as

had the appellant, and it was open to the trial judge to decline to draw an inference in favour of the appellant after weighing the evidence.

[58] Here, the trial judge reviewed the evidence that Dr. MacIntyre presented to prove causation, including his expert evidence and that others working in the Hospital had experienced similar symptoms. He also considered the evidence adduced by the Hospital to refute any link between the renovations, the release of heavy metals, and Dr. MacIntyre's impaired health. As is easily apparent from my summation earlier, that evidence was not merely "some evidence to the contrary". It was substantial evidence of extensive investigations, tests and expert reports, all relating to the issue of causation. The trial judge accepted that there was no evidence from post renovation testing which showed heavy metals, in a quantity sufficient to cause injury, in the metals demolished during the renovations. It was open to the trial judge to weigh the evidence and, having done so, determine that he was not prepared to draw an inference of causation in favour of the plaintiff.

[59] In my view, in these circumstances, the trial judge did not err by failing to shift the burden on the issue of causation to the defendant or to draw an inference of causation. I would dismiss this ground of appeal.

2. The Test for Causation

[60] In his decision, the trial judge reiterated that the burden is on Dr. MacIntyre, as plaintiff, to prove on a balance of probabilities that his medical condition was caused by exposure to heavy metals while he worked at the Hospital. He then set out the legal test for causation:

> [268] The legal standard of proof is the "but for" test as set out by The Supreme Court of Canada in the leading case of *Athey v. Leonati*, [1996] 3 S.C.R. 458 where the court stated the issue as follows:
>
> > 13 Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).
> >
> > 14 The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have

> occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441.
>
> 15 The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of injury: *Myers v. Peel County Board of Education*, [1981] 2 S.C.R. 21; *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.); *McGhee v. National Coal Board, supra*. A contributing factor is material if it falls outside the *minimis* range: *Bonnington Castings, Ltd.v. Wardlaw*, *supra*; see also *R. v. Pinske* (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.), aff'd [1989] 2 S.C.R. 979.

[61] The trial judge also quoted from *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333 wherein Chief Justice McLachlin reiterated at ¶ 21 to 23 that the basic or primary test for causation is the "but for" test which requires a substantial connection between the injury and the defendant's actions or omissions.

[62] According to Dr. MacIntyre, the trial judge applied the wrong test for causation. He argues that in the particular circumstances of this case, the "but for" test is unworkable, the material contribution test should apply, and he meets the requirements for the application of that test.

[63] Whether the trial judge defined the correct test to determine causation, a legal question, is reviewable on the standard of correctness. See *Fullowka v. Royal Oak Ventures Inc.*, 2008 NWTCA 4, rev'g 2004 NWTSC 66, aff'd 2010 SCC 5, at ¶ 200. However, the application of the legal test to the findings of fact raise a question of mixed fact and law which is subject to the standard of review of palpable and overriding error.

[64] The requirements for the material contribution test are set out in *Resurfice Corp.*:

> 24 However, in special circumstances, the law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test. Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements.
>
> 25 First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility

> must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach.

[65] With respect, I do not accept that Dr. MacIntyre satisfies either of the requirements for the material contribution test.

[66] If the testing of building materials, including the Maxxam analysis of undisturbed dust and debris on the ceiling tile in his office, had shown metals at levels sufficient to cause harm, or if the diagnosis by his experts of heavy metal toxicity had been upheld by the trial judge, Dr. MacIntyre might have proven that the CBDHA's negligence caused his injury as required by the "but for" test. Doing so was not impossible or nearly impossible with the evidence he had to present to the judge.

[67] The judge found that CBDHA had breached its statutory obligations to Dr. MacIntyre. However, because he failed to establish that breach released dust which contained heavy metals, Dr. MacIntyre did not show that he was exposed to an unreasonable risk of injury. Accordingly, he did not satisfy the second requirement.

[68] The trial judge did not err by defining the correct test here as the “but for” test or by applying that test to his findings of fact. In the circumstances of this case, the requirements for the material contribution were not met. I would dismiss this ground of appeal.

3. Failure to Address Alleged Breach of Contract, CBDHA's Breach of the *OHSA*, and to find the cause of Dr. MacIntyre's illness

[69] Dr. MacIntyre submits that the trial judge made three failings, each of which constitutes a reviewable error. He says that the decision is silent as to:

> (a) the breach of his lease with the Hospital which was set out in his Statement of Claim as a cause of action;
>
> (b) the effect of the breach of the *OHSA*, even though the trial judge found that the requisite pre-demolition assessment was not done; and
>
> (c) as to the cause of his disabling illness, even though the trial judge accepted that he was ill and had made the correct decision to stop working as an oral and maxillofacial surgeon in April 2003.

[70] I see no merit in these arguments.

[71] The alleged failures to make factual findings raise questions of mixed fact and law. These attract the palpable and overriding error standard of review.

[72] In his pleadings, Dr. MacIntyre stated that his lease with the CBDHA contained a term, express or implied, that the landlord would comply with all applicable laws and regulations, and normal and safe construction practices, in carrying out the Hospital renovations. He submits that the trial judge did not fully deal with this claim. However, his prayer for relief sought only general damages, loss of past and future income, loss of domestic capacity, special damages and punitive damages. His pleadings did not seek termination of the lease, relief from forfeiture, or damages arising from any breach of that lease. Moreover, when questioned by the judge during closing submission as to how the claim in contract differed from that in tort, counsel for Dr. MacIntyre replied that it was the same issue. In the context of the pleadings and these submissions by counsel, it was not necessary for the trial judge to deal with the claim in contract separately from that in tort.

[73] I then turn to the argument that the trial judge should have addressed the consequences of the CBDHA's failure to comply with the *OHSA* and its regulations, which could significantly impact the outcome of his case. As explained earlier, the judge did conclude that the CBDHA was in breach of its duty to Dr. MacIntyre.

[74] The Supreme Court of Canada considered the effect of a breach of statutory duty in a civil cause of action in *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205. In *Munroe v. McCarron*, 1999 NSCA 123, in regard to that case, this court recounted:

> 30 Justice Dickson, on behalf of the Court, stated at p. 225:
>
> Breach of statute, where it has an effect upon civil liability, should be considered in the context of the general law of negligence. Negligence and its common law duty of care have become pervasive enough to serve the purpose invoked for the existence of the action for statutory breach.
>
> 31 At pp. 227-228, Justice Dickson summarized his views, in these words:
>
> 1. Civil consequences of breach of statute should be subsumed in the law of negligence.
>
> 2. The notion of a nominate tort of statutory breach giving a right to recovery merely on proof of breach and damages should be rejected, as should the view that unexcused breach constitutes negligence per se giving rise to absolute liability.
>
> 3. Proof of statutory breach, causative of damages, may be evidence of negligence.
>
> 4. The statutory formulation of the duty may afford a specific, and useful, standard of reasonable conduct.

[75] While the legislative provisions are relevant in regard to the appropriate standard of care, it is the plaintiff who continues to carry the burden of proof on causation. As Justice Dickson in *Saskatchewan Wheat Pool* wrote:

> 38. It must not be forgotten that the other elements of tortious responsibility equally apply to situations involving statutory breach, i.e. principles of causation

> and damages. To be relevant at all, the statutory breach must have caused the damage of which the plaintiff complains.

[76] The trial judge correctly applied these legal principles. After determining that a statutory breach had been committed, he did not find that the breach alone established negligence and proceeded to consider the issue of causation. Accordingly, he did address the effect of that breach and committed no palpable and overriding error.

[77] I now address the final aspect under this ground of appeal. Although he found that Dr. MacIntyre was too ill to continue his surgery practice, the trial judge did not determine the cause or nature of his impaired health nor, having criticized treatments that were undertaken, did he identify what alternative courses of action he should have followed. These omissions, Dr. MacIntyre argues, amount to reviewable errors because the judge did not give clear reasons and make necessary findings of fact.

[78] I do not agree that the judge made a reviewable error in not making a diagnosis from the symptoms reported by Dr. MacIntyre. Quite simply, this is not the role of a trial judge. The argument that a trial judge has a positive obligation to determine the nature or cause of a plaintiff's illness was rejected in *Logozar v. Golder*, [1994] A.J. No. 696 (C.A.). There the appellant argued that the judge's ruling that her condition was not the result of the accident was not enough and that the judge was under a "parallel duty" to determine the cause. McClung, J.A. wrote at ¶ 4:

> I hardly think that a judge is obliged to make a positive finding on any fact that he concludes is unproven. In this case current medicine does not know what causes fibromyalgia; why should the judge? To me he approached his task appropriately when he said (after generally reviewing the competing medical opinion on the source of the plaintiff/appellant's fibromyalgia, or myofascial pain syndrome, another medical opinion) :
>
> > It is therefore difficult to say whether or not she had the problem at the time of the accident, or if it was latent at that time, and her pre-accident history, medically, is incomplete. The question is whether it is possible to reach a conclusion on the proof available in this case, as to just what it was that she is suffering from, and whether the accident caused it.

[79] I agree with this reasoning. To decide Dr. MacIntyre's claim, the trial judge was required to determine whether or not the evidence before him was sufficient to prove that the oral surgeon's impaired health was the result of heavy metal toxicity. If he rejected that claim, the judge was not under any compulsion to go further and make a medical diagnosis or suggest treatment.

[80] The trial judge made no palpable and overriding error by failing to make certain findings. I would dismiss all three aspects of this ground of appeal.

4. Errors in admitting expert evidence from Dr. Richard Parent, and in allowing recovery of any of the amounts paid to him

[81] One of the witnesses the CBDHA called was Dr. Richard Parent, an American toxicologist. He was qualified to give opinion evidence in the field of toxicology, including the assessment of exposures and agents and the relationship between the exposure to the agents and physiological effects.

[82] Dr. Parent reviewed a number of documents including the reports by Helen Mersereau, Drs. Baker, Niebor, Smith and Aposhian; reports on Dr. MacIntyre's urine samples before and after chelation therapy; analysis of heavy metals in Dr. MacIntyre's family; the Maxxam analysis of the materials above the ceiling tile; documents from Drs. Boucher and Perlmutter; and certain discovery transcripts. In his report dated December 29, 2003, he opined that the Hospital renovations did not produce any "toxicologically-significant" heavy metal contamination of Dr. MacIntyre's work area in that facility; Dr. MacIntyre's body was not contaminated with heavy metals as a result of alleged exposures during that work; his symptomatology was not consistent with heavy metal contamination; and, there was no causal link between his alleged illness and his working at the Hospital during renovations.

[83] His report was filed and Dr. Parent testified at trial on direct and was cross-examined. He was also questioned on re-direct and by the trial judge. Counsel for Dr. MacIntyre did not object to any of his testimony. During closing argument, that counsel made vigorous submissions concerning this expert's evidence and asked the judge to ignore his report.

[84] Dr. Parent charged the CBDHA fees totalling US $209,850 representing 409.75 hours at $500 an hour. This the CBDHA claimed as a recoverable disbursement.

[85] Dr. MacIntyre argues that while Dr. Parent was qualified as a toxicologist, most of his evidence was beyond his expertise. He points out that his report summarized the content of reports and documents prepared by others but contained no original work, and referred to documents not before the court; Dr. Parent offered opinions on chelation therapy without himself having had any experience, conducted any research or published about it; and, he suggested that Drs. Boucher and Perlmutter had violated the ethical standards of their professional associations without having read those documents. He submits that the trial judge should have expressly disregarded this expert's evidence and that not a penny of the disbursement for Dr. Parent should have been recoverable.

[86] In *Maritime Travel Inc. v. Go Travel Direct.Com Inc.*, 2009 NSCA 42 at ¶ 98, this court agreed with the parties that the standard of review on the admissibility of evidence is correctness. In *R. v. West*, 2010 NSCA 16 this court noted:

> [55] A trial judge must be correct in his or her identification and application of the rules on the admissibility of evidence (see *R. v. Underwood*, 2002 ABCA 310 at ¶ 61; *Smith; James, supra*, aff'd 2009 SCC 5). Deference is afforded to trial judges with respect to issues such as determination of probative versus prejudicial effect (*R. v. Pasqualino*, 2008 ONCA 554; *R. v. Poulette*, 2008 NSCA 95).

[87] Counsel for Dr. MacIntyre admitted that Dr. Parent was qualified to give evidence as a toxicologist. Furthermore, there was no objection during his testimony that the witness was testifying beyond his expertise. The following passage from *Sopinka, Lederman and Bryant: The Law of Evidence in Canada*, Third Edition at pp. 822-823 is instructive:

> If no objection is raised before the expert testifies in relation to a substantive issue, then any cross-examination as to the expert's qualifications goes only to weight, not to the admissibility of the witness' testimony (see *Prepper v. R.* (1888), 15 S.C.R. 401 at 408; *R. v. Marquard*, [1993] 4 S.C.R. 223 at 224). Once the trial judge rules that a person has the requisite qualifications and expertise to provide opinion evidence in relation to a material issue in dispute, the extent of the expert's accomplishments, experience and recognition by her or his peers, the

> focus of study within a particular field and the manner of presenting her evidence are matters of weight for the trier of fact (see *R. v. Fisher* [2003] S.J. No. 597, at para. 19 (Sask. C.A.); *McLean (Litigation Guardian of) v. Seisel* (2004), 182 O.A.C. 122, at 102-113 (Ont. C.A.)).
>
> Opposing counsel has an obligation to object if the witness testifies beyond her or his purported area of expertise. If opposing counsel objects, the trial judge has a discretion to permit the party producing the witness an opportunity to further qualify the expert. In the absence of an objection, a technical failure to qualify a witness who clearly has the expertise in the subject matter does not mean the witness' evidence should be ignored. Failure by counsel to object to the expert's qualifications at an early stage is only a bar to a subsequent objection where the witness stays within her or his purported area of expertise. This situation should be distinguished from the case where an expert testifies beyond her or his field of expertise. If it is shown that the witness does not have the necessary expertise, it is immaterial that no challenge was made at the time that the witness was qualified and the trial judge should direct the fact finder to disregard the expert's opinion. In these circumstances, the admission of opinion evidence outside the witness' expertise without a proper direction of a trial judge may constitute appealable error: See *R. v. Marquard*, [1993] 4 S.C.R. 223 at 243-44, 250; *R. v. Millar*, [1989] O.J. No. 829 (Ont. C.A.).

An earlier version of this passage was cited by this court *R. v. Rayner*, 2000 NSCA 143, 189 N.S.R. (2d) 144 at ¶ 27.

[88] In these circumstances it is difficult to see how the trial judge committed any error in admitting the opinion evidence of Dr. Parent. At the conclusion of the trial the appellant did make spirited submissions that, on a number of bases, the report of Dr. Parent should be entirely disregarded. While the trial judge did not expressly disregard the report of Dr. Parent, his evidence did not appear to play much of a role, if any in the key findings made by the trial judge.

[89] In his decision, the trial judge recounted portions of Dr. Parent's report and testimony where this toxicologist was critical of Dr. Boucher's treatment, Dr. Aposhian's report, and Dr. Perlmutter's opinion that certain people were sensitive to low levels of heavy metals. He also noted that Dr. Parent was not a physician and had not had any contact with Dr. MacIntyre.

[90] It is noteworthy that, in concluding that Dr. MacIntyre had not proven that heavy metals had been released by the Hospital renovations and that such metals

were the cause of his medical condition, the trial judge made no mention of Dr. Parent, his report or his testimony. He did not refer to any of it or Dr. Parent in his listing of factors upon which he founded his conclusion that Dr. MacIntyre had not proven that heavy metals were the cause of his medical condition.

[91] Indeed, all indications are to the contrary. In his costs decision, the judge expressly described Dr. Parent's evidence as "not significant" in regard to his eventual finding on the case. He concluded that where this expert mainly reviewed research material on toxicology, the time spent was not reasonable. He reduced the disbursement claim from almost US $210,000 to US $35,000.

[92] While Dr. MacIntyre urges that the trial judge either unduly or erroneously relied on Dr. Parent's evidence, I can find no support within the decision that he did so.

[93] There is a further matter relating to this issue which needs to be addressed. In the course of submissions on this ground, Dr. MacIntyre invited this court to accept as relevant a certain factor pertaining to the admissibility of scientific evidence contained in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 43 F. (3d) 1311, (9th Circ. 1995), which he described as “the fifth element”. It was set out by that Court of Appeals as follows:

> [HN11] One very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying. That an expert testifies for money does not necessarily cast doubt on the reliability of his testimony, as few experts appear in court merely as an eleemosynary gesture. But in determining whether proposed expert testimony amounts to good science, we may not ignore the fact that a scientist’s normal workplace is the lab or the field, not the courtroom or the lawyer’s office.

[94] Some background is helpful at this point. In *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 US 579 (1993), the Supreme Court of the United States determined the standard for admitting expert scientific testimony in a federal trial. The case was remanded back to the Ninth Circuit to apply its ruling. The extract quoted above is from the Ninth Circuit decision.

[95] The US Supreme Court decision has been judicially considered in Canada. See, for example: *R. v. J.-L.J. [R. v. J.J.]*, 2000 SCC 51 and *R. v. Trochym*, 2007 SCC 6. However, the Ninth Circuit decision has not. What is more, its so-called "fifth element" was not outlined in the decision of the Supreme Court of the United States. Additionally, the element we are urged to adopt does not appear to be part of the actual test considered by the Court of Appeals, but only noted as a very significant fact.

[96] In any event, having dismissed this ground of appeal for the reasons explained above, there is no need for me to consider and comment on this aspect of the Ninth Circuit decision. I decline the invitation to do so.

[97] The argument that no recovery of any portion of Dr. Parent's fees should have been permitted will be dealt with in my consideration of the ground of appeal pertaining to costs.

5. Errors in Findings of Fact

[98] According to Dr. MacIntyre, the trial judge made several palpable and overriding errors of fact which would warrant intervention by this court. I will deal with each of them in turn.

(a) Duration and extent of dust released during the renovations, and Dr. MacIntyre's exposure

[99] The trial judge heard evidence from over a dozen witnesses as to the timing and extent of the renovations done at the Hospital. He wrote:

> [92] Based on the conflicting evidence about dust created by construction on the second floor it is very difficult to conclude conclusively the actual state of affairs during the time the work was done. All the witnesses who testified appear to be credible. ...
>
> [95] The weight of evidence here would dictate that dust did escape from the construction area on the second floor and I so find. I believe some of the descriptions of the dust might have been exaggerated over time, however, I conclude that for some period of time there was a significant dust problem in the plaintiff's area caused by the construction work done on the second floor.

> [96] I would, however, also conclude that the period during which dust was probably released on the second floor was the period between July 19 and July 31, 2001 during the demolition phase of the renovations.
>
> [97] The other work done on the second floor would not cause the kind of dust described by the plaintiff's witnesses.
>
> [98] However, I also conclude that during the work being done on the third floor there would be very little if any dust coming down through the floor to the second floor. Certainly there would be noise from the construction but I reject the suggestion that any significant dust came through the floor and then through the ceiling tiles and on to the furniture in the plaintiff's space.

The judge also found that, where Dr. MacIntyre was on vacation around the time of the demolition work, it appeared that his exposure to dust during that phase was only about one week, "a relatively short period of time".

[100] Dr. MacIntyre challenges the judge's dust-related conclusions by pointing out evidence in support of heavy dust and lengthy construction work. He also attacks the evidence of Frank Dziuvek, one of the workmen involved in the renovation, who had kept a diary or notebook.

[101] The many witnesses who testified as to conditions at the Hospital gave varying accounts as to the amount of dust created, and as to the time frame of the work on the second floor and the renovations as a whole. The descriptions of the coverings over the doorways or openings to where renovation work was underway ranged from plastic sheeting affixed only at the top, which allowed workmen to enter and dust to freely escape, to material affixed all around and a zipper that was opened by and closed behind workmen. The descriptions of the construction dust ranged from dust visible in the air and on surfaces, through dust in which one could see footprints and stretcher wheel marks, to dust possibly half an inch thick. According to the witnesses, the renovations started either in 2001 or 2002, with the duration said to have lasted anywhere from several months to the better part of two years.

[102] From that mass of conflicting detail, the judge had to determine the duration of the renovations and the extent of the dust that resulted. He had the benefit of hearing the witnesses' testimony and had to assess reliability. A review of the record shows that there was evidence to support his finding as to the duration of

the second floor renovations and when Dr. MacIntyre was in the Hospital during that period. I am not persuaded the core of Mr. Dziuvek's testimony was substantially undermined under cross-examination. Moreover, the judge's determinations that there was a “significant dust problem” on the second floor and that "little if any dust" fell from the third floor during work there through the ceiling and into Dr. MacIntyre's premises was consistent with the evidence of some of the witnesses who testified at trial.

[103] I reject the argument that the trial judge was clearly wrong and so committed any palpable and overriding error in respect to the dust or Dr. MacIntyre's exposure to dust created by the renovation.

(b) Whether heavy metals were released into the air at the Hospital

(c) Whether Dr. MacIntyre has suffered, and is continuing to suffer, heavy metal toxicity?

[104] As these two issues are inter-related, I will deal with them together. Dr. MacIntyre describes the determination of the second issue as the finding central to the trial judge's decision.

[105] The judge set out his conclusions on these issues and explained his reasons:

> [304] The opinions offered by the medical experts called on behalf of the plaintiff are opinions on the ultimate issue in this case. That is whether the plaintiff has heavy metal toxicity and if so what was the cause.
>
> [305] To prove his case the plaintiff must establish that he has heavy metal toxicity and that it was caused by the release of dust into his area of the hospital. That is the basis of his case. Suggestions of other causes or problems at the hospital do not help him prove that issue because there is no suggestion of negligence in regard to the other issues such as the poor ventilation problem.
>
> [306] Clearly the court after hearing all the evidence and after having that evidence tested by cross-examination is in a better position to decide if the renovations and the resulting dust caused the plaintiff to ingest heavy metals into his system.

[307] In *Mustapha v. Culligan of Canada Ltd.* [2008] 2 S.C.R. 114 The Supreme Court of Canada stated (paragraph 3):

> A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach.

[308] In this case while I have found that the defendant breached it's [sic] duty of care by the manner in which it did renovations at the hospital I am not prepared to conclude that the plaintiff has shown on the balance of probabilities that heavy metals were released by the construction and that the plaintiff acquired heavy metals by ingesting that dust.

[309] In coming to my conclusion about the release of heavy metals and the plaintiff's medical condition I have not reviewed all the evidence presented at the trial, however, I have considered all of it.

[310] The court heard evidence from a number of witnesses who testified about the plaintiff's condition during the period after May 2002 and following the time he stopped working in April, 2003. His wife described his condition and how she encouraged him to consider whether he should continue working and the risk that might present to his patients.

[311] I conclude based on the evidence I have heard that his decision to stop working in April, 2003 was the correct one. Considering the type of skilled work he was doing it would have been unwise for him to continue.

. . .

[317] In summary I conclude that the plaintiff has not proven that heavy metals were released by the renovations done at the hospital in 2001 and that heavy metals are the cause of his medical condition.

[318] I do so based on a number of factors including:

1. I conclude that his exposure to dust at the hospital was for a relatively short period of time. Considering that he was on vacation around the time of the demolition work it would appear that he would be present during the demolition phase for only about a period of one week.

2. I am satisfied that the testing done by the defendant was appropriate and if heavy metals existed in the building materials at the hospital during the renovation work they would have been detected at levels to cause concern when the tests were done in the summer of 2003.

3. I am not satisfied that the plaintiff had high levels of heavy metals when he was tested initially in the spring of 2003.

4. I am not prepared to conclude that the symptoms suffered by other staff at the hospital supports a finding that the plaintiff had heavy metal toxicity and that it came from the hospital.

5. I reject the conclusions of Dr. Perlmutter and Dr. Aposhian about how the plaintiff came to have heavy metals in his system.

6. I reject the opinion of Dr. Boucher about the cause of the plaintiff's medical condition. I believe he too quickly diagnosed metal toxicity and did not take the time to consider other possible causes especially after the expected number of chelation treatments did not resolve the plaintiff's condition.

7. I believe the plaintiff has undertaken an excessive amount of alternative medicine procedures which have not achieved the desired result and might in fact be contributing to his medical problems.

8. I accept the opinion of Dr. Baker about the plaintiff's situation.

[106] As explained earlier, the materials that had been demolished or replaced during the renovations were not available for testing. The evidence pertaining to metal content within the building materials was:

1. Helen Mersereau's analysis of building material samples from various locations in the Hospital obtained by destructive or intrusive testing, and

2. the Maxxam analysis of materials retrieved from above a ceiling tile in Dr. MacIntyre's office, which had been undisturbed since the renovations.

[107] As to the Maxxam results, there was no evidence that clearly established whether the numbers generated represented high or unusual levels of metals. Dr. Boucher described the Maxxam results as "high" but he could not interpret them. Ms. Mersereau testified that there was nothing in the Maxxam results that was

contrary to the conclusions in her reports. Her tests of materials believed to be the same or similar to those demolished during the renovation showed no metal levels of concern.

[108] The onus was on Dr. MacIntyre to show that heavy metals were released into the air at the Hospital during the renovations. Having reviewed the evidence before him, I see no palpable and overriding error in the trial judge's conclusion that they were not.

[109] Dr. MacIntyre's argument that the trial judge made palpable and overriding errors in finding that Dr. MacIntyre did not suffer from heavy metal toxicity can be summarized as follows:

> (a) Dr. Perlmutter was the only expert qualified to diagnose heavy metal toxicity and he diagnosed Dr. MacIntyre as suffering from this illness;
>
> (b) The judge had no valid reason for rejecting Dr. Perlmutter's evidence. In particular, he erred in relying on the contents of a letter from Dr. Jonathan Fox; and
>
> (c) The judge failed to recognize the limitations in Dr. Baker's expertise and flaws in her evidence.

[110] It is helpful to begin my analysis with some information about heavy metal toxicity, chelation and challenge dosing. A normal and healthy human body contains some metals. The toxicity of heavy metals is the toxicity associated with certain metals, such as arsenic, mercury, lead and cadmium. Chelation treatment or therapy uses chelating agents to eliminate heavy metals in the body. These agents, which can be taken orally or given intravenously, bind with the metals in the tissues of the body and allows their excretion in the urine. They do not add to or increase the metals in the body.

[111] All the experts agreed that chelation is an accepted treatment for heavy metal toxicity. Dr. Baker and Dr. Perlmutter both testified that they use it for patients diagnosed with that illness. However, as will be seen, experts differ with regard to the use of the challenge dose. This is the giving of a dose of chelating agents to assess the toxic metal concentrations in the body.

[112] I return to the issue of whether the trial judge erred in concluding that Dr. MacIntyre does not have heavy metal toxicity. This necessitates a review of the evidence of Dr. Perlmutter and Dr. Baker.

[113] Dr. MacIntyre relied upon, among others, Dr. Perlmutter's diagnosis. Dr. Perlmutter is a neurologist who was qualified to give opinion evidence on the diagnoses, treatment and prognoses of patients with toxic metal poisoning. He has been treating patients with that illness for 15 years. The trial judge recognized his expertise and described him as “a very impressive” witness, “obviously competent in his field” who “deals with heavy metal issues on a daily basis”.

[114] In his initial July 2006 telephone interview with him, Dr. Perlmutter noted that, according to Dr. MacIntyre, the renovations took eleven months and "six months into it", he started feeling "shaky" and "different". Dr. MacIntyre told him that it had been demonstrated that he had severe heavy metal toxicity, other people working near him had had similar if not more severe compromise to their health, and provided notes describing in detail the types of treatments he had had. Afterwards, although he had not yet examined Dr. MacIntyre, the neurologist wrote in his notes that he had a history "with a sudden and profound decline in his health" which was "likely a consequence of the toxic exposure he experienced".

[115] Dr. Perlmutter examined and diagnosed Dr. MacIntyre with heavy metal toxicity in August 2006. He had reviewed, among other things, previous medical records, his blood and urine results, Dr. Baker's independent medical evaluation, and Ms. Mersereau's metal analysis. His February 8, 2008 evaluation report read in part:

> I would agree that there is no compelling evidence indicating a significant heavy metal toxicity issue with reference to the laboratory studies of Dr. MacIntyre. None the less, some individuals are specifically and exquisitely sensitive to even low levels of specific heavy metals.

According to Dr. Perlmutter, Dr. MacIntyre is suffering from heavy metal toxicity, he did seem to show "improvement to a minimal degree" with chelation therapy, he was totally disabled when examined and treated by Dr. Perlmutter and, within a reasonable degree of medical probability, he would remain totally disabled for the

rest of his life. In his January 14, 2009 followup note, the neurologist confirmed that his professional opinion with reference to Dr. MacIntyre remained unchanged.

[116] In his testimony, Dr. Perlmutter explained that the diagnosis of heavy metal toxicity involves an evaluation of his history as provided by the patient or other sources, the physical examination and the relevant laboratory studies. He testified that the temporality of Dr. MacIntyre's complaints in relation to the renovations, as provided in the history, was a significant factor in his conclusions and one of the bases of his contention that Dr. MacIntyre is one of those people “exquisitely sensitive” to low levels of heavy metals. It was his view that challenge doses are frequently used in diagnosis. While Dr. MacIntyre had had maybe 100 or more chelation treatments, an "extensive exposure" to this therapy, he testified that this was not unusual in the treatment of heavy metal toxicity.

[117] In his decision, the judge reviewed Dr. Perlmutter's evidence. He observed that this neurologist was not aware of aspects of his patient’s medical history which Dr. Perlmutter acknowledged would have been very important to his evaluation of him, and his conclusions rested on Dr. MacIntyre having become sick "six months into" the renovation rather than months afterwards.

[118] One aspect of the medical history which the judge identified is contained in a letter written by Dr. Jonathan Fox of the Nova Scotia Environmental Health Centre. Dr. MacIntyre saw him in April 2003, the same month he stopped practising as an oral surgeon. In a letter dated April 24, 2003 to the referring physician, Dr. Fox reviewed, among other things, Dr. MacIntyre's "history of experience with his body". He wrote that Dr. MacIntyre had related a pattern where every couple of years, his body "shuts him down" and had explained that he would develop a severe and prolonged illness such as the flu and be off for a week or 10 days. Dr. Fox did not testify at trial.

[119] Dr. Fox's letter was contained in the multiple volumes of exhibits laid before the trial judge. Dr. MacIntyre submits that the letter was not admitted into evidence. He criticizes the judge, saying he erred in law in taking it into account and giving it any credence, in rejecting Dr. Perlmutter's evidence. In cross-examination, Dr. MacIntyre admitted that he had told Dr. Fox that in the Spring of 2001, he had “gone through hell” for 18 months, working very hard and studying for his Fellowship examinations. He did not remember describing to Dr. Fox that

his body would shut down every couple of years. Dr. MacIntyre and his wife had testified that he did not have experiences where his body did so.

[120] I am not persuaded by these arguments regarding the infamous letter from Dr. Fox. I begin by observing that the body "shuts him down" portion of the letter is not the doctor's medical opinion, but apparently was derived from information Dr. MacIntyre gave Dr. Fox. Early in the trial, counsel advised the judge that the only opinions before the court would be by experts who testified, and opinions and statements of fact in letters would not be evidence before the court. However, it is significant that a review of the record shows that the admissibility of Dr. Fox's letter was simply not resolved during the trial. Later discussions between counsel and the judge regarding admissibility and the use to which documents could be put, were limited to certain documents in Exhibit 1B which did not include this material from Dr. Fox, or they related to Dr. MacIntyre's use during his testimony of imagery supplied by Dr. Fox to explain his susceptibility to heavy metals.

[121] Moreover, counsel for Dr. MacIntyre did not object when the suggestion was put to Dr. Perlmutter that it was fact that Dr. MacIntyre's body had a pattern in the past of "shutting down" due to the pressure of work. In addition, in closing submissions, counsel for CBDHA referred to Dr. MacIntyre telling Dr. Fox about health problems before the renovations. Counsel for Dr. MacIntyre again did not object, nor did he refer to the admissibility of Dr. Fox's letter in his closing submission. Indeed, in addition to noting that Dr. MacIntyre saw Dr. Fox, he referred to other aspects of the letter, which would seem to be an invitation to the court to rely on that letter and its contents.

[122] Counsel presented the trial judge with an array of materials contained in thick exhibit books. Dr. MacIntyre now faults the judge for allowing the use made of the letter by Dr. Fox and argues that he erred by admitting or relying on hearsay evidence to prove a fact. Yet counsel failed to clearly delineate in arguments to the trial judge why this letter from Dr. Fox should or should not be admitted for the truth of its contents, and referred to it in their closing arguments. In these circumstances, I am not prepared to decide that, in taking the contents of the Fox letter, which could be relevant to diagnosis, into account, the judge made such an error that appellate intervention is warranted.

[123] The judge also observed that Dr. Perlmutter stated that if he had known Dr. MacIntyre became sick months after the renovations, rather than during them, it would have influenced his opinion about the cause of the heavy metal issue. The record shows that Dr. MacIntyre testified that he felt "shaky" in February 2003, months before the sudden disorientation and weakness he experienced on the Victoria Day weekend later that year. February 2003 would be some six months after the renovations began and during the renovations. I agree that the judge's observation, which implied that what Dr. Perlmutter understood regarding the onset of symptoms was not correct, was wrong. However, as I will explain, this of itself was not critical to how the judge made his determination that Dr. MacIntyre does not suffer from heavy metal toxicity.

[124] As well as emphasizing Dr. Perlmutter's qualifications and opinions, Dr. MacIntyre submits that the trial judge failed to recognize flaws in Dr. Baker's evidence. For example, Dr. Baker testified that, in view of the number of chelation treatments administered by Dr. Boucher, Dr. MacIntyre had had an excessive amount of chelation. Dr. MacIntyre points out that there had been a lengthy discussion at trial during Dr. Baker's testimony as to the different meaning of the term "a treatment" as compared with "a dose" of chelation and the time periods required, argues that her assessment was incorrect as it was based on treatments rather than doses, and notes that the judge recounted in his decision that this expert had questioned the number of chelation treatments. However, that discussion ended when the judge asked if her view would be different if Dr. Boucher meant doses instead of treatments and Dr. Baker agreed. I do not consider the trial judge's statement in his summation of her evidence to be a finding or inference of fact. In addition, it is apparent from his question that the trial judge was aware of the import of the distinction between those terms in regard to her evidence. His listing of factors supporting his conclusion that Dr. MacIntyre does not suffer from heavy metal toxicity does not target excessive chelation but rather refers to an "excessive amount of alternative medical procedures" which would encompass those taken in Mexico and New York as well as various treatments in Nova Scotia.

[125] Dr. MacIntyre argues that had the judge not erred in admitting Dr. Fox's letter and misapprehended the evidence he gave to Dr. Perlmutter regarding the temporality of his symptoms, the trial judge would not have rejected his diagnosis of heavy metal toxicity. I cannot agree. Having examined his decision and, in particular, his listing of factors in his ¶ 310 which is quoted in ¶ 105 above, I am of

the view that what the judge did was consider the conflicting expert opinions and select Dr. Baker's as the most reliable. He was not driven to his determination solely because he thought Dr. Perlmutter's opinion was flawed for discrete reasons or that Dr. Baker's was immune from challenge, but because, after weighing all the evidence, he found her expert opinion more persuasive.

[126] In this regard, I note that Dr. Baker was qualified as a medical doctor with specialties in medical toxicology and occupational and environmental medicine, and qualified to give opinion evidence in those fields. Dr. MacIntyre's submission that only Dr. Perlmutter was qualified to diagnose heavy metal toxicity is an overstatement.

[127] The judge knew there were reasons why he should be wary of Dr. Baker's opinion. He reminded himself that it should be "carefully scrutinized", she having been hired by an insurer which had to decide whether Dr. MacIntyre was entitled to disability benefits. He observed that she had seen him only once for a fairly short visit, and her interview notes were "somewhat disorganized".

[128] In her testimony, Dr. Baker emphasized that on April 30, 2003, before he received any chelation therapy, Dr. MacIntyre had had normal blood levels and, except for mildly elevated antimony, normal urine levels. Antimony she considered a relatively innocuous metal. She testified that unless levels were elevated above the normal range, chelation treatment is not administered.

[129] Dr. Boucher had had the results of those same tests when Dr. MacIntyre saw him in 2003. He made the first diagnosis of heavy metal toxicity based on Dr. MacIntyre's symptoms. He then administered a challenge dose of chelation to confirm his diagnosis. The results showed elevated levels of metals. But according to Dr. Baker, challenge dosing is not appropriate to determine if a person has heavy metals in his or her body. Her evidence was that, even if lab test results were totally normal and a person did not have excess metal in his or her body, chelation increases the urine excretion of metals. Thus, after chelation, the urine could well test positive and yet not mean anything.

[130] Dr. Baker also testified that with chelation treatment, metal levels come down and the person gets back to normal. If Dr. MacIntyre's symptoms were due to heavy metal toxicity, he should be back to normal or much, much better. She

was concerned about his ongoing chelation treatment, observing that chelating agents pull off not only potentially harmful metals but also essential metals needed by the body. She noted that Dr. Lecky, a neurologist, had expressed similar concerns.

[131] Dr. Baker did not question that Dr. MacIntyre had the symptoms he reported, such as headaches, dizziness, brain fog and weakness. It was, however, her view that they were not caused by heavy metal toxicity.

[132] Dr. Boucher treated Dr. MacIntyre with intravenous chelation for around six years. He testified that Dr. MacIntyre had had considerably more treatments than any other patient he had ever treated. He had not done any investigation to determine if anything else was going on, and described Dr. MacIntyre as having "a protracted response to treatment" with gradual improvement over time. Asked whether, since Dr. MacIntyre continued for years to excrete metals, it had occurred to him that he was still being exposed to heavy metals, Dr. Boucher responded "That's a good point." He had no explanation as to why chelation for this length of time had not resulted in a complete elimination of metals from Dr. MacIntyre's body.

[133] Dr. MacIntyre argues that "everyone" except Dr. Baker said that he was sick with heavy metal toxicity. "Everyone" in this context means his experts. However, this is not a numbers game. The judge received, heard and weighed the evidence of the medical experts called by Dr. MacIntyre and the CBDHA. He appreciated that the expert opinions were opinions on the ultimate issue, namely whether Dr. MacIntyre had heavy metal toxicity and if so, its cause. He heard their qualifications and their testimony, testimony which was throughly tested under detailed cross-examination. For example, questions were raised as to the foundations of their views on causation, diagnosis and treatment, including what each expert knew or relied upon at critical points and what each thought would have been significant if it had then been known. Dr. Perlmutter acknowledged that he did not know that Dr. MacIntyre had experienced an improvement after the onset of symptoms in May 2002, that a knife-like pain in his skull had started months later during his New York treatments, or that his family, who had not been exposed to the Hospital environment, had tested for high levels of some metals.

[134] The trial judge stated that while his decision did not review all the evidence, he had considered it all in reaching his decision. He identified the factors that led to his conclusion that Dr. MacIntyre did not have heavy metal toxicity. These included the normal blood and urine levels pre-chelation, the symptoms experienced by other Hospital staff not being supportive, and the fact that Dr. MacIntyre's conditions did not resolve after many chelation treatments. He did not simply rely upon matters he suggested negatively impacted Dr. Perlmutter's evidence to diminish its significance but, after hearing all the evidence under direct and cross-examination, reasoned that another medical opinion was the most logical and credible in the absence of a demonstrated exposure to heavy metals and in the particular circumstances before him.

[135] I see no palpable and overriding error in the trial judge's description of Dr. Perlmutter as more intent on treatment than determining the cause of his patient's illness, or in his acceptance of Dr. Baker's evidence over that of other experts. I would dismiss this ground of appeal.

(d) and (e) Dr. MacIntyre's return to work in three years

[136] As these two parts of this ground share certain aspects, I will deal with them together. The trial judge stated that, considering the type of skilled work he performed as an oral and maxillofacial surgeon, Dr. MacIntyre's decision to stop working in April, 2003 was the correct one as it would have been unwise for him to continue. In assessing provisional damages, he did not accept that Dr. MacIntyre would be disabled until age 65. He concluded that, based on his "present medical condition", Dr. MacIntyre should be able to return to work within the next three years and assumed that some time was required for reinstatement as a dental surgeon. He limited entitlement to loss of future income for that period.

[137] Dr. MacIntyre argues that the judge's statement that he was correct to stop work cannot be reconciled with the judge's acceptance of Dr. Baker's opinion that he was capable of working in his profession, and his finding that he will be able to return to work in 2012, three years after trial. He says that there is no evidentiary basis for concluding that he will return to work by then and therefore no basis to reduce his lost income claim.

[138] I agree that no witness testified that Dr. MacIntyre will be able to return to work within that time frame. The only reference in the record to a three-year period is found in the testimony of his wife, Dr. Ready. The Provincial Dental Association had advised her that if a dentist is off work for three years, recertification was required.

[139] However, the fact that the trial judge accepted Dr. Baker's opinion that Dr. MacIntyre did not have heavy metal toxicity does not mean that he was then bound to accept that Dr. MacIntyre has been able to work as a dental surgeon since her 2003 examination of him. It is always open to a judge to accept or reject any or all of a witness' testimony or an expert's opinion.

[140] During the course of a long trial, the judge heard a very considerable amount of evidence regarding the oral surgeon's medical condition over the course of several years. Dr. Boucher described gradual improvement over time. Dr. MacIntyre himself testified that his health had improved and he was better, albeit not back to "even close where I was". He still has persistent pain in and about his head. The judge heard the oral surgeon's detailed description of the types and demands of the work he performs. He heard that Dr. MacIntyre's evidence that he had joined a gym, he was able to get out in the community more, what he did during a typical week at the time of trial, and the extent to which he could now participate in his children's activities. He also heard, and commented upon his expertise, work ethic and excellent reputation in the community.

[141] I am unable to agree that the trial judge, who saw and heard Dr. MacIntyre and the expert witnesses, was clearly wrong in determining that Dr. MacIntyre should be able to return to work in three years following the trial and reducing his entitlement to loss of future income accordingly.

[142] Having dealt with the grounds of appeal pertaining to the merits of the judge's decision on Dr. MacIntyre's claim, I turn to the grounds of appeal pertaining to his provisional assessment of damages and his award of costs.

Error in the Provisional Assessment of Damages

[143] Dr. MacIntyre submits that the trial judge erred by reducing Dr. MacIntyre's claim for special damages, general damages, and future care costs. Where I have

dismissed the appeal on the merits, it is not necessary that I deal with this ground against the provisional assessment of damages. See *Atlantic Business Interiors Ltd. v. Hipson*, 2005 NSCA 16 at ¶ 11, *Signalta Resources Ltd. v. Dominion Exploration Canada Ltd.*, 2008 ABCA 437 at ¶ 48 and *Doiron v. Haché*, 2005 NBCA 75 at ¶ 114.

Error in Allowing Increased Costs as a Result of Offer To Settle

[144] Whether or not to award costs is a discretionary decision which will only be disturbed where wrong principles of law have been applied or the decision is so clearly wrong as to amount to a manifest injustice: *Claussen Walters & Associates Ltd. v. Murphy*, 2002 NSCA 20 at ¶ 5.

[145] On January 15, 2009 the CBDHA made a formal offer to settle for $250,000. This was 55 days prior to the first day of trial. In his costs decision, the trial judge held that the 2009 *Civil Procedure Rules* applied to this proceeding. *Rule* 10.09 provides in part that a judge may award costs to a party who successfully defends a proceeding and obtains a favourable judgment, in an amount based on the tariffs increased by certain percentages. The CBDHA sought a twenty-five percent increase in costs, which would increase the total requested from $770,762.00 based on the application of 1989 Tariff A to the amount claimed, to $963,453.00.

[146] The judge decided that it was not appropriate to award costs based on the amount of the original claim. He calculated what costs would be if either Scale 3 or 4 of Tariff A were applied to his provisional award of damages and twenty-five percent was added to reflect the CBDHA offer to settle. He then decided to exercise his discretion and awarded a lump sum amount of costs of $300,000.

[147] Dr. MacIntyre says the trial judge erred by allowing the CBDHA to recover an increased lump sum amount as the result of its formal offer to settle. He points out that he had pursued his action for almost five years before the commencement of trial and urges that his failure to accept $250,000, only weeks before an “all or nothing” matter was heard, was reasonable. He adds that mathematically the size of the offer represents only about 1% of his claim and about 3% of the trial judge’s provisional assessment of damages, which underscores that the CBDHA did not make a realistic or reasonable attempt to settle.

[148] While the trial judge referred to the CBDHA's submissions regarding the effect of its formal offer to settle pursuant to the tariffs, there is no indication that he took this into account in settling his award of costs. Rather, what he did was accept Dr. MacIntyre's argument that a lump sum should be awarded. He referred to *Williamson v. Williams*, [1998] N.S.J. No. 498 (C.A.) where this court indicated that recovery of costs should represent a "substantial contribution towards a party's reasonable expenses in presenting or defending a proceeding". Freeman, J.A. expressed the view that that meant more than 50% and less than 100% of a lawyer's bill for services.

[149] Here, the CBDHA's solicitor-client costs were $700,000. In *Founders Square Limited v. Nova Scotia (Attorney General)* (2000), 186 N.S.R. (2d) 189, Moir, J. observed that when the tariffs result in amounts too low to be a substantial indemnity or too high to be a partial indemnity, the court will depart from the tariffs. After referring to that decision, the trial judge exercised his discretion and awarded $300,000 lump sum.

[150] In my view, Dr. MacIntyre misapprehended the costs decision. The trial judge did not include a percentage increase in arriving at the lump sum award of costs. I see no application of wrong principles of law nor a decision so clearly wrong as to amount to a manifest injustice that would warrant appellate intervention in the exercise of the trial judge's discretion.

[151] As recounted earlier in my decision, although the CBDHA had paid Dr. Parent over US $209,000, the trial judge awarded only US $35,000. Dr. MacIntyre argues that the judge should have disallowed any disbursement for that neurologist's account.

[152] The CBDHA had retained Dr. Parent early in this litigation which raised complex issues. Although the judge concluded that it was not reasonable for Dr. Parent to have spent as much time as he did and his evidence was not significant in his eventual determination of the matter, the question is whether it was reasonable for the party to have retained the expert. In *Maritime Travel*, this court stated:

> [110] . . . it was necessary and appropriate to incur the disbursement, the damages issue was a complex one and the claim was a substantial one. In hindsight and in light of my conclusion, it was not a position that had merit. However, at the time the decision was made to retain the expert, it was prudent to

> retain Ernst & Young. It was relevant to the issue raised by Maritime Travel, albeit unsuccessfully. . . .
>
> [115] . . . The ultimate use made by a judge of an expert report is not the determining factor as to whether the cost of an expert report may be properly claimed as a compensable disbursement.

[153] The judge properly considered whether the disbursement in relation to Dr. Parent's account was reasonable and just. There is no palpable and overriding error which would support any intervention in his discretionary decision respecting this disbursement.

Disposition

[154] I would dismiss the appeal and award the CBDHA costs of $20,000 together with disbursements as agreed or taxed.

Oland, J.A.

Concurred in:

Saunders, J.A.

Beveridge, J.A.

Citation: MacIntyre v. Cape Breton District Health Authority, 2011 NSCA 3

Date: 20110118
Docket: CA 317064
Registry: Halifax

Between:

Duncan F. MacIntyre

Appellant

v.

Cape Breton District Health Authority

Respondents

Revised judgment:	**The text of the original judgment has been corrected according to this erratum dated February 8, 2011.**
Judge(s):	Saunders, Oland and Beveridge, JJ.A.
Appeal Heard:	October 13, 2010 at Halifax, Nova Scotia
Held:	Appeal is dismissed and the Cape Breton District Health Authority is awarded costs of $20,000 together with disbursements as agreed or taxed, per reasons for judgment of Oland, J.A.; Saunders and Beveridge, JJ.A. concurring
Counsel:	George W. MacDonald, Q.C. and Michelle C. Awad, Q.C., for the appellant Nancy G. Rubin and Shelley A. Wood, for the respondent

Erratum:

Page 16, paragraph 57, last line, where it reads “inference in favour of the defendants after weighing the evidence”, it should read “inference in favour of the appellant after weighing the evidence”.