IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Tingley v. Wellington Insurance 2009 NSSC 248

1995

Date: 2009/07/13
Docket: S.H. No. 115328
Registry: Halifax

Between:

Patricia Tingley, Margaret Burton, Kelli Smith and Todd Smith

Plaintiffs

v.

Wellington Insurance and Larry Hay

Defendants

Judge:	The Honourable Justice A. David MacAdam
Heard:	July 13, 2009 in Halifax, Nova Scotia
Oral Decision:	July 13, 2009
Written Decision:	August 18, 2009
Counsel:	Kevin MacDonald, for the Plaintiff Jocelyn Campell, Q,C. & Harry Turlow, for the Defendants

By the Court:

[1] Following 84 days of trial time, including 26 witnesses of whom two were not present in person, and thousands of pages of documentary evidence, the plaintiffs closed their case. The defendants now advance a non-suit motion, pursuant to *Civil Procedure Rule 51.06.* The rule reads:

> Non suit
> 51.06 (1) At the close of the plaintiff's case and before the defendant elects whether to open the defendant's case and present evidence, the defendant may make a motion for dismissal of the proceeding, or a claim in the proceeding, on the ground that there is no evidence on which a properly instructed jury could find for the plaintiff.
>
> (2) A defendant who unsuccessfully makes a motion for a non suit must elect whether to open the defendant's case and call evidence when the motion is dismissed.

Background:

[2] In September 1991 the plaintiff Patricia Tingley, then known as Patricia Smith, was living in Dartmouth, NS, and working as a rehabilitation specialist in Dartmouth and Sydney. While she was in Sydney, her two children, the plaintiffs Todd Smith and Kelli Smith, would reside with their father, her former husband

Philip Smith. Her Dartmouth residence was at 150 Silestria Drive. Her brother, Kim Tingley, lived in the basement of her home.

[3] In the early hours of September 20, 1991, Kim Tingley returned from work and discovered a break-in had occurred. He called his sister, who was in Sydney. Ms. Tingley testified that her brother told her he had called the RCMP, and that he later called back and advised her that RCMP officers had gone through the house. He reported that there were items missing. Ms. Tingley thought she called her ex-husband, Philip, and told him what had happened. She said she wanted to make sure that her daughter did not go to the house by herself and, if she did go, that he should accompany her. She understood that Kelli and Todd went to house the next morning with their father. Ms. Tingley said she spoke to a member of the RCMP and was advised that it was not necessary for her to return home.

[4] Ms. Tingley testified that on October 27, 1990, the defendant Wellington Insurance Company had issued a policy of insurance on her home at 150 Silestria Drive. She said she contacted Wellington from Sydney and advised them of the break-in. She testified that later in the week, before returning to Dartmouth, she spoke on the telephone to the defendant Larry Hay, the adjuster appointed by

Wellington. She said Mr. Hay wanted to know when she would be back in Dartmouth, so that he could attend at the house with her.

[5] Mr. Tingley testified that prior to returning to Dartmouth she received a call from either her son or her daughter, who said there was an odor, described as a sweet musty smell, in the house. Both Todd and Kelli Smith stated they noticed an unusual smell on entering the house. Ms. Tingley said that on returning to Dartmouth she picked up the children and went to the house. When she entered she could smell and taste something, and there was burning in her eyes. On the other hand, the children said that nothing stood out to them. If there is any inconsistency or contradiction in this, or any of the evidence, it is both unnecessary, as well as inappropriate to resolve it on this application.

[6] On going through the house she noticed clothes that were stained, including some in her closet. Some of the clothes were dark and wet, some were yellow-stained, and some had gray and brown stains. She concluded that something more than a “simple” break-in had occurred. Kelli Smith also spoke of spots and stains on her clothing, as well as yellow stains on the carpet and stains on her bedroom wall.

[7] Ms. Tingley testified that within a day or two of her return to Dartmouth, her son Todd was cranky, had a running nose and a high fever. She ran a tub of water for him to take a bath. She said she was in the study and heard an “ungodly scream.” Todd came out of the bathroom, naked, screaming and crying about his feet, which she said were red and swollen, up to four to six inches from his ankle. Evidence to similar effect was given by Todd Smith and Kelli Smith. Todd’s evidence was that he had not been feeling well and his mother had told him to take a bath and go to bed. He said his feet burned intensely as soon as they hit the water. He could see a line where his feet burned. He jumped out of the tub, crying, and went to get his mother. He said the socks he had been wearing had been in the bottom drawer of his mother's dresser.

[8] Ms. Tingley said that earlier in the day she had washed clothes, including a grey sweater that had been stained. She said the water turned grey when she washed the sweater and after drying it, she had washed it again. She said she gathered up the sweater and put it in a bag as they left for the hospital. At the emergency room, a nurse asked what was in the bag and Ms. Tingley said it was a sweater. She testified that when the nurse picked up the bag, she dropped it

because it was hot. The nurse, she said, called Poison Control who came and took the bag with the sweater.

[9] At the emergency room, Ms. Tingley testified, Todd was examined by the emergency room doctor, Dr. Grover. In addition, his own pediatrician, Dr. Morton, happened to be in the emergency department at the time. Ms. Tingley said the doctors asked what had happened and, after she told them, they said that as they did not know what the substance was, they could not treat him. She said she asked what they could do and was told they should remove their clothes and take showers. They were told to leave their clothes and were given hospital pajamas to wear when they left the hospital.

[10] Despite some difference as to the sequence of the showers, the evidence of all three witnesses was that it was not until Todd took a shower that there was a problem. Ms. Tingley said that after Todd had his shower, he complained of burning of his skin. When she tried to dry him off, it looked like grey skin was coming off his body. She compared it to burning skin turning charcoal grey. According to Todd's evidence, when he was in the shower, a film came off his

skin, which he first noticed on his arm and his side. Kelli noticed it and screamed. According to Ms. Tingley no one responded to a call for help.

[11] Ms. Tingley said Dr. Grover had told them not to go back to the house and so they went and stayed with a friend, Donna McKay. She said they left the hospital without having seen anyone after the showers. Todd testified that they left the hospital in hospital flannels, and he did not recall interacting with doctors or nurses after they took showers.

[12] Three documents were tendered in evidence relating to the visit by Ms. Tingley and the children to the IWK Hospital emergency room. The first was the emergency hospital record of the visit, the second is a printout delivered by a nurse at Poison Control to Ms. Tingley, after she delivered the bag with the sweater in it, and the third was the Poison Control record of their involvement with Ms. Tingley and the children.

[13] The emergency room record shows the patient as Todd Andrew Smith. Under the heading “History and Clinical Findings” it states:

> History of pesticide being sprayed in house.
>
> Brought in for decontamination.
>
> No abnormal findings.

[14] The commentary attached to the emergency room record, apparently written by a nurse, reads, in part:

> Sept 30/91 @ 2120 Mrs. P. Smith arrived with 2 children stating that her house had been broken into and sprayed with ?contaminate. Could of been at least 1 week ago, only returned to house 3 days ago. No systemic symptoms other then skin burning when water applied. Spoke with P.C. and Dr. Grover both recommend frequent showering until identified.
>
> (2200) Placed in Pl. Room. No obvious skin irritation noted. No C/O (complaint of) discomfort, rashes, etc. Med. to see.
>
> (2250) Dr. Grover has examined pt. Mom requests that child be able to shower before returning home. (to decontaminate skin).
>
> (2330) Shower completed [with] no skin irritation noted. D/C [discharged)]home [with] mom."

[15] On re-examination, Ms. Tingley said Dr. Grover directed them to take showers.

[16] During cross-examination of the three plaintiffs who attended at the IWK emergency room, much was made by the defendants about alleged inconsistencies between the version of events noted in the hospital records, including the nurses' notes, and the plaintiffs' evidence. However, this is a non-suit motion brought at the conclusion of the plaintiffs' case. The authorities consistently admonish that this is not the time to weigh the evidence or to make findings of fact. This record is referenced only to show that there is confirmation that the three plaintiffs attended at the IWK on September 30, 1991, and were seen by doctors at that time.

[17] The second document arising from the visit was a printout that Ms. Tingley says she received from Poison Control. The document is entitled, "POISINDEX ® SUBSTANCE IDENTIFICATION". Among other things, the document refers to "PESTICIDE, WATER REACTIVE, CONTAINING MANGANESE ETHYLENEBISDITHIOCARBAMATE (MANEB) (DOT)".

[18] In the Poison Control record, the third document generated that evening, the following is noted under "Comments; Misc. Info:"

> Mom & 2 children 13 & 14 y.o. have been exposed to ? Pesticide.

> -rotten wood smell & [illegible word]when skin gets wet, burns & turns red.

[19] Under "Progress Notes" the following appears (among other entries):

> F/u 2125 - Advised Mom that PCC best guess is that substance is a pesticide that is water reactive but no ways know [without] analysis, name of company & products. Given Mom 1-800 # for Ortho Co. to perhaps get more info on product.

[20] Later the "Progress Notes" continue:

> F/u 2200 Constable Marando, RCMP Cole Harbour calling re: Smiths situation. Asking about possible kind of product. Advised PCC guess is a pesticide - gave chemical name of water - reactive pest. containing manganese that is attached to give to their lab for testing as a possibility. Advised that lab could call PCC in AM. for info on possible other substances that they could test for. Constable Marando asking if plastic bags are adequate for samples of articles - yes. - PCC advised use gloves. Call pm. Thanks.
>
> F/u 2220 Dr. Morton calling re: Smith family. Mom claiming PCC advised her to be treated here @ IWK [with] showers, etc. - PCC stated that we did not advise treatment. - ok.
>
> F/u 2330 Family all showered - no burning or redness! Given IWK pajamas to wear home. No adverse effects noted. D/C'd [discharged] home.

[21] Again, reference to this record is made simply to confirm that there was interaction between the plaintiffs involved and Poison Control. Any variation between the version of events testified to by the three plaintiffs who attended at the

emergency room, and the emergency room or Poison Control records is not a matter to be weighed on this application. Such a determination will only be made, if required, after all of the evidence and the submissions of counsel have been heard.

[22] Ms. Tingley said that at the hospital, she felt poorly. She said that by the time they arrived at Ms. McKay's house after leaving the hospital, she, herself, had become very ill, with severe headaches, earache and a sore throat. Todd was also very ill. They both felt like they had high temperatures, but she admitted that on taking their temperatures, they were normal. She said they also had severe flu symptoms and their cheeks were flushed. Todd stated he was tired and had headaches and breathing problems. On cross-examination Ms. Tingley agreed with her statement on discovery that Kelli had told her and the doctors at the IWK that she was not experiencing any ill effects. She said that she did not remember Kelli having any effects until after they moved back into the house, following the cleanup.

[23] As to whether Todd had a burning sensation when he took the shower at the IWK, Ms. Tingley said on cross-examination, that she was not sure. She agreed

that on direct examination she had testified that he had a burning sensation. She added that she "vaguely" remembered that there had been a slight burning. After being referred to the Poison Control records, she said she believed he had experienced burning in the shower. Again, any inconsistency is not to be weighed on this application, but is only noted to show the evidence presented by the plaintiffs in respect to Todd's condition on the evening of September 30, 1991, when they went to the IWK.

[24] Ms. Tingley testified she had one experience of a burning sensation on her skin following the break-in and that it was before the visit to the IWK. She had put on a flannel nightshirt taken from her dresser, the back of which was later removed by the RCMP. The burning was localized to her mid-back. She said the irritation on Todd's feet was like a bad burn, while hers was a chafing, like a carpet burn. She said the nightshirt was dry, and looked normal.

[25] Donna McKay had been visiting with Ms. Tingley before they went to the emergency room. Ms. Tingley recalled asking Ms. McKay to call the RCMP before they left for the hospital. On cross-examination Ms. Tingley said she could

not remember whose idea it was to call the police. Later, she said Ms. McKay called the RCMP, but she did not know what she told them, prior to their return.

[26] Ms. Tingley testified that while Ms. Tingley and the children were at the IWK, Ms. McKay went to 150 Silestria Drive, with a RCMP officer, where the officer took pieces of clothing, and the back of a dresser that was in the master bedroom. As with some of her clothes, Ms. Tingley said, the back of the dresser was also wet. This is the dresser, from which Todd Smith had taken the socks he was wearing just before he undressed to take the bath that led to their visit to the IWK. Todd recalled that the back of the dresser was wet, as did Kelli Smith. The items were examined by Michelle Holzbecher of the RCMP Forensic Lab, Toxicology Section, who indicated she was unable to find any substance on any of the items she examined.

[27] Ms. Tingley testified that after they went back to Ms. MacKay's home, two RCMP officers arrived, and she went with them to 150 Silestria Drive. Ms. Tingley said she began to cough, experienced burning eyes and noticed a smell when she entered the house. She said she asked the officers, later identified as Constables Emberly and Turner, whether they smelled or tasted anything, to which

they responded in the negative. She said they went upstairs and she showed them a sweater, and they acknowledged that there was a white powder on it. She said one of the officers said it looked like discharge from a fire extinguisher, while the other said it looked like an excess of laundry soap. Ms. Tingley said it was not laundry soap. She also said she did not have a fire extinguisher in the house.

[28] Later Ms. Tingley contacted and met with Mr. Hay, the adjuster. She said she told him to contact the doctors, the RCMP or Poison Control about what had happened. She said she offered him a copy of the printout she received from Poison Control and the IWK records. According to Ms. Tingley, he said he did not want any of the information, insisting he was not involved in a health issue, only a break-and-enter.

[29] Ms. Tingley said she expressed to Mr. Hay her concern about the stains on the walls and on her clothes. She said he "blew her away" and got "very rude". She said the conversation became heated and that Mr. Hay was "disrespectful and bullying." The meeting lasted between 45 minutes and an hour, during which, she said, Mr. Hay seemed interested only in what was missing. She said he indicated it could be done "the hard way or the easy way." She interpreted Mr. Hay's body

language, tone and words, to indicate he was the adjuster and therefore in control. She agreed that he approved their moving into the Cambridge Suites Hotel, rather than their returning to 150 Silestria Drive. When she asked him what he would do about the clothing and the walls, he said they could be washed. She says she indicated that she wanted the house tested. She agreed that this conversation could have occurred in either her first meeting with Mr. Hay or her second.

[30] Ms. Tingley said the printout she received from Poison Control, on September 30, 1991, was given to Mr. Hay and to the RCMP. She agreed that the printout only suggested a possible substance, and that they did not know what chemical was in the house.

[31] Ms. Tingley testified to another visit by Mr. Hay, when Cst. Rice of the RCMP was also present. She said she had found more clothing with substances on them. Cst. Rice contacted the crime lab, in front of her and Mr. Hay, and indicated they could not come to the house due to their workload. Ms. Tingley said Cst. Rice told Mr. Hay that to be safe the house should be tested. She also said he indicated that anything that could absorb chemicals or substances should be replaced. She asked whether this meant linen, bedding and clothing, and he replied

in the affirmative. She said Mr. Hay told Cst. Rice not to tell him how to do his job, to which Cst. Rice responded that he was just reporting what the crime lab had said.

[32] Kelli Smith's account of the meeting with Mr. Hay and Cst. Rice was similar. She said her mother explained what was missing and that there was something wrong, that it was not a standard break and enter. Mr. Hay, she said, was not interested. Her mother also talked about the sweater, being at the hospital and the back of the dresser being wet. She said Mr. Hay only appeared interested in the missing things, that he said it was a break-in, and that he said "we can do it the easy way or the hard way." He and her mother argued. He said he was in charge and indicated he would not be following the RCMP advice. On cross-examination Kelli agreed she was incorrect when she testified that her mother told Mr. Hay and Constable Rice about the sweater, Poison Control and going to the IWK, because it had not happened by the time of the meeting.

[33] On cross-examination, Ms. Tingley was referred to notes apparently made by Mr. Hay, dated October 2, 1991. The notes apparently referred to a phone call between herself and Mr. Hay. Included in the notes is the following:

> – she went to the house last night it was so polluted
>
> – skin is still burning from being in the house.
>
> – need to get the toxins analyzed.
>
> – RCMP are doing nothing they took the back of dresser and have nothing about it
>
> – she has dept of health involved
>
> – I. W.K. think it is a specific chemical.
>
> – she took a wet sweater with her and poison control lab has it.
>
> – Dr. Morton is waiting to find out what it is
>
> – Joe Marando was to sent it to lab
>
> – she is speaking to the staff seargent today after lunch
>
> – Bill Stewart – Public Health Inspector is also going to check it out
>
> – fungicide and pesticide. maganese.
>
> – time release chemical concentrated.
>
> – water reactive.
>
> – she is more concerned with health than house right now.
>
> – hold off cleaning until we know what it is

[34] Ms. Tingley stated that the notes were “pretty accurate”, based on what she told Mr. Hay. She did not know if the references to fungicide, manganese and pesticide came from her or from the RCMP. She agreed that she assumes she told Mr. Hay in October that it was a pesticide, fungicide [or] manganese, and that manganese was only a suggestion.

[35] A later note, timed at 4:10, apparently on the same day, refers to a call from Ms. Tingley indicating that Bob Jeans, apparently of the Atlantic Health Unit, had suggested “do air sample”. On cross-examination she said she did not recall the name “Bob Jeans,” but recalled a different name. Ms. Tingley said she “assumed” that Mr. Hay would be doing “air quality testing.” She said Cst. Rice, who is now deceased, told Mr. Hay that the RCMP Crime Lab had said that he should do “air quality tests.” She agreed that there was no record of this in the RCMP files.

[36] Ms. Tingley said she provided Mr. Hay with the names of companies that could do the testing, but he decided to use Nova Scotia Research Foundation. She said Mr. Hay indicated he was not sure whether he would do it and she responded

that the house would not be cleaned without testing. She said the reason for her position was because of the sickness that Todd had suffered.

[37] Ms. Tingley said she notified Mr. Hay that before the house was cleaned it had to be tested, and he would have to arrange the testing. She told him she could not afford to do the testing herself, and he said he would do it. She said she wanted "air quality" testing, based on what she was told by the Department of Health. When Mr. Hay selected Nova Scotia Research Foundation, she took him at his word that he would have the appropriate testing done. She understood the first thing they wanted to test was clothing, and she provided selected items to Mr. Hay. She assumed that the second step would be "air quality testing."

[38] Ms. Tingley testified that Mr. Hay called and said Nova Scotia Research Foundation wanted examples of stained clothing, and that she gave him various pieces of clothing, including a blouse with an oily grey stain. Later, when Donna Strong, Mr. Hay's supervisor, was at the house, Ms. Tingley inquired after the items provided to Mr. Hay, who said he did not think he had gotten them back from Nova Scotia Research Foundation. Ms. Tingley said Ms. Strong told him to pay her for these items.

[39] Ms. Tingley said she was not present when the representative from Nova Scotia Research Foundation did the testing. She said she later heard from Mr. Hay that the results had come in and the cleaners could go into the house, as it was "safe to be cleaned." She said she found this hard to believe, and asked for a copy of the test results, which she said she did not receive at that time. According to Ms. Tingley, Mr. Hay said the best thing they could figure out was that the substance involved was urine. She said it did not smell like urine. On further cross-examination, Ms. Tingley said Mr. Hay told her that "everything was fine," but did not use the word "safe." She testified he said the cleaning was underway and when it was finished, they could move in. She maintained that the Insurance Company told her the house was safe, that she believed this, and she and the children moved back in as a result.

[40] Ms. Tingley said she believes that she and the children had moved back into 150 Silestria Drive on Halloween night, 1991. She said she soon began to experience some of the same symptoms she had experienced previously. She said she called Mr. Hay, who said the house was clean and safe and that her symptoms were probably related to materials used by the cleaners. Her symptoms continued

and became worse. She said she asked Mr. Hay about the testing and about the cleaning, and he responded that he would not do any more testing or cleaning of the house, or cleaning of her clothes, and that her sickness was not his concern. Ms. Tingley testified that she developed bladder problems, and that she and Todd had rashes, outbreaks on their lips, runny noses and bleeding. Deciding that there was little more she could do, she signed off on the insurance claim.

[41] Around November 1991, Ms. Tingley testified, she contacted a manager at Wellington and was advised that Mr. Hay and Ms. Strong would come to the house. Margaret Burton was also present at this meeting. Ms. Tingley showed them stained clothing and told them she wanted the items replaced. Mr. Hay said she would be required to produce receipts. Ms. Tingley said she responded that she wanted a lump sum for her clothes, bedding and Kelli's clothes. She said Mr. Hay offered $2500, then $3500 as a final offer, which she accepted because, as she said, she was "hitting [her] head against a brick wall."

[42] On cross examination Ms. Tingley was referred to handwritten notes of Ms. Strong, dated November 4, 1991, which included the notation that there was "semen over daughter's window." The note also included the following:

Problems:-

1. House not cleaned properly

2. Carpet had to be cleaned twice;

3. Chemical is still in the carpets [and] on walls

4. Stereo wasn't delivered in time for guy to hook it up

5. Scotch guard wasn't done properly

6. Says there is semen all over her daughters window

7. Both Pats and her daughters clothing aren't salvagable not cleaned properly

[43] After the house had been cleaned by the company selected by Mr. Hay, spot cleaning of carpets done by another company, and the clothes dry cleaned, Ms. Tingley said, there were still stains on the carpets and some of the clothing. Mr. Hay came to the house again, with Ms. Strong. Ms. Tingley says she and Kelli showed them stained clothes, including a pair of Kelli's jeans, which Mr. Hay said could still be worn. Kelli began to cry, and Ms. Tingley said she asked Ms. Strong, "are you going to do anything?" They then went upstairs and observed the stain on the walls that the cleaners had not been able to remove. She said it was a "grey oily stain" and was seeping through the wall. She said Ms. Strong told Mr. Hay to have it cleaned.

[44] Ms. Tingley said she showed Mr. Hay and Ms. Strong stains on a wall in Kelli's room. She said the stains could be seen only at a certain angle or when the lights were on; the wall was full of shiny spots. On opening the blind, she said, they saw something on the window which Mr. Hay said looked like semen. Ms. Tingley said Ms. Strong told Mr. Hay to have the windows cleaned and the room painted. She agreed in addition to Kelli's room, other parts of the interior of the house were also to be painted.

[45] Todd Smith spoke of seeing spots on the carpet and walls, before his initial visit to the IWK. He said he saw spots on the walls in the dining room, living room, his mother's bedroom and throughout the house. He does not remember them being there before. He said they looked like watermarks. They had changed colour, they were just darker watermarks. The sizes and patterns were different. He could not discern a pattern.

[46] Ms. Tingley agreed the stains disappeared when the cleaners washed them off, but said they reappeared later and could be seen in certain light or from certain angles. Todd Smith also said the stains reappeared after the cleaning was done. On

cross-examination she said it is not true that Mr. Hay did not see the stains on the carpet and walls on September 30.

[47] Ms. Tingley said she brought up the health issue on an occasion when Ms. Strong and Brian James were at the house. Mr. James owned, James Proper Care, the company that Mr. Hay had engaged to clean the house. Ms. Tingley told Ms. Strong that she had blood in her urine and masses in her breasts, to which she said Ms. Strong responded that she had problems with her own breasts and that the other issue could be an infection. Ms. Tingley said at this time she began to make a connection between her health problems and the problems with the house.

[48] After November 1991, the plaintiff Margaret Burton, a friend of Ms. Tingley, would on occasion stay at 150 Silestria Drive. Ms. Tingley said Margaret Burton never lived with her on Silestria Drive on a permanent basis. She said she did not recall Ms. Burton staying longer than seven days on any one occasion. Ms. Tingley said she and the children were sick, and Ms. Burton started to be sick as well, describing her colour as turning “yellowish orange.” She testified that one of her doctors, Dr. Deagle, told her she should not stay in the house. Ms. Tingley also said Dr. Deagle told her not to remove anything from the house. She understood

the reason to be so that they would not take any contaminated items to their new environment. Ms. Tingley also said that Craig MacMullin, who had tested pieces of carpet and paint chips from the house and provided a report listing the chemicals found, said the house was not safe for her, but may be safe for someone else. Mr. MacMullin denied making such a statement. Weighing this apparent inconsistency is not a matter for this application.

[49] The plaintiffs subsequently moved to an apartment on Forest Hills Parkway in Cole Harbour, where Ms. Burton began to reside with Ms. Tingley and the children on a permanent basis. They remained in this apartment for less than a year, moving because of exhaust fumes from the highway that gave them breathing problems. They moved into another apartment, in the same complex, where they continued to have problems due to "off gassing" from the carpets and paint fumes. Ms. Tingley said she had seizures due to the fumes. They then went to stay with her brother, Mark Tingley, at his residence on Pelzant Street, in Dartmouth.

[50] Ms. Tingley identified several occasions when she communicated to Mr. Hay, or someone else at the corporate defendant, that she was having health problems that she attributed to toxic chemicals in her home, including when she

went to Ms. McKay's after leaving the IWK, and when she told Mr. Hay she was sick when she requested hotel accommodations. Ms. Tingley said that after moving into the hotel, she contacted Mr. Hay and advised him that Todd was having breathing problems, and she was experiencing headaches, diarrhea and severe thirst. She said she requested an allowance for additional fluids, to which he agreed. She also said she told him about having a rash from her nightshirt, and that when she moved back into the house, she had a runny nose and blisters on her lips. Mr. Hay replied that these symptoms resulted from the cleaning. She also said Mr. Hay knew about her having blood in her urine, headaches, and bladder problems shortly after they returned to the house. She said she told him about her bladder problems in 1991 or early 1992.

[51] Ms. Tingley testified, on cross-examination, that prior to October 2, 1991 she had had severe diarrhea, cramps, headaches, earaches, red ears, enormous thirst, burning in the back of her throat, burning eyes and perhaps a running nose, while the blood in her urine and bladder pain appeared later. She said that between September 28 and October 13, 1991, when they left the hotel, she also had "chills and was flushed." She said Mr. Hay knew of these symptoms in 1991 and 1992, and that he said he was "not dealing with health issues, only house issues."

[52] On cross examination she said she was wrong in her discovery when she said she had two days of diarrhea, two or three days. She said two weeks would be more accurate. Later she repeated that her diarrhea lasted for two weeks. She said her bladder problems began not long after the diarrhea, but also while she was residing at the Cambridge Suites. However, there was no blood in her urine until later, in 1992 or 1993. She said there were no serious blood problems, in her urine, until 1993. Ms. Tingley agreed on cross-examination that she did not visit a doctor on account of these symptoms.

[53] Ms. Tingley said, she had severe diarrhea, which was foul smelling, lime green in colour, with steam or foam. Kelli Smith recalled her mother experiencing diarrhea when they were at Donna Mackay's house, before they went to the Cambridge Suites. She described it as greenish, gray, and brown with a film on top. She said this also occurred when they were at the hotel and when they later returned to the house.

[54] On cross-examination Ms. Tingley confirmed that she smoked in the house before and after the break-in, as did Ms. Burton. She also confirmed that her

brother Kim smoked, adding that 95% of his smoking was in the basement. She said she could not recall Kelli smoking in the house. She acknowledged that on her first visit to Dr. Roy Fox, on September 17, 1994, he told her she should stop smoking. She agreed that she did not permanently stop until 1997, adding that she did not then notice any improvement in how she felt. She agreed that she and Ms. Burton smoked in the apartment on Cole Harbour Road. On cross-examination she said Dr. Fox was the third person to diagnose her with multiple chemical sensitivity. The first was Dr. Deagle and then when he left and moved to the United States she had a similar diagnosis from Dr. Bruce Elliot.

NON-SUIT

The applicable non-suit rule

[55] The defendants say the appropriate rule on this motion is the current Civil Procedure Rule 51.06, referenced earlier.

[56] The plaintiffs suggest in effect, there is effectively no difference between either Rule 51.06 or its predecessor, Rule 30.08 of the *Civil Procedure Rules 1972*, which reads as follows:

> At the close of the plaintiff's case, the defendant may, without being called upon to elect whether he will call evidence, move for dismissal of the proceeding on the ground that upon the facts and the law no case has been made out.

[57] However, there is an obvious distinction. The line of authorities cited by the plaintiffs, referencing CPR 30.08 or its equivalent in other jurisdictions and suggest a non-suit motion relates only to all of the plaintiffs claims, and does not permit dismissing some while others remain. Clearly, the phrase, "or a claim in the proceeding" in the 2009 Rule recognizes the possibility of dismissing some claims, while others remain.

[58] The new Civil Procedure Rules provide guidance on which rules apply in ongoing proceedings. Rules 92.02(1) and (2) provide:

> Application to outstanding proceedings
> 92.02 (1) These Rules apply to all steps taken after January 1, 2009 in an action started before January 1, 2009, unless this Rule 92 provides or a judge orders otherwise.
>
> (2) The Nova Scotia Civil Procedure Rules (1972) continue to apply to each of the
> following kinds of proceedings:
>
> (a) an action or other proceeding in the Family Division;
> (b) a family proceeding outside the Family Division;
> (c) all other proceedings, except an action, started before January 1, 2009, unless a judge orders otherwise.

[59] As noted, Rule 92.02(2)(c) provides that the predecessor rule applies to "all other proceedings, except an action, started before January 1, 2009, unless the judge orders otherwise." No application was made prior to the hearing to have the 1972 Rule apply to this non-suit motion. Counsel for the plaintiffs raised it in response to a question from the court, after the defendants had presented not only their pre-hearing brief, but their arguments on the motion. I am satisfied that such a motion, if it is to be made, should be made sufficiently far in advance of the hearing to permit both parties a full and fair opportunity to present arguments on the merits of their respective positions as to the appropriate Rule to be applied. The application was denied.

The non-suit motion

[60] The plaintiffs, as outlined in counsel's brief on the non-suit motion, make the following claims:

1. Breach of contract for items that Wellington were obligated under the policy to pay for but refused to do so (paragraph #25 of the second pleadings);

2. Negligent misrepresentation on the part of Wellington and its agent, Larry Hay (paragraph #31 of the second pleadings);

3. That the Corporate Defendant and its agent, Larry Hay, were negligent and/or in breach of their fiduciary and contractual duties to the Plaintiffs; particulars of which are set out in paragraph #32 and #33 of the second pleadings;

4. The Defendants and each of the them have made negligent misrepresentations; particulars of which are set out in paragraph #31 and #34 of the second pleadings; and

5. The Defendants and each of them committed equitable fraud pursuant to the doctrine established in *Derry v. Peek*, the particulars of which are set out in paragraph #34 of the second pleadings.

[61] The defendants submit that the plaintiffs have not presented any evidence establishing the standard of care. In respect to causation, the defendants say that "the plaintiffs have not established a causal connection between any act or omission by the defendants and the resultant damages alleged to be suffered by the plaintiffs." The Defendants claim the Plaintiffs have failed to provide any evidence to establish:

(a) The standard of care required of an insurance adjuster when an insured claims chemicals have been dispersed in their home;

(b) That Larry Hay did or did not do something in breach of this unknown standard of care;

> (c) That chemicals at toxic levels or at any level were present in the house as a result of the break and enter;
>
> (d) That anything Larry Hay might have done differently would have affected the outcome; and
>
> (e) A causal connection between chemicals present in the house as a result of the break and enter and their health symptoms.

[62] In respect to the claim in contract, the defendants say that "without any evidence having been led by the plaintiffs on industry custom or standard, the plaintiffs have not laid the foundation upon which the court can determine what terms ought to be implied into the contract." Also, the defendants submit that the causation issue applies to the contractual claim and that there is no evidence that if the defendant, Mr. Hay, had acted differently in 1991, a chemical at toxic levels, or any hazard, would have been detected and completely eradicated from the house. In these circumstances, the defendants submit, the plaintiffs have failed to prove, even at a *prima facie* level, that any act or omission of Mr. Hay, whether founded in contract or tort, caused a loss.

[63] In respect to the allegation of bad faith, the defendants claim that the plaintiffs have failed to present evidence that the defendants breached any standard of care, or for that matter, what the standard of care might be. They say a breach of

either a tortious or contractual duty must exist before it can be said that a party has acted in bad faith. Counsel for the plaintiffs acknowledged that bad faith was not being advanced as a separate cause of action, but as conduct that was alleged to justify either punitive or aggravated damages, in the event the plaintiffs were successful. As such, there is no cause of action founded on bad faith.

[64] Neither in their pre-hearing written submission nor in their initial oral argument did the defendants deal with the other claims advanced by the plaintiffs, except as outlined above. The defendants sought, in reply, to amend their motion to include the other causes of action. Apart from negligent mis-statement, the plaintiffs' counsel objected on the basis that he had assumed the defendants were not moving on the causes of action founded on fiduciary duty or equitable fraud. I was initially satisfied that in the circumstances, the defendants' request to amend their application to include a non-suit in respect of these claims should not be allowed. As with the application to have the predecessor Rule apply, I am similarly satisfied that an application to amend the non-suit motion should be denied because of the lateness of the application. The dismissals because of the lateness of the respective motions does not amount, however, to a determination that either application would otherwise have succeeded on its merits.

The law on non-suit

[65] The issue on a non-suit motion is whether the Plaintiffs have established a *prima facie* case against the Defendants, in the sense of whether a jury could find in favour of the Plaintiffs, if the jury accepted the evidence tendered by the plaintiffs. As noted in the Defendants' submission, whether the Plaintiffs have established a *prima facie* case is a question of law. Plaintiffs' counsel agreed with the defendants' assessment of the role of the trial judge on a motion of non-suit.

[66] On an appeal from the granting of a non-suit in *Wentzell v. Spindle* (1987), 81 N.S.R. (2d) 200 (S.C.A.D.), Clarke C.J.N.S., for the court, referred at para. 3 to the following passage from Sopinka and Lederman, *The Law of Evidence in Civil Cases*, at page 521:

> If such a motion is launched, it is the judge's function to determine whether any facts have been established by the plaintiff from which liability, if it is in issue, may be inferred. It is the jury's duty to say whether, from those facts when submitted to it, liability ought to be inferred. The judge, in performing his function, does not decide whether in fact he believes the evidence. He has to decide whether there is enough evidence, if left uncontradicted, to satisfy a reasonable man. He must conclude whether a reasonable jury could find in the

> plaintiff's favour if it believed the evidence given in trial up to that point. The judge does not decide whether the jury will accept the evidence, but whether the inference that the plaintiff seeks in his favour could be drawn from the evidence adduced, if the jury chose to accept it. This decision of the judge on the sufficiency of evidence is a question of law; he is not ruling upon the weight or the believability of the evidence which is a question of fact. . . . [Emphasis in original.]

[67] The Nova Scotia Court of Appeal, in *MacDonell v. M&M Development Limited* (1998), 165 N.S.R. (2d) 115, [1998] N.S.J. No. 49 (C.A.), observed the following, at paras. 38 and 39 (QL version):

> On a nonsuit motion, the trial judge has to consider all of the circumstances, including the issues of fact and law raised by the pleadings. (J.W. Cowie Enrg. Ltd. v. Allen (1982), 52 N.S.R. (2d) 321.)

> The general test for a nonsuit motion is whether or not a *prima facie* case was made out by the plaintiffs. It is sometimes expressed as whether a jury, properly instructed on the law could, on the facts adduced, find in favour of the plaintiff. If not, the motion will succeed. (Turner-Lienaux v. Nova Scotia A.G. (1993), 122 N.S.R. (2d) 119.)

[68] The consideration of the evidence, against the legal framework, was discussed in *Petten v. E.Y.E. Marine Consultants*, [1995], N.J. No. 197 (S.C.T.D.) at paras. 4 and 10:

> . . . Before a non-suit motion can be granted, the trial judge must be satisfied that no case has been made out "upon the facts and the law". The evidence must, therefore, be viewed against the legal framework of the claims which are being

> relied upon. Although the plaintiff may have adduced evidence to link the defendant to the circumstances of the case, that in itself is not enough; the evidence must be capable of supporting the specific causes of action alleged. The judge may determine the applicable law on this non-suit motion because questions of law are always for the judge, and not the jury, to decide.
>
> * * *
>
> What is contemplated by the probative sufficiency test is nothing more than a threshold common sense screening of the evidence to ensure that it has some meaning and is not fanciful or ridiculous. Thus, it would not be enough to resist a non-suit motion simply to point to the fact that words were uttered during viva voce testimony or were contained in a documentary exhibit which, if taken literally and outside of their context, could result in the trier of fact finding liability. If the words, judged by common experience or when viewed in the context of the remainder of that witness's evidence (including, say, an unequivocal later retraction) are insensible or ridiculous and cannot have any real meaning or substance or cannot have their literal meaning, the judge on a non-suit motion would be entitled, notwithstanding their existence, to conclude that the words themselves did not have enough probative sufficiency from which a jury, reasonably instructed, could infer liability. Beyond that, however, the weighing and assessment process is for the trier of fact and not the judge on the motion. The judge sitting without a jury, although the ultimate trier of fact, must nevertheless resist the temptation at the non-suit stage to weigh the plaintiff's evidence to determine whether on a balance of probabilities the case has been proven to that point. The plaintiff is entitled, on putting forward as part of his or her case some evidence of probative sufficiency from which a trier of fact could infer liability at that stage, to require the defendant to put his or her case before the court and to take advantage, if possible, of evidence so tendered that might bolster the plaintiff's case.

[69] The Nova Scotia Court of Appeal commented on probative sufficiency in *J.W. Cowie Engineering Limited v. Allan et al* (1982), 52 N.S.R. (2d) 321, [1982] N.S.J. No. 39. The Court upheld a non-suit in favour of a defendant solicitor who

was sued by an expert who had been retained by the solicitor. The court (at paras. 13 and 14) cited *Cross on Evidence* (4th ed., 1974), at p. 66:

> . . . Cross in his text on Evidence (4th ed., 1974), comments on the rules at p. 66:
>
> > The extent of this method of control increased during the nineteenth century, for, as Willes, J., said in *Ryder v. Wombwell*, (1868), L.R. 4 Exch. 32, at p. 39:
> >
> > It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge (subject of course to review) is, . . . not whether there is literally no evidence but whether there is non [sic] that ought reasonably to satisfy the jury that the fact sought to be proved is established.
> >
> > The test to be applied by the judge in order to determine whether there is sufficient evidence in favour of the proponent of an issue, is for him to enquire whether there is evidence which, if uncontradicted, would justify men or [sic] ordinary reason and fairness in affirming the proposition which the proponent is bound to maintain, having regard to the degree of proof demanded by the law with regard to the particular issue. This test is easy to apply when the evidence is direct, for the question whether witnesses are to be believed must be left to the jury, but it is necessarily somewhat vague when circumstantial evidence has to be considered. In that case, little more can be done than inquire whether the proponent's evidence warrants an inference of the facts in issue, or whether it merely leads to conjecture concerning them. . . .

* * *

> In *Mahen v. Arkelian* (1972), 30 N.S.R. (2d) 405 (C.A.), the test applied by this Court was whether a *prima facie* case had been made out by the plaintiff. It is clear that the mere fact there is some evidence, however weak, does not prevent a trial Judge from granting the motion. With respect, I am satisfied the trial Judge applied the proper test.

[70] Justice LeBlanc outlined the test in *Knox v. Maple Leaf Homes*, 2002 NSSC 275, at para. 18 as follows:

> The test on a non-suit motion is whether the plaintiff has established a prima facie case or, as it is sometimes described, "whether a jury, properly instructed on the law could, on the facts adduced, find in favour of the plaintiff": *MacDonell v. M & M Developments Ltd.* (1998), 165 N.S.R. (2d) 115 (N.S. C.A.). A trial judge considering whether to grant a non-suit must consider the sufficiency of the evidence, not weigh it or evaluate its believability. The question is whether the inference the plaintiff suggests *could* be drawn from the evidence if the trier of fact so chose: Sopinka et al., *The Law of Evidence in Canada*, 2nd ed. (Butterworths, 1999), at para. 5.4. The decision depends "on all the circumstances of the case, including the issues of fact and law raised by the pleadings": *J.W. Cowie Engineering Ltd. v. Allen* , [1982] N.S.J. No. 39 (N.S. C.A.), at para. 15. [Emphasis in original.]

[71] I have not weighed the evidence, but have simply considered whether the evidence, if believed, could support the inferences sought by the plaintiffs. As to the reference to "facts adduced," I note that this does not mean that any facts have been proven, as these would be findings to be made only after conclusion of the trial. I have not weighed the evidence, beyond a "threshold common-sense screening . . . to ensure that it has some meaning and is not fanciful or ridiculous," as described in *Petten, supra*. at paragraph 10.

[72] In referencing a *prima facie* case I have simply assessed the evidence as presented by the witnesses, together with the exhibits. Where there are suggestions of inconsistency in the evidence of a witness, such as where the witness allegedly said different things on different occasions, either in writing or on discovery, I have considered their evidence at trial in determining whether, if a jury accepted it, there is a sufficiency of evidence that a properly instructed jury, could decide in the plaintiff's favor. This is not to say that a properly instructed reasonable jury would decide in the plaintiffs' favor, simply whether they could so decide. I emphasize that at this stage of the trial, there are no facts. There is only evidence, which, if believed by the trier, could become facts in assessing whether the plaintiffs will succeed.

Negligence

[73] With respect to the Plaintiff's cause of action in negligence, the Defendants say the elements of negligence are well settled, and include: (a) Existence of a duty of care; (b) Breach of the standard of care required by the duty of care; (c) Causation; (d) Damage; and (e) Remoteness. The Defendants say the Plaintiffs

have failed to present evidence as to the requisite standard of care and as to causation. The Defendants say there is no evidence before the Court on what standard has been breached, nor is there evidence on how any breach caused a loss.

Standard of Care

[74] According to the defendants, the Plaintiffs have not presented any evidence to establish the standard of care required of the Defendant Larry Hay. The Plaintiffs have not called expert evidence on the duties of an insurance adjuster and have not called evidence establishing industry custom or practice for assessing the Defendants' conduct. Absent evidence of the standard expected of a reasonable insurance adjuster, they say, it is impossible to say whether the standard of care was breached.

[75] The defendants cite *Seiler v. Mutual Fire Insurance Company of British Columbia*, 2003 BCSC 1423, [2003] B.C.J. No. 2151 (B.C.S.C.). In that case, the plaintiffs alleged that water damage to their home was not prevented by insurance adjusters, and that the presence of water caused the growth of a toxic mould, which

caused health problems to them and their children and caused them to move. Edwards, J. held that there was no evidence establishing the standard of care expected of the defendants, nor was there evidence to establish a causal connection between the water damage and the mould, or between the mould and the health problems. In the absence of any evidence to suggest what a reasonable insurance adjuster would have done in the circumstances, it could not be said the plaintiffs proved the defendant adjusters did not behave reasonably. Therefore, there was no evidence that any implied term of the insurance policy had been breached. Edwards, J. said, at paras. 15-16:

> Regardless of whether the plaintiffs' claim is in tort or in contract, a key element they must prove is that the defendants failed to meet the tort law standards of care required of professionals in their respective disciplines, or standards they implicitly warranted in any contract that they would meet in carrying out the work they did. That work was insurance adjusting by Brower and Clingwall and water damage restoration by Cromwell.
>
> The defendants' short point is that there is no expert evidence of what standards of care are required of the defendants so there is no basis upon which the Court can make a key finding of fact, that is, breach of the appropriate standards, by any of the three defendants, necessary for the plaintiffs' action to succeed.

[76] The Court in *Seiler* stated that the standard of care applicable to insurance adjuster faced with water damage and potential mould growth was not obvious to a

lay person and could not be inferred without specialized knowledge. The Court observed at paras. 29-32:

> Plaintiffs' counsel argued the fact the defendants "took control" of the house after the flooding incidents meant that failure by the defendants to restore the house to safe habitable condition is a basis for inferring negligence on the part of the defendants, without the necessity of the plaintiffs proving their theory that toxic mould was the cause of the family members' ill-health.
>
> This is a classic "bootstrap" argument: because the family got sick after the defendants took control of restoration of the house the defendants' actions or omissions in restoration of the house must be negligent.
>
> The standard of care implicit in this proposition is that a competent and experienced adjuster and contractor would ensure the eradication of any possible unobserved health hazard which may have been caused by water damage.
>
> The defendants' counsel's responses are that there is no evidence of any standards of care, no evidence that the defendants failed to meet the requisite standards of care nor any evidence that if the defendants had met whatever standards of care the law imposes on them as professionals, all toxic mould or any other health hazards in the house would have been eradicated, if indeed any such mould or other hazards had started to develop when the house was flooded.

[77] The Court concluded that expert evidence was necessary to establish the standard of care applicable to the execution of the defendants' professional functions, and therefore the no evidence motion succeeded. The British Columbia Court of Appeal affirmed this proposition in dismissing the plaintiffs’ motion to file their appeal late: 2003 BCCA 696. The Court of Appeal said, at paras. 15 - 16:

> . . . The events underlying this litigation are not such every day occurrences as a motor vehicle accident or a slip and fall accident where lay persons may, without expert assistance, draw inferences as to the standard of care and causation from proven facts. A lay person would not be familiar with the standard of care applicable to insurance adjusters, or the repairers they hired, to effect temporary or permanent repairs to a roof, part of which is blown away. Nor would a lay person be able to infer whether mould or mildew developed as a result of the water damage, whether any such mould or mildew that did develop was toxic, or, if toxic, whether the mould or mildew caused or contributed to the symptoms about which the plaintiffs' family complained.
>
> The learned trial judge found at para 25 of his reasons that there was no expert evidence pointing to the existence of mould, and that the relationship between mould and disease was not a matter of common knowledge. In my respectful view he was correct in reaching these findings. I also agree that the absence of expert evidence on those issues supports the conclusion that there was no evidence upon which a jury acting reasonably could find that the defendants breached the standard of care or caused harm to the plaintiffs.

[78] In *Kingscourt Auto Enterprises Inc. v. General Accident Assurance Co. of Canada*, [1992] O.J. No. 289 (Ont. C.J. - Gen. Div.), the Court said at p. 10 (QL version);

> The standard of care imposed upon the adjusters in this case is not to be error-free but simply to take reasonable steps similar to those that a reasonably prudent and careful claims adjuster would take.

[79] The Defendants also cite *Meehan v. Dixon*, 2008 BCSC 87, [2008] B.C.J. No. 119 (B.C.S.C.), where the plaintiff landlords alleged that the defendant property manager negligently failed to inspect the interior of a house, and thereby

failed to discover a tenant's marijuana grow operation, which caused extensive damage to the inside of one of their houses. The plaintiffs also alleged a breach of an implied contractual term to carry out such inspections. There was no evidence that industry standards required frequent interior inspections of rental premises. With respect to the standard of care, the Court said, at para. 39:

> ... the standards of conduct of the professional in question are not in the ordinary experience of a judge or lay person. I cannot conclude, as the plaintiffs urge, that negligence should be found within the narrow confines of this case and the expectations of these particular plaintiffs. Without evidence adduced about the standard inspection duties of property managers, it is difficult to conclude whether those duties were breached. In addition, in the absence of expert evidence about the characteristics of marijuana grow operations today, I cannot know how reasonably easy or difficult it is for a property manager to anticipate such operations, or to detect them before major damage is done to a house.

[80] The defendants submit that there is no evidence as to the standard applicable to Mr. Hay or Wellington Insurance in adjusting and assessing the Plaintiffs' claim in 1991. Additionally, they argue, there is no evidence upon which the Court can conclude that anything done differently in 1991 would have necessarily changed the result. They reference Dr. Roy Fox's evidence that "since we just do not know what, if any, chemical was spread in the house, it is impossible to say what should have been done to remediate/clean it." The Defendants say the Plaintiffs have not

established a *prima facie* case of negligence and that their claim should be dismissed on this basis alone.

[81] On the question of whether expert evidence is required to establish the standard of care of an insurance adjuster, I note there is authority to the effect that "matters falling within the ordinary common sense of juries can be judged to be negligent":*ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, 1995 CarswellBC 593, at para. 57. On the question of whether expert evidence was necessary to establish the standard of care, the court in *Meehan* cited *Shaak v. McIntyre*, 1991 CarswellBC 1783, where Ryan J., at para. 51 said that, "[t]here may be cases where the defendant has so clearly fallen below the standard required of him or her that expert evidence is not required." Such a case, the court in *Meehan* said at para. 37, "would entail a particularly egregious act or omission, such that an ordinary person would easily be able to recognize the negligence." However, as noted above, the court went on to find, at para. 39, that "the standards of conduct of the professional in question are not in the ordinary experience of a judge or lay person."

[82] On the other hand, in *Petersen v. Cromwell Restoration Ltd.*, 2008 BCSC 601, 2008 CarswellBC 974, where the plaintiff was injured after entering her home

(on the advice of the adjuster) and being exposed to toxic ozone gas that was being used for cleaning and deodorizing after a fire, the court dismissed a non-suit motion. The defendants (the insurer and the fire restoration company) claimed that expert evidence was required to establish the standard of care and to establish the concentration and toxicity of the gas. The court distinguished *Seiler* on the basis that it involved latent toxicity, whereas in the case before the court, there was evidence "that ozone is a toxic substance and that care must be taken in its use and application," including evidence from an expert qualified to give evidence on toxic chemicals, air quality and the effect on plants and animals (including humans) of toxic chemicals (paras. 31-35). There was evidence "that ozone is a dangerous substance; that when it is being applied by a restoration company in a house after a fire there should be no persons in the area where the ozone is being generated; and that following the ozone process, there should be a system of ventilation that replaces the air within the area where the process took place with fresh air" (para. 68). There was also evidence that "the defendants, through their representatives, Messrs. Wilson and Millar, understood the danger associated with the use and application of ozone and told the plaintiff that while the ozone process was taking place, she should not enter the house. Following the application of the ozone to the plaintiff's house, according to the plaintiff, she was told by Mr. Millar that it was

safe for her to re-enter the house on January 6, 2000 to collect her mail. In addition, she testified that Messrs. Wilson and Millar told her that ozone was harmless" (para. 69). The court, at para. 74, concluded:

> In all of the circumstances, I do not consider that it would be appropriate to dismiss the plaintiff's claim on a no evidence application. There is certainly some evidence to support the plaintiff's allegations against the defendants. I disagree with defence counsel that the failure on the part of the plaintiff to call an expert to testify about an industry standard relating to the conduct of the defendant Cromwell, as a restoration company, and the defendant CNS, with respect to the role of its in-house adjuster, is fatal to the plaintiff's claim. Rather, I think that in the circumstances of this case, based on the test described in *Murao v. Blackcomb Skiing Enterprises Ltd. Partnership*, 2005 BCCA 43, 36 B.C.L.R. (4th) 318 (B.C. C.A.), the standard may be derived from evidence of a general practice that prevailed in 1999.

[83] I note that, while there was no expert evidence of industry standards, the court did have evidence of general practice at the relevant time.

Causation

[84] In the event they are unsuccessful on their submission on the standard of care, the Defendants proceed to address causation. They submit the Plaintiffs have not established a causal connection between any act or omission by the Defendants and the resultant damages alleged to have been suffered by the Plaintiffs. The

defendants say there was no evidence that if Mr. Hay acted differently (for example by ensuring that indoor air quality testing was completed), such action would have revealed the presence of a toxic chemical or that the recommended cleanup would have been different than the cleanup that was performed by James Proper Care.

[85] The Defendants submit that the Plaintiffs have not presented evidence that there were toxic chemicals in their house at any time. They say the only evidence relating to the presence of chemicals is found in the lab reports from Accu Chem Labs and sample testing results by Craig MacMullin of Fenwick Labs. The Accu Chem reports were not admitted for the truth of their contents. According to the defendants, none of the Plaintiffs' medical witnesses linked the Accu Chem results to the Plaintiffs' alleged health problems. Dr. Jean Gray testified that the chemicals listed in the Accu Chem lab reports are ubiquitous in homes and buildings and that the presence of xylene and trimethylbenzene, two of the chemicals found in the Accu Chem testing, did not give her any concern. She testified she did not consider the Accu Chem lab reports as evidence that a toxic exposure had occurred.

[86] Craig MacMullin stated that Patricia Tingley provided him with carpet and paint chips from her home, which she stated had been contaminated with an alleged toxic chemical. According to the defendants, none of the Plaintiffs' experts felt that the Fenwick Lab findings linked the Plaintiffs' health complaints to an event occurring in their home in 1991. Dr. Jean Gray testified that these chemicals would normally be found in paint and in carpet. Dr. Fox agreed. Mr. MacMullin could not say the chemicals were not ordinarily found in carpet and paint.

[87] Dr. Fox testified that the Accu Chem and Fenwick Labs data was of no significance to him and that he was not surprised that Mr. MacMullin found the chemicals he did in the carpet and paint. He also testified that there is no "objective" evidence of a toxic chemical being present in 150 Silistria Drive."

[88] In summary, the Defendants submit, neither Dr. Fox nor Dr. Gray considered the Fenwick or Accu Chem findings to be evidence of a toxic exposure in the home. Furthermore, the Defendants say, no witness has been able to identify a toxic chemical in the house. The Defendants refer to *Seiler, supra,* where the Court found that the causal relationship between mould and disease was not a matter of common knowledge and that expert evidence was therefore required to

establish the presence of mould at toxic levels and to establish a link between mould and the symptoms experienced by the plaintiffs. The defendants say the *Seiler* decision is strikingly similar to the present situation, in that, in *Seiler*, the plaintiffs' family doctor assumed the presence of mould from what the plaintiffs told her. Similarly, in this case, the defendants say Dr. Roy Fox admitted in cross-examination that he assumed there were toxic chemicals in the house because of what the plaintiffs told him.

[89] The defendants submit that the Plaintiffs have not established through expert evidence the presence of a chemical or chemicals at toxic levels in the house, and have failed to provide evidence showing a causative link between a chemical or chemicals in their house and their alleged health symptoms.

[90] With respect to causation, the defendants refer to *MacIntyre v. Cape Breton District Health Authority*, 2009 NSSC 202, which involved a plaintiff who claimed to have suffered from an environmental illness caused by chemical exposure during renovations to the hospital where he worked. MacLellan, J. held that the two experts on behalf of the plaintiff assumed the chemicals in his blood appeared as a result of the renovations, because his symptoms commenced afterward, and

because other people who worked in the same hospital also complained of symptoms. This was insufficient to provide the causative link necessary for liability. The defendants submit that the reasoning advanced by the plaintiff in *MacIntyre* was similar to the position of the plaintiff here: "because we are sick now, Larry Hay must have been negligent and that negligence must have caused our illness." The defendants also note that the court in *MacIntyre* found there was a lack of objective evidence of heavy metals. They submit that this is similar to the present case, where there is, they say, no evidence that a toxic chemical was in the house.

[91] In addition to the above, the defendants submit that Dr. Roy Fox admitted that the health conditions of Patricia Tingley, Kelli Smith and Todd Smith could have been caused by their initial exposure to or entry into the house. There was evidence that Kelli Smith and Todd Smith entered the house with their father the morning after the break and enter, September 21, 1991. There was also evidence that between September 21, 1991 and September 28, 1991, when Kelli Smith and Todd Smith returned to the home with their mother (upon her return from Sydney), Kelli Smith was in and out of the house on a daily basis. Since this initial exposure or entry into the home predated any notice to the Defendants of health concerns,

the defendants submit that the claims of these three Plaintiffs can be dismissed on this basis alone.

[92] The defendants also take the position that the original opinions provided by Dr. Fox in support of the Plaintiffs' claims no longer stand. They say:

> (a) He no longer feels Kelli Smith's history is consistent with a chemical exposure in the home;
>
> (b) He no longer feels there is a basis to conclude that Todd Smith was exposed to a chemical in the home;
>
> (c) He can not tell the Court that Ms. Burton got multiple chemical sensitivity from the Smith house; and
>
> (d) He is no longer certain that a sufficient basis exists to justify his initial opinion that Ms. Tingley was exposed to a chemical in her home.

[93] However, this evidence by Dr. Fox followed a number of assumptions postulated by Defendants' counsel. Some of the assumptions related to documentary evidence of medical treatments of the Plaintiffs apparently not previously known to Dr. Fox. However, some required an interpretation of the evidence, such as, whether Ms. Tingley had diarrhea for 2 - 3 days, as she stated in

discovery and apparently to at least one of her doctors or for two weeks as she testified to at trial; whether Kelli was ill in 1991 or not until 1993. Findings of fact would also be required in respect to some of the assumptions advanced by Defendants counsel in respect to Todd and Ms. Burton as well.

Breach of Contract

[94] In the absence of an express term in the policy of insurance, the defendants say the Plaintiffs appear to be asking the court to imply a term into the contract requiring Mr. Hay to have taken some additional step in 1991. In the absence of an express contractual term, implied terms can arise from custom or from the parties' conduct: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12. The defendants maintain that without evidence as to industry custom or standards, the Plaintiffs have not laid a foundation upon which the Court can determine what terms ought to be implied into the contract. In *Seiler, supra,* as noted earlier, the trial judge stated, at para. 15:

> Regardless of whether the plaintiffs' claim is in tort or contract, a key element they must prove is that the defendants failed to meet the tort law standards of care

> required of professionals in their respective disciplines, or standards they implicitly warranted in any contract that they would meet in carrying out the work they did. . . .

[95] In *Kingscourt, supra*, the action against the insurer was in both contract and tort. The policy imposed a duty on the insurer to investigate claims and defend any action which may be brought in respect of such a claim. The Court cited (at p. 10 of the QL version) *Frederickson v. Insurance Corporation of British Columbia* (1990), 44 B.C.L.R. (2d) 303, where it was said at p. 329 that "the contractual obligation to investigate and to defend the action carries with it the obligation to exercise reasonable care and skill in doing so." The Court in *Kingscourt* could not conclude that the standard of investigation fell below that of a reasonable insurance adjuster. In *Meehan*, the court held that "there was no expert evidence regarding the industry standards for property inspections that would support a contractual duty to regularly inspect the interior of a dwelling" and that in the absence of such evidence, it was "difficult for this Court to find that there was a contractual duty for Ms. Dixon to inspect the interior of the premises such that she would have discovered a marijuana grow operation before damage occurred." (para. 25). Additionally, the plaintiffs had not demonstrated that regular inspections would have prevented the creation of the grow operation and the resulting damages.

[96] In the present case, the defendants argue, there is no evidence from any witness respecting the standards expected of a reasonable insurance adjuster in the circumstances of the claim made by Ms. Tingley. Nor, they say, is there evidence that if Mr. Hay had acted differently in 1991, a chemical at toxic levels, or any hazard, would have been detected and eradicated from the home. In these circumstances, the defendants submit, the Plaintiffs have failed to establish a *prima facie* case that any act or omission of Mr. Hay, founded in contract or tort, caused a loss.

[97] In respect to the causes of action framed in contract and negligent, excluding negligent mis-statement, I am satisfied there is no evidence of the standard of care of an insurance adjuster in the position of Mr. Hay nor evidence of custom or practice from which to determine if there has been a breach of the standard to support or claim in negligence, or to permit reading in an implied term into the contract of insurance, to support a claim founded in breach of contract.

Bad faith

[98] The defendants also submit that the Plaintiffs having failed to present evidence that the Defendants breached any standard of care or what the standard of care might be, that their claim under the heading of bad faith must fail. The defendants say a breach of a duty in tort or contract must exist before it can be said that a party has acted in bad faith. In *Suchy v. Zurich Insurance Co.*, [1999] B.C.J. No. 304 (S.C.), at para. 230, the court stated the question as whether the plaintiffs, "on a consideration of the whole of the evidence, demonstrated a lack of fair play or arbitrariness by the defendants in dealing with the plaintiffs' ... claim?"

[99] A finding of bad faith does not inevitably result from a denial of coverage. With respect to the burden on the plaintiffs, the defendants refer to *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30. In that case, an insurer caused compensable mental suffering to the plaintiff by the manner it dealt with a disability benefits claim. Bad faith was not established. However, in the course of discussing punitive damages, the Court said at paras. 62-63:

> By their nature, contract breaches will sometimes give rise to censure. But to attract punitive damages, the impugned conduct must depart markedly from ordinary standards of decency -- the exceptional case that can be described as malicious, oppressive or high-handed and that offends the court's sense of decency: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1 at para. 196; *Whiten*, at para. 36. The misconduct must be of a nature as to take it beyond the

usual opprobrium that surrounds breaking a contract. As stated in [Whiten v. Pilot Insurance Co., [2002] S.C.R. 595, 2002 SCC 18], at para. 36, "punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment)". Criminal law and quasi-criminal regulatory schemes are recognized as the primary vehicles for punishment. It is important that punitive damages be resorted to only in exceptional cases, and with restraint.

In *Whiten*, this Court set out the principles that govern the award of punitive damages and affirmed that in breach of contract cases, in addition to the requirement that the conduct constitute a marked departure from ordinary standards of decency, it must be independently actionable. Where the breach in question is a denial of insurance benefits, a breach by the insurer of the contractual duty to act in good faith will meet this requirement. The threshold issue that arises, therefore, is whether the appellant breached not only its contractual obligation to pay the long-term disability benefit, but also the independent contractual obligation to deal with the respondent's claim in good faith. On this threshold issue, the legal standard to which Sun Life and other insurers are held is correctly described by O'Connor J.A. in *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters* (2000), 184 D.L.R. (4th) 687 (Ont. C.A.), at para. 29:

> The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy. This duty of fairness, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith.

[100] The Defendants submit that the Plaintiffs have not offered evidence that Mr. Hay's conduct constituted a departure from ordinary standards of decency, nor that Mr. Hay or Wellington are guilty of some independently actionable wrong. There was no evidence as to the intentions of the Defendants. Without providing evidence of how a reasonable insurer and claims adjuster would deal with a claim such as that of the Plaintiffs in this case, the Defendants say, there is no basis upon which the Court can determine whether the Defendants acted unfairly, in the manner in which the claim was investigated and assessed. In short, the Defendants say, if the Plaintiffs have not offered evidence of tort or contract liability, there is no basis upon which a claim in bad faith can be adjudicated by the Court.

[101] Whether, as suggested by the Defendants, a breach of a duty in tort or contract must exist before it can be said that a party has acted in bad faith, is on a review of the authorities far from clear. The Defendants, as noted, have cited a number of cases that have suggested as much. However, in *Whiten v. Pilot Insurance Co.* (1999), 170 D.L.R. (4th) 280, [1999] O.J. No. 237, (Ont. C.A.), where the insurance company had argued that “even a breach of its covenant to act in good faith is no more than a breach of its contractual obligations, not an

independent actionable wrong," Laskin J.A. (dissenting in part) said, at paras. 25 and 28:

> . . . A contract of insurance between an insurer and its insured is one of utmost good faith. Although the insurer is not a fiduciary, it holds a position of power over an insured; conversely, the insured is in a vulnerable position, entirely dependent on the insurer when a loss occurs. For these reasons, in every insurance contract an insurer has an implied obligation to deal with the claims of its insureds in good faith. That obligation to act in good faith is separate from the insurer's obligation to compensate its insured for a loss covered by the policy. An action for dealing with an insurance claim in bad faith is different from an action on the policy for damages for the insured loss. In other words, breach of an insurer's obligation to act in good faith is a separate or independent wrong from the wrong for which compensation is paid.
>
> * * *
>
> A strong argument can be made for finding that the relationship between insurer and insured is of sufficient proximity to give rise to a concurrent duty in tort alongside the insurer's implied contractual obligation to act in good faith. However, I do not think that it is necessary to go this far because I am satisfied that an insurer's breach of the implied term of the insurance contract to act in good faith meets the *Vorvis* requirement of an independent actionable wrong.

[102] On appeal to the Supreme Court of Canada, Binnie J., for the majority, referred to *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, at paras. 79-82:

> In the case at bar, Pilot acknowledges that an insurer is under a duty of good faith and fair dealing. Pilot says that this is a contractual duty. *Vorvis*, it says, requires a tort. However, in my view, a breach of the contractual duty of good faith is independent of and in addition to the breach of contractual duty to pay the loss. It constitutes an "actionable wrong" within the *Vorvis* rule, which does not require an independent tort. I say this for several reasons.

> First, McIntyre J. chose to use the expression "actionable wrong" instead of "tort" even though he had just reproduced an extract from the *Restatement* which *does* use the word tort. It cannot be an accident that McIntyre J. chose to employ a much broader expression when formulating the Canadian test.
>
> Second, in *Royal Bank v. W. Got & Associates Electric Ltd.*, [1999] 3 S.C.R. 408 (S.C.C.), at para. 26, this Court, referring to McIntyre J.'s holding in *Vorvis*, said "the circumstances that would justify punitive damages for breach of contract *in the absence* of actions also constituting *a tort* are rare" . . . . Rare they may be, but the clear message is that such cases do exist. The Court has thus confirmed that punitive damages can be awarded in the absence of an accompanying tort.
>
> Third, the requirement of an independent tort would unnecessarily complicate the pleadings, without in most cases adding anything of substance. *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.) held that a common law duty of care sufficient to found an action in tort can arise within a contractual relationship, and in that case proceeded with the analysis in tort instead of contract to deprive an allegedly negligent solicitor of the benefit of a limitation defence. To require a plaintiff to formulate a tort in a case such as the present is pure formalism. An independent actionable wrong is required, but it can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation. [Emphasis by Binnie J.]

[103] Counsel for the Plaintiffs, in his submission, states that “bad faith” was not being advanced as an independent actionable wrong. Rather, it was put forward as a justification for additional damages, such as punitive damages.

[104] I am satisfied, in view of counsel to the Plaintiffs acknowledgment that bad faith was not being advanced as an independent actionable wrong, there is no cause of action in bad faith to be non suited. As the Plaintiffs are only advancing bad faith as a factor for assessing damages, it can only be assessed once liability of the

Defendants, or either of them, to the Plaintiffs, or any of them, has been determined.

Negligent Misstatement and Equitable Fraud

[105] In addition to causes of action framed in contract, negligence and fiduciary duty, the Plaintiffs also claim on the basis of negligent misstatement and equitable fraud. Although the Defendants had not raised either of these claims in their submissions, Plaintiffs' counsel did not object to the defendants advancing an argument that the claim founded on negligent misstatement should be non suited having regard to the evidence presented by the Plaintiffs. The non-suit motion neither advanced, nor did defendants' counsel address in oral argument, that the claim based on equitable fraud should be non-suited. Consequently, the claim of equitable fraud remains for determination following all the evidence and the submissions of counsel. On the other hand, counsel for the plaintiffs responded to the submission that the elements of negligent misstatement had not been

established in the Plaintiffs' evidence, at least to the extent necessary to avoid a non-suit.

[106] In their pre-hearing submission, in respect the tort of negligent mis-statement, counsel for the defendants referenced the Supreme Court of Canada decision in *Queen v. Cognos* Inc., [1993] 1 S.C.R. 87 where, at para 33, the requirements are outlined:

> The required elements for a successful Hedley Byrne claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. . . .

[107] In determining whether there is evidence that could satisfy these requirements, I have considered the evidence as presented by the plaintiffs. I have not, as already noted, considered any inconsistencies or contradictions with what they may have said previously or as between themselves. Ms. Tingley and Ms. Burton both testified that the defendant, Mr. Hay said that the house was safe for

them to resume living there. At that time Ms. Burton was a periodic temporary guest of Ms. Tingley and according to the evidence, was residing in the house on the date it is alleged Mr. Hay made this statement. On the evidence Ms. Burton would visit Halifax as part of her duties as an employee of Ms. Tingley's company, and would reside in the Tingley home on these occasions. I am satisfied that a jury could find that there was "a special relationship," in view of Mr. Hay's position with the corporate defendant and in these circumstances.

[108] As to whether the representation was "untrue, inaccurate or misleading" again, without weighing the evidence, there was the evidence from Professor Tang Lee, a Professor of Architecture (Building Science and Indoor Environmental Quality) of the Faculty of Environmental Design, at the University of Calgary. Although not testifying in person, his reports, prepared for the plaintiffs, and extensive excerpts from his discovery examinations, were admitted into evidence. In one of his reports he comments on a video taken by friends of Kelli Smith, sometime in 1994, and after the family had moved out of Silestria Drive. The Plaintiffs say the video shows stains on the ceilings, walls and carpets in the home. Professor Lee viewed the video, and in his report of September 7, 2004, he made the following comments:

> . . . From the video taken on May 11, 1994, there was considerable evidence of chemical staining throughout the entire house including the walls, ceilings, bulkheads, carpeting, around light fixtures, at the junction between wall and ceilings, etc. Even from the poor video quality, it was clearly seen that some of the stains were in the shape of spots and some streaks. The stains were especially noticeable on the carpet, with clear demarcation where the chemical spills had extended. The extent of the chemical spills was clearly seen on the carpet. In some locations, the stains reached to the edge of the carpet and corners of the room.

[109] On discovery examination by Ms. Campbell, Professor Lee did not significantly vary from this opinion.

[110] In reference to whether the representor acted negligently, the statement alleged to have been made by Mr. Hay, and in the case of Ms. Burton also by Ms. Strong, the suggested supervisor of Mr. Hay, would have required that some steps be taken to ensure that what was being said was accurate, or that some caution would have to have been included with the statement. Since, on the report of Professor Lee there were “chemical stains”, and in view of the evidence of the plaintiffs respecting staining of some of the walls, ceilings, carpets and clothing, and in view of their position representing the corporate defendant, the need for some care in making such an assertion is obvious. On the evidence the only suggested source referenced by Mr. Hay appears to be to an investigation carried

out by the Nova Scotia Research Foundation. On the evidence it appears their representative attended with Mr. Hay at the home. He also apparently tested some clothing that was selected by Ms. Tingley. He made a brief report that suggested a stain on at least one piece of the clothing could have been urine. As to whether it was reasonable for Mr. Hay to rely on this report, if in fact he did, there is the further report of Professor Lee, where he says:

> The examination of their report reveals serious flaws of procedure and rigour, limited scope of work and missed crucial analysis of evidence. The report and their opinion is therefore incorrect, unreliable and unsubstantiated.
>
> * * *
>
> It is my opinion that this report is severely limited in scope and mandate, shoddily conducted, poorly reported, inaccurate, and thus unreliable, and would not be acceptable even for an undergraduate level course. This report is without merit.

[111] If Mr. Hay or Ms. Strong made the statement alleged, without relying on anyone, or relying on a report that is as described by Professor Lee, then it would be open for the trier of fact to find that such reliance was unreasonable and any statement made in reliance on it, was either reckless, careless or negligent.

[112] In respect to whether there was reliance that resulted in damages, (i.e. causation) there is the evidence of Dr. Fox. Initially Dr. Fox had testified that from the history presented by the plaintiffs they have been subjected to a toxic exposure in the home at 150 Silestria Drive. In his letter of April 1, 1997, addressed to counsel for the plaintiffs, he wrote:

> . . . I believe that these individuals became sick as a result of exposure in the Smith home. The initial exposure was on September 20, 1991 and there is no doubt that Pat and her two children had exposure at that time. It is obvious that they were symptomatic at that time since they attended the hospital on October 4, 1991. They then were re-exposed after returning to the house in the end of October and continued to be exposed as they stayed there. Margaret Burton was then exposed when she entered the house in November of 1991. It would seem to me that the claim that the environment was clean was invalid, and that the toxic waste, which is thought to have been sprayed, continued to be present within the furnishings and the walls etc. Thus, all the family had a continued and sustained exposure. I believe that the exposure that occurred after the supposed clean-up does constitute significant negligence and the family should never have had that exposure. It is hard to say whether Patricia Smith, Todd Smith and Kelli Smith would have had any symptoms had they not returned to the house prior to the end of October.

[113] In testifying about this letter, on examination by counsel for the Plaintiffs, Dr. Fox said:

> Dr. Fox: Well, I'm expressing at the beginning what my understanding of the situation is. The history of the exposure and that the illness that these people have developed.
>
> Mr. MacDonald: Okay. And you indicate that you felt that there was an initial exposure.

> Dr. Fox: Right.
>
> Mr. MacDonald: And you say they went back into an environment that was not cleaned and you say that that caused subsequent problems. Is that correct?
>
> Dr. Fox: Right.

[114] Counsel for the defendants asserts that if there was an initial toxic exposure when Ms. Tingley and her two children first entered or occupied the home, this was before any involvement by the defendants, and therefore was not an exposure for which they have any responsibility. The evidence of Dr. Fox, particularly in his testimony at trial, is that these plaintiffs suffered two exposures, the first being the initial exposure and the second after the cleanup and after the alleged statement by Mr. Hay and Ms. Strong. In his evidence he said that the second exposure caused "subsequent problems". Counsel for the defendants says there is no evidence by Dr. Fox that had there not been a second exposure, and assuming there was an initial exposure to a toxic substance in the home, the plaintiffs would have avoided the illnesses that they say they have suffered. Counsel may be correct. However Dr. Fox says that the second exposure, following the cleanup, caused "subsequent problems." Whether the defendants are responsible for the problems caused by the suggested initial exposure is a matter that is not necessary to determine on this application, even within this limited scope of review of the

evidence. If the plaintiffs are indeed successful, the issue of damages may require an assessment of any injuries resulting from the plaintiffs' reliance on the statement, as opposed to any injuries that may have already been incurred by them. Whether that will be necessary is not a matter for determination at this time.

[115] The application to non-suit the claim for negligent mis-statement is dismissed.

Fiduciary duty

[116] Following an initial decision that did not dismiss the Plaintiffs' claim founded on breach of Fiduciary Duty, the Defendants advanced the position that their submission on bad faith encompassed the claim of breach of fiduciary duty as well. Having regard to the formulation of the cause of action by the Plaintiffs – the statement of claim referring, without distinction to breaches of "fiduciary duty and duty of utmost good faith" and the possibility that the Statement of Claim could have been reasonably interpreted as linking bad faith to fiduciary duty, counsel was permitted to address the issue of whether the claim in fiduciary duty should be non-suited.

[117] Leading cases on fiduciary duty are *Frame v. Smith*, [1987] 2 S.C.R. 99 and *Lac Minerals Ltd. v. International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.). In *Lac Minerals,* Sopinka J. wrote the majority reasons on fiduciary duty. After a discussion of traditional fiduciary relationships, such as corporate directorships and trusteeships, at pp. 598- 599, he stated :

> . . . when confronted with a relationship that does not fall within one of the traditional categories, it is essential that the Court consider: what are the essential ingredients of a fiduciary relationship and are they present? While no ironclad formula supplies the answer to this question, certain common characteristics are so frequently present in relationships that have been held to be fiduciary that they serve as a rough and ready guide. I agree with the enumeration of these features made by Wilson J. in dissent in *Frame v. Smith*.... The majority, although disagreeing in the result, did not disapprove of the following statement, at pp. 135-36:
>
> > A few commentators have attempted to discern an underlying fiduciary principle but, given the widely divergent contexts emerging from the case law, it is understandable that they have differed in their analyses.... Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
> >
> > Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
> >
> > (1) The fiduciary has scope for the exercise of some discretion or power.

> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.
>
> It is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship.
>
> The one feature, however, which is considered to be indispensable to the existence of the relationship . . . is that of dependency or vulnerability. . . .

[118] Justice Sopinka added, at p. 600, that "the presence of conduct that incurs the censure of a court of equity in the context of a fiduciary duty cannot itself create the duty." In other words, the duty must pre-exist the wrongful conduct.

[119] The Court revisited fiduciary duty in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, with La Forest J. writing for the majority. At p. 405, he commented:

> From a conceptual standpoint, the fiduciary duty may properly be understood as but one of a species of a more generalized duty by which the law seeks to protect vulnerable people in transactions with others. I wish to emphasize from the outset, then, that the concept of vulnerability is not the hallmark of fiduciary relationship though it is an important *indicium* of its existence. Vulnerability is common to many relationships in which the law will intervene to protect one of the parties. It is, in fact, the 'golden thread' that unites such related causes of action as breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation.

[120] In *Amertek Inc. v. Canadian Commercial Corp.* (2005), 256 D.L.R. (4th) 287 (Ont. C.A.), at para. 99, the Court referred to the line of decisions of the Supreme Court of Canada, including *Frame, Lac Minerals* and Hodgkinson, and stated:

> . . . the court has described two categories of relationship. In the first category, which includes such relationships as trustee-beneficiary, guardian-ward and agent-principal, the court has identified an inherent vulnerability which gives rise to the rebuttable presumption that one party has a duty to act in the best interests of the other party. The second category is more open-ended than the first and introduces the possibility of new or non-traditional legal relationships being sheltered under the protective umbrella of 'fiduciary'. The essence, or *sine qua non*, of this category is expressed by La Forest J. in *Hodgkinson v. Simms* at 409-10:
>
> > Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.

[121] Whether there is, or can be a fiduciary duty, owed by an insurer, and/or insurance adjuster, to an insured has been considered in a number of cases.

[122] In *Veno v. United General Insurance Corp.* [2008] N. B. J. No. 179, (N.B.C.A.), the plaintiff was injured in a motor vehicle collision. Chief Justice Drapeau, for the Court, commented on the relationship between an insurer and its

insured including whether the relationship is fiduciary. At paras. 86 and 87, he observed:

> . . . That brings me to the argument based on United General's duty to investigate as a tributary of its duty of good faith and fair dealing. Recall that under Ms. Veno's definition of that duty, United General is required to give as much consideration to her interests as it does to its own interests. With respect, that understanding confuses the insurer's duty of good faith and fair dealing with a fiduciary's duty of loyalty.
>
> Indeed, the law allows the insurer to protect its own interests by adopting and defending reasonable (i.e. rationally defensible) legal and factual positions, even if they are at odds with the interests of the insured. It is no doubt that understanding of the law that prompted Justice Garnett to observe in *Lamrock v. Wellington Insurance Co. et al.* (1999), 222 N.B.R. (2d) 374, [1999] N.B.J. No. 584 (QL), para. 18, that "[a]lthough the relationship between the insurer and its insured should not be overly adversarial, the insurance company has a legitimate self-interest in determining that it is making payments for measures that are remedying a situation for which the accident in question was the cause." That view is echoed, admittedly in broader terms, in Denis Boivin, *Insurance Law* (Toronto: Irwin Law Inc., 2004) at pp. 36-37:
>
> > [...] mutual dependency and good faith do not suggest that the relationship between an insurer and its insureds is fiduciary. Although there are *obiter dicta* suggesting that utmost good faith is "fiduciary" in nature or "resembles" a fiduciary duty, no Canadian judgment has burdened insurers with the true hallmark of a fiduciary relationship - namely, a duty of loyalty. On the contrary, parties to an insurance contract are entitled to pursue their personal interests. In the event of loss, for example, the insurer may interpret the policy, the law, and the facts in the manner most compatible with the insurer's own interests. This is a fundamental tenet of the adversarial process. This process encourages litigants - whether in insurance matters or other matters - to adopt legal positions that maximize their respective interests. Thus, unless Canadian courts are willing to impose fiduciary duties on all debtors and promisors, it is difficult to justify why insurers should be treated as fiduciaries when they process insurance claims. Because of their dependency, consumers of insurance

> products do require special treatment in comparison to other creditors and promisees. However, by recognizing a duty of good faith, the common law of insurance already addresses their needs. In this context, there is little room for equity.

[123] Justice Robins, in the judgment of the Ontario Court of Appeal in *Plaza Fiberglass Manufacturing Ltd. v. Cardinal Insurance Co.,* [1994] O.J. No. 1023, in respect to the fiduciary duty issue, at paras 12 - 15, stated:

> The main question before the court is whether New Hampshire, as excess insurer, was in breach of any fiduciary duty or obligation in failing to inform Plaza of its primary insurer's financial problems and the potential consequences of those problems. To answer this question, it is necessary to examine the nature of the relationship between Plaza and New Hampshire.
>
> 13. Fiduciary duties may arise in two ways. First, the law has generally recognized that certain relationships are presumed to entail fiduciary responsibilities. These are typically relationships that involve significant disparities of power between the parties. Second, the law has also recognized that fiduciary duties may be found in relationships that would not generally be considered fiduciary but which, due to factors specific to the given situation, suggest that a fiduciary relationship has arisen. There are, therefore, two stages to this inquiry: is the relationship in question one that has traditionally been considered fiduciary; if not, given the facts of the case at hand, can fiduciary duties be said to have attached? As La Forest J. stated in International Corona Resources Ltd. v. Lac Minerals Ltd., [1989] 2 S.C.R. 574 at p. 648, 61 D.L.R. (4th) 14:
>
> > The imposition of fiduciary obligations is not limited to those relationships in which a presumption of such an obligation arises. Rather a fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship.

> As insurer and insured, New Hampshire and Plaza were parties to a contract of insurance. Such contracts have long been classified as contracts uberrima fides -- contracts in which the utmost of good faith is required of the parties. A higher duty is exacted from parties to an insurance contract than from parties to most other contracts in order to ensure the disclosure of all material facts so that the contract may accurately reflect the actual risk being undertaken. The principles underlying this rule were stated by Lord Mansfield in the leading and often quoted case of Carter v. Boehm (1766), 97 E.R. 1162 (K.B.) at p. 1164, 3 Burr. 1905:
>
> > Insurance is a contract of speculation. . . . The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstances in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist. . . . Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary. . . .
>
> > The fact that a contract is one of utmost good faith does not however mean that it gives rise to a general fiduciary relationship. The relationship between insured and insurer is not akin to the relationship between, say, guardian and ward, principal and agent, or trustee and beneficiary. In these latter instances, the inherent character of the relationship is such that the law has traditionally imported general fiduciary obligations. The insurer-insured relationship is contractual, the parties are parties to an arm's-length agreement. The principle of uberrima fides does not affect the arm's-length nature of the agreement, and, in my opinion, cannot be used to find a general fiduciary relationship. The insurance contract, as noted above, imposes certain specific obligations on its parties. These obligations, however, do not import general fiduciary duties into each and every insurance relationship. Before such fiduciary obligations can be imported there must be specific circumstances in the relationship that call for their imposition.

[124] As noted earlier, in *Whiten v. Pilot Insurance Co., supra*, at para. 25, Justice Laskin said:

> A contract of insurance between an insurer and its insured is one of utmost good faith. Although the insurer is not a fiduciary. . . .

[125] Justice Newbury, in the judgment of the British Columbia Court of Appeal in *Warrington v. Great West Life Insurance Co.*, [1996] B.C.J. No. 1944, at para 10, held:

> . . . To my mind, the insurer's obligation to pay benefits under the policy upon receiving such proof is virtually indistinguishable from any other contractual duty undertaken by a contracting party and it is a long stretch indeed to characterize its role in this regard as a fiduciary one, even where the insured is "vulnerable" in the sense that he is in dire need of benefits.

[126] After noting her agreement with the comments of Justice Robins at para. 15 in *Plaza Fibreglass Manufacturing Ltd. v. Cardinal Insurance Co., supra,* previously noted, she continued:

> The Court reviewed the three characteristics said by Wilson, J. in her dissent in Frame v. Smith to be generally present in fiduciary relationships, which factors were subsequently approved by the majority of the Court in LAC Minerals Ltd. Robins, J.A. in Plaza Fibre Glass found that on the facts before him, there was no "scope . . . for any unilateral exercise of a power or discretion with respect to the primary insurance and no question of trust or confidence being reposed in the excess insurer in this regard." (at 167-8).

[127] Noting the defendant insurer's lack of discretion, Justice Newbury concluded, at para. 11:

> . . . As for Mr. Warrington and his employer, they placed in Great-West no more trust or confidence than a contracting party normally places on the other: they expected Great-West to do what it was contractually bound to do.

[128] The sole exception as referenced by counsel, in characterizing the insurer-insured relationship as fiduciary is the judgment of Klebec, J. in *Wigmore v. Canadian Surety Co.* [1994] S.J. No. 400 (Sask. Q.B.). Justice Klebec reviewed the relationship of Mrs. Wigmore with the adjuster retained by the defendant. The adjuster was an independent insurance adjuster employed by the insurer to adjust the plaintiffs' claim for losses sustained when their home was flooded with water and sewage. The husband was found to have wilfully intended to defraud the insurer by altering an invoice and therefore to have violated a condition of the policy. His claim was dismissed. After noting the three principal elements in a fiduciary relationship, Justice Klebuc considered them in the circumstances of Mrs. Wigmore and her relationship with the adjuster:

> (1) The fiduciary has scope for exercise in discretion and power;

Justice Klebec noted that the adjuster testified that the role of an insurance adjuster was more than “eyes and ears” of the insurer, but that it was also included “giving the client assistance in any way possible as well as assisting in negotiating a settlement claim that is fair to both the insurer and the insured.” (Para. 38). Justice Klebec also noted that the adjuster indicated he had “considerable power and discretion in his relationship with the insurer,” and demonstrated this in his approval of some of their costs (para. 38). Justice Klebec added, again at para. 38:

> . . . he represented himself to be an advisor who the [plaintiffs] could rely. He further told the Wigmores he was an independent adjuster and thereby communicated that not only he was a person trained and experienced in handling insurance claims, but also a person who was independent of Canadian Surety and therefore someone they could look to for advice and assistance. I am satisfied Mr. Overend's expertise, coupled with his assurances and Mrs. Wigmores receptiveness, vested him with a substantial degree of power vis-a-vie Mrs.Wigmore.

[129] There is nothing in the present instance to suggest Mr. Hay in any way suggested he was independent of the defendant insurer. In fact, on the evidence he was an employee rather than an independent adjuster. There is nothing to suggest he was doing anything other than investigating and assessing the claim on behalf o his employer.

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiaries legal or practical interests;

[130] Justice Klebuc observed, at para. 39:

> . . . From the first time she met with Mr. Overend to the date she received his letter of August 19, 1991, denying coverage, she felt comfortable in the manner he was dealing with her claim as indicated by her statement that "Rick was working with us and we had full confidence - he was our agent - he was trying hard to get money for us". I am satisfied that Mr. Overend considered himself to be bound to act in her interest as evidenced by his reference to her as his "client". I am satisfied that the second factor outlined in Lac, namely trust and confidence in Mr. Overend by Mrs. Wigmore is proven.

[131] Clearly Ms. Tingley had no such trust or confidence in Mr. Hay, as evidenced by her description of him as “very rude”, “disrespectful and bullying”. Also her lack of trust and confidence is evidenced by her testimony that she contacted senior persons in Wellington in an effort to obtain a settlement. Although she said she relied on his statement that “the house was safe”, it cannot be said that a jury could reasonably conclude that overall there was the trust or confidence necessary for a fiduciary relationship.

(3) The beneficiary is particularly vulnerable to, or at the mercy of the fiduciary holding the discretion or power.

[132] Justice Klebuc said Mrs. Wigmore was a “quiet person with little business or related experience to draw on in connection with making an insurance claim.” This, together with her being distraught and “fully occupied in looking after three children in a disrupted household,” were factors that made her vulnerable (para. 41).

[133] Although Ms. Tingley was upset, particularly with the apparent health effects on Todd, there was evidence she had knowledge of the working of the insurance industry. A number of the R.C.M.P. officers who interacted with Ms. Tingley testified to their belief she had an understanding of the insurance industry. One of the officers commented that she seemed to know how the system worked. There was nothing in the evidence to suggest any greater vulnerability than any insured would have, in pressing a claim against their insured in the circumstances of loss, including injuries to themselves and their children.

[134] As observed by Justice Laskin in *Whiten v. Pilot Insurance Co.*, *supra*, at para. 25:

> Although the insurer is not a fiduciary, it holds a position of power over an insured; conversely, the insured is in a vulnerable position entirely dependent on

> the insurer when a loss occurs. For these reasons, in every insurance contract an insurer has an implied obligation to deal with the claims of its insureds in good faith.

The obligation to deal in good faith does not equate to a fiduciary duty.

[135] The alleged statement by Mr. Hay and Ms. Strong that the “house was safe” may, if all the elements are established, amount to negligence, or in this instance negligent misstatement. However, that is to be contrasted with breach of a fiduciary duty.

[136] In his concluding reasons in *C.A. v. Critchley* [1998] B. C. J. No. 2587 at para. 151, Justice Ryan of the British Columbia Court of Appeal, commented:

> This conduct, amounting to a breach of fiduciary duty, can be contrasted with conduct which is simply negligent. As Southin J. (as she then was) made plain in Giradet v. Crease and Co. (1987), 11 B.C.L.R. (2d) 361 at p. 362:
>
> > Counsel for the plaintiff spoke in this case in his opening as one of breach of fiduciary duty and negligence. It became clear during his opening that no breach of fiduciary duty is in issue. What is in issue is whether the defendant was negligent in advising the settlement of a claim for injuries suffered in an accident. The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But "fiduciary" comes from the Latin "fiducia" meaning "trust". Thus, the adjective, "fiduciary" means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with

> the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words. The obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task. One would not assert of an engineer or physician who had given bad advice and from whom common law damages were sought that he was guilty of a breach of fiduciary duty. Why should it be said of a solicitor? I make this point because an allegation of breach of fiduciary duty carries with it the stench of dishonesty if not deceit, then of constructive fraud. ... [Emphasis added by Ryan J.A.]

[137] Justice Ryan's comments are equally applicable to these circumstances, including the relationship of the parties here. The claim founded on breach of a fiduciary duty is dismissed.

CONCLUSION

[138] The Defendants submit that the Plaintiffs' negligence claim must fail on account of their failure to present evidence establishing a *prima facie* case on the elements of negligence. If all of the evidence presented thus far is accepted by the Court, the Defendants submit, it is inadequate to prove the Plaintiffs' case. They take the position that expert evidence is required to establish the standard of care for an insurance adjuster, as well as on the issue of causation, in order to provide the Court with evidence that a chemical or chemicals at toxic levels were spread in

the home during a break and enter, and to demonstrate the link between the chemical or chemicals and the health problems alleged by the Plaintiffs.

[139] I repeat that I make no assessment of the credibility of any of the witnesses nor have I weighed their testimony either as to its consistency with the other evidence presented by the same witness or as it relates to the evidence given by other witnesses. This applies both to the plaintiffs, and all the other witnesses, including the experts.

[140] The motion is granted with respect to all claims in contract and negligence, other than the claim based on reliance on an alleged statement by Mr. Hay and Ms. Strong. In view of the plaintiffs' acknowledgment that there is no separate cause of action founded on bad faith, it is not necessary to rule on the defendants' application in this regard. Bad faith will be a matter to be considered in the context of what damages the plaintiffs may be entitled to, if indeed that becomes the case. The claim for breach of a fiduciary duty is dismissed. In the absence of a motion to non-suit the claim for equitable fraud this claim remains. This is not, however, a determination on whether there is any evidence to sustain such a claim.

J.