IN THE SUPREME COURT OF NOVA SCOTIA

Citation: MacIntyre v. Cape Breton District Health Authority, 2009 NSSC 202

Date: 20090630
Docket: Syd 225468
Registry: Sydney

Between:

Duncan F. MacIntyre

Plaintiff

v.

Cape Breton District Health Authority

Defendant

D E C I S I O N

Judge:	The Honourable Justice Douglas L. MacLellan.
Heard:	April 6, 7,8,9, 2009, in Sydney, Nova Scotia April 14, 15, 16, 17, 20, 2009 in Halifax, Nova Scotia April 22, 23, 24, 27, 28, 29, 30, and May 1, 2009 in Sydney,NovaScotia May 11, 2009, in Antigonish, Nova Scotia
Written Decision:	June 30, 2009
Counsel:	George MacDonald, Q.C., Michelle C. Awad and Daniel Wallace, for the plaintiff David Farrar, Q.C., Nancy G. Rubin, and Shelley A. Wood, for the defendant

By the Court:

[1] The plaintiff, Duncan F. MacIntyre claims against the defendant, Cape Breton District Health Authority as the owner of the New Waterford Consolidated Hospital (the hospital) for injuries he alleges he sustained while a tenant of the defendant at the hospital.

[2] The plaintiff alleges negligence by the defendant in the manner in which it's employees did renovations to the hospital in the area he occupied. He alleges that he ingested heavy metals from the dust generated by the work resulting in significant medical problems to him and causing him to have to stop work in 2003.

[3] Te plaintiff, is 45 years old and a native of Sydney, Nova Scotia. He has been married for 16 ½ years and has four children. He has two brothers and three sisters, along with his father, presently living in the Sydney area.

[4] Dr. MacIntyre went to high school in Sydney, and initially attended the University of Maine on a hockey scholarship. He remained there for two years and then transferred to St. Francis Xavier University in Antigonish, Nova Scotia where he

finished his Science degree in 1986. He then went to Dalhousie University between 1986 and 1988 and obtained an Arts degree. He attended Dalhousie Dental School from 1988 to 1992. After he graduated from dental school, he applied for a speciality in oral and maxillofacial surgery at the University of Illinois in Chicago. He attended there for 48 months and obtained his doctorate in 1996. He got married in 1992 and in June of 1996 moved back to Sydney to start his practice. He initially worked with Dr. Wallace at the New Waterford Consolidated Hospital and entered into a lease with the hospital on January 21st, 1997. The lease was for five years. His office space at the hospital was located on the second floor and he had his secretary, Deanna Bray, along with a nurse, working for him. Later, he was joined by a dental assistant, Helen Prentice.

[5] Most of his dental work was done at his premises at the New Waterford Hospital, however, he was also entitled to use the OR at the Sydney Regional Hospital for major surgery. He did that every second Monday.

[6] He was on call for major trauma cases which came to the Regional Hospital.

[7] Dr. MacIntyre described for the Court some of the types of procedures he did involving major dental surgery. He had done many of these procedures while he did his residency at the University in Chicago.

[8] Dr. MacIntyre described how his patient practice grew after he started and especially after Dr. Wallace died in 2000. He said he was having difficulties dealing with all the patients and asked the defendant to provide him with space at the Sydney Regional Hospital. That was denied and he than asked for additional space at the New Waterford Hospital, but was also denied.

[9] He said that his premises were cramped and he would have liked to have had more room and possibly a second dental chair.

[10] Dr. MacIntyre described his typical week. He said he would work six to eight hours on Sunday prior to his Mondays' major surgeries at the Sydney Hospital.

[11] He would arrive at the hospital around 6 a.m. on Monday for the 7 a.m. surgery. He would normally do one surgery in the morning and take a break for lunch and then do the second surgery. Surgeries would typically last four to five hours.

[12] For the rest of the week, he would be attending at his office at the hospital doing procedures on 30 to 35 patients per day. That could involve eight to ten surgeries per day. He was responsible for arranging to put the patients to sleep, if necessary.

[13] In addition to his obligations at his office, he was on call and if required would have to attend at the Regional hospital to deal with emergency dental situations.

[14] He said his family life was very active and his children were involved in numerous activities. He said his wife was also a dentist and they were active socially.

[15] Dr. MacIntyre described his close-knit family and the many activities the family took part in, especially at his father's cottage. He said that in 2000-2001, he built a cottage in East Bay and he did a lot of work on the property. The cottage itself was built by carpenters.

[16] He also was involved with his family in sailing on his father's sail boat and they would normally take part in sailing races in Baddeck and Chester.

[17] During this period, Dr. MacIntyre described himself as having a great life. He had four healthy children and he was doing work which he loved to do and doing his service to the community. He also had as his two best friends his two brothers.

[18] He described his assistant Deanna Bray as the glue that kept his office together for 4 ½ years. He said she was pleasant to work with and all his patients enjoyed her. He described hiring Helen Prentice as his dental assistant in 1999, and she assisted him with all his surgeries, including major surgeries at the Regional Hospital.

[19] Dr. MacIntyre said that he loved going to work and all the people who worked at the hospital.

[20] Dr. MacIntyre described the problems he started having with the premises at the hospital. First there was flooding from the floor above him which caused the ceiling tiles of his office to fall down. He described that as major floods and that it happened a number of times. The hospital staff would come in and clean up the mess. He also described problems with the air circulation in his premises and the extreme heat and lack of ventilation. He said he used to sweat so much that he would have to exchange

his scrubs during the day. He said it appeared that the corridors of the hospital were air-conditioned but not his office space despite the fact that his lease called for air-conditioning in his premises.

[21] The plaintiff described the major renovations which were done at the hospital which took place when the long-term patients, located on the second floor, were being moved to the third floor. The renovations also involved changes in the actual area where he was located in that a bathroom and doctors room was changed into a waiting room and the former waiting room was changed into a storage room. He said this work started in the summer of 2001 and continued until March or April of 2002.

[22] He said that because of the work being done, many times the dust in his area was very bad. He said you could see tracks of the workers in the dust. He also said that some of the workers were wearing masks and he remembered on one occasion when he took a patient down to his car in the elevator in a wheelchair and at the same time a worker with a wheelbarrow was in the elevator. He said the worker was wearing a mask. He said he talked to the workers and suggested that what was being done was crazy. He said you could see the dust in the air. He said the workers used

a jackhammer to remove the bathroom from the area being made into a waiting room. He said the workers put up some clear plastic barriers, but it was not sealed off.

[23] He said at that time he was very focussed on his own work, and did not complain to anyone in the hospital administration.

[24] He said that in addition to the work being done on his floor, major work was being done on the floor above him, and that in all, the renovations took between nine to 11 months to complete.

[25] Dr. MacIntyre said that on the long Victoria Day weekend in May 2002, he was at his cottage in East Bay piling wood. He said he did not feel good and had to lie down. He said he was very disoriented and weak. He said he called Dr. Phil Curry and later saw him at his office. He said Dr. Curry did tests and sent him for a CAT scan. He also ordered blood tests which were done on May 27th, 2002.

[26] He said that the dizziness and vertigo remained and he was in bed for a couple of days. He thinks he might have taken that time off from work. He said his doctor

felt he probably had a viral infection and that he was told that he should eventually get better.

[27] He said he started to get headaches which were seven days a week during the summer of 2002. He said he also had crushing pain in his left ear. He called that brain pain. He said that as he continued to work sometimes the parents of his patients would inquire whether he was well enough to do the procedures on their children.

[28] He said in the Fall of 2002, he had persistent nausea but was not throwing up.

[29] In June 2002, he saw Doctor Richard Leckey a neurologist in Sydney. That referral was to deal with a possible viral infection. He had an MRI done in Halifax as they were wanting to rule out any mass in his brain which had not been picked up by the CAT scan. He said all the results were negative including an ultrasound of his abdomen.

[30] He said that during the late summer and Fall of 2002, little things would set him off into rages. It could involve things as simple as his children having the T.V. on too long. He said he became withdrawn and attempted to separate himself from his

family. He stopped playing hockey with his brothers. While he continued to work, he attempted to do exercise to get out of his building and continued to do some sailing. He said he did three or four races that summer.

[31] From January to April of 2003, he continued working but reduced the number of patients. Normally, if a patient cancelled another one would be filled in, but during that period he stopped doing that. He said he also used to rest in his dental chair between patients, and that he had problems dealing with his major surgeries at the Regional hospital. He said sometimes he would sleep for some time in his dental chair at his office.

[32] He said he started to have concerns about his ability to deal with patients and had difficulty remembering what drugs he had given them.

[33] He said that around that time he had a trauma patient at the hospital and was not able to complete the major surgery so he put it off until the next day.

[34] He said he talked about his situation with his wife and with his assistant Deanna Bray.

[35] He said that after getting negative results from the tests ordered by his doctor he decided to attempt to discover his problem by himself. He arranged to have blood tests done.

[36] On April 23rd, 2003, he finished two long time patients he had been dealing with in the past and decided to stop practising. He did so because he felt he could not continue to do the work he had been doing.

[37] He said his assistant Deanna Bray also started to become ill around the same time.

[38] He said in May of 2002, he went to see Dr. Ben Boucher in Port Hawkesbury who had some expertise in heavy metal poisoning. Dr. Boucher recommended that he do Chelation therapy which was a process to remove heavy metals from his body. That involved an intravenous injection over a three hour period. He also took samples of his urine to be sent to a lab in London, Ontario.

[39] He said that one of the side effects of Chelation therapy is the fact that it takes good minerals out of your body also and therefore you have to take supplements to replace them. He arranged through a number of different sources to have these vitamins and minerals supplied to him.

[40] He said his reaction to his therapy administered by Dr. Boucher was horrific, and on one occasion while driving back from Port Hawkesbury, he thought he was having a heart attack and went to the Regional hospital ER.

[41] Tests there did not disclose any heart issues but as a result of that episode he decided to get another opinion about chelation therapy. He contacted his wife's brother, a surgeon in Boston and asked for a name of a specialist in heavy metal toxicity. He was referred to Dr. Keith Falchuk and he and Deanna Bray went to see him.

[42] As a result of that visit Dr. Falchuk wrote to the plaintiff's disability insurance company and indicated that the chelation treatment that the plaintiff was receiving was appropriate and that he was responding to the treatment because his metal levels were going down.

[43] In the fall of 2003 the plaintiff attended at the Sanoviv Medical Institute in Mexico. He was there for 18 or 19 days.

[44] He continued to see Dr. Boucher about three times per week for chelation treatments. In November, 2003 he went to St. Paul, Minnesota for an independent medical examination on the request of his disability insurance company. He saw Dr. Beth Baker and she filed a report with the insurance company in which she concluded that he was not suffering from heavy metal toxicity and should be able to go back to work.

[45] The plaintiff said that after he went off work he wanted the administrators at the hospital to provide him with assistance in getting medical treatment for his symptoms. He said that was never done.

[46] He said that in the fall of 2003 he "went public" with his case when he attended a town hall meeting at the hospital at which the staff of the hospital attended. He said there were sixty to seventy people at the meeting. He said at that meeting his wife

confronted John Malcolm and John Theriault and called them liars in respect to the information being provided to the staff.

[47] He said that he later met with John Theriault and he offered him $10,000.00 and that he advised him to get a lawyer to protect his family.

[48] He said he continued to pay rent for his space at the hospital until August or September of 2003 and that in November of 2003 he went to the hospital and was upset because all his office equipment and files had been removed from his office. He said as a result of that visit he received a letter from John Theriault advising him not to attend the hospital accept for medical purposes.

[49] In January 2004 the plaintiff attended at the downtown clinic in New York. It was a clinic set up to treat rescue workers from the 911 attack. He stayed there for 60 days. The normal course of treatment there was 45 days. He said he was very sick when he was being treated at that clinic.

[50] He also went to Arizona and was advised by a doctor on methods for treatment for heavy metals.

[51] In August 2006 he went to Naples, Florida an was treated by Dr. David Perlmutter. The treatment there was chelation therapy and hyperbaric oxygen treatment.

[52] In October, 2008 he went back to the Sanoviv Clinic in Mexico and was there for five weeks.

[53] He also went back to Florida for further treatment with Dr. Perlmutter.

[54] The plaintiff testified about the expenses he incurred in attending in Mexico, New York, and Florida for the treatments he received and about his income prior to going off work in 2003.

[55] The plaintiff explained his routine now by which he deals with his medical condition. He does an exercise program and spends two to three hours in a sauna he has set up in the basement of his home. He goes to North Sydney for colonic treatment. He takes oxygen treatment and pills. On alternative days he goes to Port Hawkesbury for chelation treatments. He is also on a strict diet. He eats very little

red meat and eats mostly fruit and vegetables. He takes vitamin supplements. He says that he does do some things with his family but not what he used to do.

[56] He said that he could only attend half of his father's birthday party in January, 2009. He has very little contact with his friends.

[57] On cross-examination the plaintiff said that the dust problem in his office was over a eight to eleven month period. He also said that he took vacation in 2001 for the last week of July and the first week in August.

[58] He said that when he started chelation with Dr. Boucher in May of 2003 they expected that he would have 12 to 15 treatments and instead over the next six years he had 120 to a 140 treatments and some additional treatments in other locations.

[59] He acknowledged that he spent a great deal of time reading materials on heavy metal toxicity. He said he sometimes spent 14 to 15 hours per day doing that.

[60] He also acknowledged that while at the New York clinic he first experienced the intense knife like pain on the top of his head which has persisted.

ISSUES:

[61] There are a number of issues in this trial which are in serious dispute. One of them is the timing and extent of the renovations done at the hospital. The timing of the renovations is important in accessing when the plaintiff and others at the hospital developed symptoms which they attribute to the renovations and specifically the dust generated by the renovations.

[62] I have heard various times suggested by witnesses who were present at the hospital. The plaintiff testified that the renovations took place in late summer and fall of 2001 ending in February or March of 2002.

[63] Deanna Bray, his secretary, who worked at the hospital testified that she remembers the renovations having taken place in late 2001 and early 2002. She said she first developed symptoms herself in the spring of 2002.

[64] Lynette MacVicar said that the renovations were done over a two year period. Celeste MacLean said they were done during 2001 and 2002 ending towards the end

of 2002. Sherry MacMullin, who worked for the plaintiff as a nurse, said that the work at the hospital was done in the spring and summer of 2002. She said she remembered that because she found out that she was pregnant in June 2002.

[65] Dr. James Collicutt testified that he remembered the renovations being done in 2002 and 2003. Lynn LeBlanc was at the hospital with her son on September 12, 2001. Her son was a patient of Dr. MacIntyers and she noted work being done in the area adjacent to his office. She testified that there was a lot of dust in that area on that day.

[66] Darren Burke worked as a cleaning person at the hospital. He was responsible to clean the plaintiff's offices. He said the work was done in 2002 or 2003 and that it took two months to do. On cross examination he agreed that the work was completed by the end of 2002.

[67] The defendant called a number of witnesses who testified to when the work was done on the second and third floor of the hospital. John Malcom is the C.E.O. of the Cape Breton Health Authority. He was responsible for the New Waterford Hospital. He said that the major renovations at the hospital involved moving chronic or long

term patients who were located on the second floor up to the third floor. That involved making physical changes to the rooms on the third floor to accommodate long term patients. The third floor was to become basically a nursing home. Bathrooms had to be enlarged to accommodate wheelchairs and some new rooms were created out of space that had previously been used as a maternity ward. The patients who were not long term patients were moved down to the second floor and it became the acute care wing.

[68] He said the work also involved changing a doctor's lounge on the second floor into a waiting room. That is the area across from the plaintiff's office where Deanna Bray works.

[69] Mr. Malcom said that the work took place between July 2001 and March 2002. He was there on July 23, 2001 and work on the second floor was in progress.

[70] Ricky Brennick was the person on site at the hospital who arranged for the work to be done on the second and third floors. He said he arranged for Frank Dziubek to be in charge of the work.

[71] Mr. Dziubik produced in court a diary which he kept and into which he put notes about what he was doing each day during the summer and fall of 2001. He explained his notations and testified that based on his diary notes he started work at the New Waterford Hospital on July 11, 2001. He said he started demolition on the second floor on July 19 after having done some work on the third floor. He said Lawrence MacSween worked with him and that by July 31 the demolition on the second floor was completed and they started to put up new walls in that area. He said that his notes show they finished work on the second floor by August 17, 2001 and moved up to the third floor to work there. He said he continued to work there until February 8, 2002 after which he went to work at the North Sydney Hospital.

[72] Lawrence MacSween testified that he worked helping Frank Dziubek at the hospital. He said he worked with him for a little over a week taking down walls and that he got hurt on the job and went off on compensation. When he came back he said the work in the waiting room area on the second floor was finished. His compensation claim record was introduced into evidence (Exhibit 109) and indicates Mr. MacSween was injured on July 20, 2001. The hospital work sheet (Exhibit 110) indicates that he was off work from Monday, July 23 to August 8, 2001 and returned to work on August 9, 2001.

[73] Based on the evidence in this case I conclude that the work at the hospital on the second floor took place between July 19, 2001 and August 17, 2001 and that the demolition work was completed by around July 31, 2001. That would be the work that would cause the kind of dust described by the various witnesses.

[74] I specifically reject the evidence from any witnesses who testified that the work done on the second floor was done during the summer of 2002. I would refer in particular to Sherry MacMullin. She testified that she learned that she was pregnant in June, 2002 and that the work was done during the time she was pregnant. I also reject the evidence of Dr. Collicutt when he testified that the work was done in the summer of 2002 in areas other then the area described by Frank Dziubek and Lawrence MacSween.

[75] Any witnesses who timed the work after the fall of 2001 are simply confused but I do not believe are attempting to specifically mislead the court. The only exception to that finding would be the evidence of Sherry MacMullin who believes that her unborn child was affected by the construction dust during the summer of 2002. She was not pregnant in the summer of 2001 when the work was actually done,

therefore her child could not have been directly affected by any exposure she had during that time. I believe she truly believes her child got heavy metal toxicity as a result of her exposure and therefore wants to suggest that she was pregnant while the work was being done.

[76] I specifically suggested to her after she concluded her evidence that she must be mistaken about the timing of the work but she insisted that the work was done in the summer of 2002.

[77] Another issue in which there is direct contradictory evidence is the nature of the work done at the hospital and the existence of dust during the time of the work.

[78] The plaintiff testified that when the work started on the second floor that the workers used mauls and a jackhammer to knock down walls. He said the workers had masks on to protect themselves from the dust. He said that the dust was so bad that he could see it in the air and that it was on the floor to the extent that you could see footprints where a person had walked. He said that the workers pushed wheelbarrows filled with debris from the construction area down the hall and onto the elevator. He said he saw that on one occasion as he took a patient following surgery out to his car

in a wheelchair. He said the wheelbarrows left tracks on the floor. He said his area was very, very dusty and that he commented on that to the workers doing the work. He said the area of the work was not properly sealed to contain the dust. He said there was a plastic tarp up in that area but it did not contain the dust because the workers were in and out of the area.

[79] He said that when the work moved to the third floor above him that dust would come down from the ceiling into his room. He said that he talked to the housekeeping staff about the problems and described the situation as crazy.

[80] A number of other witnesses offered the same kind of description about the conditions at the hospital during the renovations. These included;

[81] Debbie Murray, a registered nurse, who worked and assisted the plaintiff with his surgeries at the hospital said that the dust would be on her uniform and shoes and would be tracked into the OR. Sherry MacMullin, also a nurse, said that the dust was bad and that she could see footprints on the floor. She saw workers with wheelbarrows full of debris taken from the area where the work was taking place.

[82] Deanna Bray said she had to wipe her desk area a couple of times each day to get rid of the dust.

[83] Helen Prentice worked there for the plaintiff as a dental assistant during the time of the renovations. She described seeing footprints in the dust on the floor and junks of cement in wheelbarrows. She said that it was more then just dust and more approached what she called grit. She said it covered everything including the sinks, cabinets and window sills in the surgery room. She said they had to clean up every morning. She said there was dust in the elevators and that dust was visible in the air.

[84] A number of housekeeping staff testified that the conditions were similar to that described by the plaintiff's employees.

[85] Lynette MacVicar was working as a housekeeper at the time. She said that there was dust everywhere. She said that it was so bad that one day it was so thick in the air that she could not see another staff person to whom she was talking and who was some distance away.

[86] Celeste MacLean also worked in the housekeeping staff. She said the place was covered in dust and it caused her to do a lot of extra work to clean it up. Ernest Radke is a nurse who took his daughter to see the plaintiff at the hospital. He said he saw dust in the hallway and footprints on the floor. He said he was surprised to see that type of condition in an area that was suppose to be sterile.

[87] Lynn LeBlanc went to the hospital with her son on September 12, 2001 to see the plaintiff and she saw “dust everywhere”.

[88] Darren Burke was the person responsible for housekeeping in the plaintiff’s office space. He said that there was lots of dust and that he would wipe it up. He said you could see it in the air if you looked down the hall. He also saw footprints and wheel tracks on the floor. He complained to his supervisor to no avail.

[89] The defendant called the two men who did the work on the second floor Frank Dziubek and Lawrence MacSween described the precautions they took to ensure that dust would not escape their work area and go into the hospital space occupied by the plaintiff. Frank Dziubek said that before they started the work of demolition that they

sealed off that room with six mil plastic. He said it had a zipper in it to permit the workers to go in and out.

[90] Lawrence MacVicar testified that when he worked on the second floor with Frank Dziubek that they always did so behind the plastic. He remembered putting a zipper on the plastic because it was a new procedure for him. He said they taped the sides and went in and out through the zipper part. He said he thought they used the second door of the work area to go in and out with wheelbarrows instead of going through the plastic tarp.

[91] He said that when he worked on the third floor dust was not that much of a concern because there were no patients in that area. He said they would normally first seal off a particular area of the floor before doing demolition work. He said on the third floor when he noticed dust from the wheelbarrows that Frank got a wet blanket and put it on the exit from the construction area so that the wheelbarrows would not track dust beyond that area and also to wipe their feet while leaving the area.

[92] Based on the conflicting evidence about dust created by construction on the second floor it is very difficult to conclude conclusively the actual state of affairs

during the time the work was done. All the witnesses who testified appear to be credible. To reject the witnesses offered by the plaintiff would mean that I would have to find that they deliberately lied about what they saw or that they all got together and made up the same story about dust everywhere and footprints on the floor.

[93] On the other hand Frank Dziubek and Lawrence MacSween saw what happened through their own perspective. They were mainly concerned about getting the work done and not about the fall out from their demolition work.

[94] It is clear that they did put up a plastic bearer to stop dust from spreading into the hallway. All witnesses described that. The question is whether that plastic barrier did its job. Was it really sealed with a zipper or was it hanging free and not doing much of a job in containing dust?

[95] The weight of evidence here would dictate that dust did escape from the construction area on the second floor and I so find. I believe some of the descriptions of the dust might have been exaggerated over time, however, I conclude that for some

period of time there was a significant dust problem in the plaintiff's area caused by the construction work done on the second floor.

[96] I would, however, also conclude that the period during which dust was probably released on the second floor was the period between July 19 and July 31, 2001 during the demolition phase of the renovations.

[97] The other work done on the second floor would not cause the kind of dust described by the plaintiff's witnesses.

[98] However, I also conclude that during the work being done on the third floor there would be very little if any dust coming down through the floor to the second floor. Certainly there would be noise from the construction but I reject the suggestion that any significant dust came through the floor and then through the ceiling tiles and on to the furniture in the plaintiff's space.

THE LAW

[99] The plaintiff here alleges that the defendant, as the owner of the New Waterford Hospital, owed a duty to him as a tenant of that hospital to ensure that when renovations were carried out to the structure on the second floor where the plaintiff leased and occupied space, that the said renovations were carried out in a manner that did not unreasonably endanger his health. The defendant does not dispute that it owed a duty of care to the plaintiff. He was a tenant in the premises owned by the defendant under a written lease.

[100] ***The Occupiers Liability Act***, Section 4 (1) applies to the defendant. It provides as follows:

> "4 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that each person entering on the premises and the property brought on the premises by that person are reasonably safe while on the premises.
>
> (2) The duty created by subsection (1) applies in respect of
>
> (a) the condition of the premises;

(b) activities on the premises; and

(c) the conduct of third parties on the premises."

[101] ***The Occupational Health and Safety Act*** also applies here Section 19 (a) provides:

"Every owner shall

(a) take every precaution that is reasonable in the circumstances to provide and maintain the owner's land or premises being or to be used as a workplace

(i) in the manner that ensures the health and safety of persons at or near the workplace, and

(ii) in compliance with this Act and the regulations"

[102] The plaintiff's position is that heavy metals were disturbed by the demolition on the second floor of the hospital and that the resulting dust was ingested by him. His position as advanced by himself and his medical experts is that the heavy metals got into his body at that time and that by May of 2002 started to have a significant effect on his health.

[103] He takes the position that conventional medical procedures were not able to diagnose the cause of his symptoms and that he found the answer when he went to see Dr. Boucher in May, 2003. Dr. Boucher diagnosed him with heavy metal toxicity and began a long series of chelation treatments.

[104] To prove his case, therefore, the plaintiff must establish a causal link between the renovations done at the hospital and his illness.

[105] During the course of this trial there has been many references by the plaintiff to other possible causes of his medical problems. He has referred to rat poison being used in the ceiling of his office space. He has suggested inadequate air ventilation in his office space. He has suggested a problem from the lint emanating from the hospital laundry and attaching to the screens on his office windows. He spoke about water leaks from the floor above into his treatment room. There was some suggestion that the water in the hospital was off colour on numerous occasions.

[106] No attempt has been made by the plaintiff to establish a causal link to any of these other possible causes.

[107] I conclude therefore that the plaintiff's case is based on the allegation that the defendant breached it's duty of care to him by negligently doing renovations to the second floor of the hospital, which negligence resulted in the release of heavy metals and which heavy metals caused his medical condition as of May 2002 and that continues to the day of trial.

BREACH OF DUTY OF CARE

[108] It is alleged here by the plaintiff that the defendant breached its duty of care to him in the manner in which it's employees carried out the renovations on the second and third floor of the hospital. The breach suggested is of not doing a proper assessment of the materials to be demolished by the renovations and by not taking adequate precautions to ensure that dust created by the demolition did not escape the area of the demolition and spread into the area where the plaintiff was working.

[109] Based on the evidence I conclude that the defendant did not do a proper investigation into the potential release of hazardous materials when it decided to renovate the room on the second floor.

[110] The evidence is that it was left to Ricky Brenick to arrange for the work to be done. I conclude that he really did not address his mind to the issue of the release of possible hazardous materials. He was not aware of the existence of any hazardous materials in the walls that were to be removed and simply did not consider that as a possibility.

[111] I have also already concluded that the measures taken by the defendants employees were not adequate to ensure that dust was not released from the area where the demolition was done.

[112] I therefore conclude that the defendant breached its duty of care to the plaintiff by the manner in which it carried out the renovations on the second and third floor of the hospital.

[113] The plaintiff as a tenant in the hospital should be entitled to not have to put up with construction work done to the hospital in a manner that generated dust of the kind described by the witnesses called by him.

[114] The measures taken by the defendant to enclose the work area on the second floor were not adequate and transporting debris by wheelbarrow through the public hallway and on the public elevator was not appropriate.

[115] The mere breach of a duty of care however, does not make the defendant liable for damages unless it can be shown that the breach created a situation that caused the plaintiff injury.

[116] The second step in the process is therefore.

WERE HEAVY METALS RELEASED AS RESULT OF RENOVATIONS AT HOSPITAL?

[117] In May 2002 the plaintiff had the first significant symptoms of medical problems. He initially went to see Dr. Phillip Curry and was later referred to Dr. Richard Leckey, a neurologist who arranged for a number of neurological tests which all proved negative. Dr. Leckey was of the opinion that the plaintiff might be suffering from a viral infection.

[118] The plaintiff continued to work in the from May 2002 until April 23, 2003, but before he stopped working he was in contact with the administration of the hospital and raised the issue that his medical symptoms were related to the conditions at the hospital.

[119] On April 23, 2003 he wrote to John Theriault and said (Exhibit 2, Tab 12):

> "I have reflected at great lengths on our conversation of last night. My purpose of leaving New Waterford Hospital is for a temporary amount of time to improve my health. As I have identified to you, I have seen multiple practitioners between here and Halifax. There has been no diagnosis as to what my problem is. I have also had multiple blood tests, CT scans, and an MRI of my brain to rule out any structural anomaly. To date, nobody has been able to give me an ideas as to why I am experiencing headaches, dizziness, constant nausea, and at times numbness and tingling in my upper and lower extremities. I have identified that I was in poor health to you and Dr. Naqvi last fall and because this is approaching one year, I really think this needs to be addressed immediately."

[120] He also raised the possibility of relocating his office out of the New Waterford Hospital.

[121] On May 8, 2003 the plaintiff wrote John Malcolm the C.E.O. of the defendant, he said (Exhibit 2, Tab 13):

> "I am writing this letter with reference to my poor health that has been persistent daily since May of 2002. This happened within a 10-14 day period after the renovations were completed at the New Waterford Consolidated Hospital directly across from my office. It would be best for you to familiarize yourself with what renovations were done and how materials were moved in and out of the renovation site. Since that time, my secretary and I have had very similar symptoms. I have had profound nausea, dizziness, vertigo, tremors, severe headaches, fatigue, heart palpitations, tingling in my left shin, along with profound weakness throughout my lower and upper extremities. There are periods of time that my facial color appears white/ash grey and clammy. This has happened persistently over the last 11 ½ months. I have told numerous people regarding the above and only in January did the air quality testing begin.
>
> • • •
>
> I have investigated my problem via any means and I did come up with a laboratory in London Health Sciences that could possibly provide the answer to my question. What is my diagnosis? On May 8, 2002, I received word that the lab results were back from London Health Science Center. Both myself and Ms Denna Bray have extremely high toxic levels of heavy metals and for myself Arsenic within my blood and urine. These levels are the last stage of toxicity whereby the other tissues involved, the fat, muscle, brain tissue and the like would also have very high levels of these potential carcinogens.
>
> I will need your assistance to help me identify a modality of care that could potentially be of assistance in eliminating these toxic levels from my body. Please exercise your contacts within Canada/USA. I am extremely sick. I have been so, along with my secretary for the past 11 ½ months. There is no question in my mind that these levels are the result of working in the New Waterford Consolidated Hospital in that particular area of the building."

THE HOSPITAL RESPONSE:

[122] James MacLellan worked for the defendant in 2003 as the Director of Occupational Health and Safety. He had three nurses and one clerk in his department. He was responsible for all the hospitals run by the defendant including the New Waterford Hospital.

[123] He first met the plaintiff in January 2002 when he attended his office with his son for medical treatment. He said he was very impressed by how the plaintiff dealt with the situation which involved immediate dental surgery performed by the plaintiff on his son.

[124] Mr. MacLellan said that in December, 2002 he was told by John Theriault that the plaintiff had health issues and that he should meet with him. That meeting took place in January, 2003 at the plaintiff's office. At that point the main concern was a

ventilation issue in the office so Mr. MacLellan arranged for an air assessment to be done. That was done by David Muggah of Atlantic Indoor Air Audit Company in February 2003. It found (Exhibit 84):

> "The air in Dr. MacIntyre's exam/office was monitored for the amount of carbon dioxide for a period of one day. The results show that the level of carbon dioxide increased from 8 AM to 12 PM reaching a level above the threshold for indoor air quality concerns. This increase occurred with intermittent occupancy and is to be expected in a room without a ventilation system. While the level of carbon dioxide does not in itself create an indoor air concern, it is an indicator that the potential exists for the accumulation, through poor air change, of other chemicals should their release occur. The levels in the afternoon were less as a result of the opening of the window in this room."

[125] After receipt of that report Mr. MacLellan met with the plaintiff and it was decided that a more extensive assessment of the air quality should be made. The company F.C. O'Neill, Scriven & Associates Limited was engaged and it produced a report (Exhibit 11, Tab 20) part of that report noted (page 372):

> "Based on a review the existing building drawings the current supply air volume to this 2nd Floor wing is 1,160 cfm of outside air, which is distributed in the corridor. This outside airflow rate csscntially matches the required outdoor airflow rate. However, there is insufficient filtration of this air stream and there is no general ventilation in the space to accommodate the overall air change requirements."

[126] Mr. MacLellan said that after that report was prepared the plaintiff suggested the hospital engage Helen Mersereau to do a more extensive assessment. She is an occupational hygienist.

[127] As a result of that request he contacted Ms. Mersereau's company and asked her to do a report. She did that and filed a report on April 30, 2003 (Exhibit 93, Tab 7A). The testing for that report was done on April 23, 2003 and it involved interviews with staff at the hospital. Her conclusions and recommendations are as follows:

> "**7.0 CONCLUSIONS AND RECOMMENDATIONS**
>
> The three most common symptoms suffered by the occupants were headache, dizziness and nausea. No single contaminant or source was found to be the cause of the symptoms suffered by the occupants. However, several potential sources were identified and include fluctuation of temperature and humidity; lack of fresh air; location of the air intake and lighting. Steps should be taken to remove/reduce these potential sources to improve the air quality. The following recommendations are made:
>
> 1. The ventilation should be improved to ensure adequate fresh air, humidity and temperature.
> 3. Mechanical ventilation should be located away from potential pollution sources.
> 4. Review lighting to try and improve visual conditions.
> 5. Provide short term ventilation solution until better HVAC conditions can be developed.
> 6. Health and safety requirements should be considered as part of overall ventilation design (author would like to be part of the design process).
> 7. Remove any debris from ceiling spaces."

[128] After that report was received Mr. MacLellan became aware that the plaintiff was suggesting that he had been exposed to heavy metals during the renovations at the hospital. As a result he contacted Helen Mercereau again and asked her to do an assessment of the air concentrations of metals in the plaintiff's area of the hospital. That was done and a report filed in May of 2003 the air sampling was done from May 14 to May 16, 2003.

[129] The report indicated in Exhibit 93, Tab 7B:

> "**3.0 Results**
>
> Table 1 gives a summary of the results collected, the appropriate limits to be used for comparison, and a notation of whether the sample exceeded the recommended limits. The industrial limits (threshold limit values) are listed for information purposes, but are not the limit of choice for indoor air quality. The indoor limit is given, against which the results are compared. It is advisable to keep indoor contaminants to less than 10% of the industrial limits, as is shown in the table. The time and date of sampling is also provided, with an identification of which unit was sampled. All the metals were present in undetectable concentrations except for Chromium. Chromium was present in the three samples at 0.0003 to 0.0004 mg/m^3. No metal was above the guideline values. *The results indicate that all metals were no present in levels that exceeded the acceptable indoor concentrations.*
>
> **4.0 Discussion**

As can be seen from the table, the results indicate that all metals are present in acceptable concentrations within the hospital. There should be no concern regarding health effects caused by these levels of metals present in the hospital air. For the most part, the amount of metal present in the air was undetectable (below the limit of detection of the lab equipment used for this purpose).

5.0 Recommendations

1. Ensure all staff are informed of the results included in this report.

6.0 Conclusion

The concentrations of all metals did not exceed the guidelines for acceptable indoor air quality during the period of measurements."

[130] That report was followed by a similar report for the x-ray and lab section of the hospital. That report came back on August 23, 2003 and indicated (Exhibit 93, Tab 7C):

"**7.0 CONCLUSIONS AND RECOMMENDATIONS**

The four most common symptoms suffered by the x-ray occupants were headache, dizziness, fatigue and nausea. No single contaminant or source was found to be the cause of the symptoms suffered by the occupants. However, several potential sources were identified and include warm temperatures and low humidity. The following recommendations are made:

1. Local humidification should be provided to several areas of the xray department.

2. Staff should take lunch breaks away from the work area, with exercise if possible.
3. Window air conditioning units should be investigated for placement in several areas.
4. Provide task lighting for Debbie's office (or other areas where computers are used).
5. Review colour scheme of Debbie's computer if possible.
6. Ensure detailed information be obtained from all lab staff allow a more detailed review of their air quality."

[131] Mr. MacLellan said that in July 2003 he once again engaged Helen Mercereau to do a study of the building materials and water at the hospital. The report dated July 8, 2003 was as follows (Exhibit 93, Tab 7D):

"**1.0 Executive Summary**

As a follow up to the indoor air quality investigation of the hospital, building materials and water were analysed to determine the metal content. This was done to try and determine if renovations done in Spring of 2002 could have released metals into the workplace air. The samples were taken on June 26, and were analysed by Enviromental Services Laboratory, Sydney, NS. Water analysis was also performed to determine if these water sources may have been contaminated with metals as well.

Although there is no set limit for building material content, NS Department of Labour uses a rule of thumb of 1% of content to put work practice controls in place. This rule of thumb would apply to metals such as lead, mercury, nickel, arsenic, etc (metals with toxic effect). For the purpose of this report, the limit of 1% is used to signify the potential for problematic air concentrations for the toxic metals of interest. Higher limits would apply to non-toxic metals such as calcium, iron, etc.

The results indicate none of the toxic metals are present in any building material at levels above 1%. This would signify that renovation activity is unlikely to have created dust concentrations of these metals which would lead to health effects. Three samples did contain aluminum in concentrations above 1%, although aluminum would not be classified as a toxic metal.

2.0 Methods

2.1 Sample Collection

Samples were collected on June 26, 2003. Approximately one gram of material was taken from various building materials that may have been distrubed during a renovation in the Spring of 2002. Sixteen samples of building materials were taken. Water samples were taken on the same date, from taps close to the 2nd floor work area. Four water samples were collected. The water samples and bulk samples were then sent ESL in Sydney for metal analysis.

3.0 Results

Table 1 gives a summary of the results collected. Water samples are the first four samples listed. The sixteen building material samples are given, with their location also noted. All the building material samples contained toxic metals at concentrations of less than 1% (<10,000 ppm). Three of the building materials contained aluminum in concentrations above 1%. However, aluminum would not be classified as a toxic metal. The water samples all met the Canadian drinking water guidelines.

4.0 Discussion

> As can be seen from the table, the results indicate that all toxic metals are present in concentrations of less than 1% within the building materials. The water samples met the Canadian drinking water guidelines. Although it is difficult to re-enact the renovation situation, the concentrations of the metals in the building materials do not indicate concentrations which may have created an airborne hazard during the renovation activity. The NS Department of Environment and Labour (NSDEL) uses a the 1% concentration for asbestos, lead and other toxic materials as the point at which work practice controls must be instituted. For the work done in the New Waterford hospital, the concentrations present would have indicated the need for normal construction practice, with no extra precautions for toxic metals being present. This means that the construction activity would have been unlikely to generate airborne metals at concentrations leading to health effects."

5.0 Recommendations

1. Ensure all staff are informed of the results included in this report.

6.0 Conclusion

> The concentrations of all metals did not exceed the guidelines of 1% for toxic metals in the building materials, or the drinking water guidelines for the four water samples. The construction activity was unlikely to have been the cause of the health concerns in the area with respect to the toxic metal content."

[132] Finally in August 2003 Mr. MacLellan requested that Helen Mersereau do tests on the laundry lint and ventilation dust at the hospital. The conclusions of that report were as follows (Exhibit 93, Tab 7 E):

"**6.0 DISCUSSION**

All analyses performed from the samples taken on July 17, 2003 did not reveal any significant concentrations of metals present. The lint dust contained very little metal, as did the ventilation dust and the water. This analysis supports the earlier conclusion from air sampling conducted in the area in the Spring of 2003, which reported low metal dust concentrations in work areas. Although the lint is present in the air, its metal content is low. The water samples met the Canadian Drinking Water Guidelines. Based on all the sampling conducted to date, it is unlikely that the ventilation dust or lint would cause any health effects due to their low metal content.

7.0 CONCLUSIONS AND RECOMMENDATIONS

The water, lint and ventilation dust are not likely to have contributed to the metal toxicity displayed by occupants of the hospital. Metal content was low in the samples collected."

[133] Mr. MacLellan said that in September, 2003 he first referred the matter of issues about health concerns by staff of the hospital to the joint occupational and safety committee of the hospital (JOSC). He said the committee were upset by the fact that they had not been involved earlier and he took responsibility for that over sight.

[134] He indicated that during the summer of 2003 the hospital advised staff they could be tested if they wished for heavy metals in their systems. About 40 people were tested and the results were sent to Dr. Everette Nieboer, a professor of toxicology at McMaster University in Ontario.

[135] Dr. Nieboer did a report dated August 11, 2003 in which he commented on the test results. He said (Exhibit 92, Tab 2 A, Page 4):

> "**Concluding Remarks**
>
> On the whole, the results do not reflect unusual exposures, although the application of the precautionary principle (i.e., due diligence) warrants a low level of concern for some of the reported concentrations and their donors and a first-tier follow-up has been suggested in such instances. If any of the individuals with the exceedances were receiving or recently received chelation, it was most likely the primary reason. No additional follow-up would likely be required in these cases. Depending on the chelation drug(s) employed, many of the contaminants considered might be expected to be temporarily mobilized from stores thereby increasing excretion."

[136] Mr. MacLellan said he arranged to have Dr. Mike Ryan a local G. P., with some experience in occupational health, act as a go between and a resource person for the staff being tested and Dr. Nieboer in Ontario.

[137] Mr. MacLellan said that an emergency meeting of the JOSC was held on November 3, 2003 as a result of local media coverage about the health problems at the hospital.

[138] The committee was advised that another round of testing would be done at the hospital to account for the winter heating season. The committee also discussed how the construction period could be recreated to reflect the situation at the time the renovations were done at the hospital.

[139] It was agreed that more testing of staff would take place and the group extended to include anyone working at the hospital not just the people affected by the renovation work.

[140] The minutes reflect that at that meeting Mr. MacLellan asked all the committee members if there were any other suggestions as to what should be done. The note from the minutes is that the committee was content with all done so far, the committee was made up of both union and management personal.

[141] Mr. MacLellan testified about the December 10, 2003 meeting of JOS committee at which Dr. Nieboer's report of December 1, 2003 was presented. In that report Dr. Nieboer concluded that in his opinion the symptoms noted by staff were associated with inadequate ventilation. He recommended that no further testing except that already in progress be undertaken.

[142] Despite that suggestion Mr. MacLellan said that the committee decided to write to Dr. Nieboer and request that he come to New Waterford and meet with the staff at the hospital.

[143] The committee prepared a letter (Exhibit 2, Tab 33) dated January 30, 2004 which invited Dr. Nieboer to come and with the assistance of Dr. Ryan to provide an opportunity to staff to discuss their health concerns. The letter provided (Exhibit 2, Tab 33):

> "The members of the New Waterford Occupational Health and Safety Committee and management of the Cape Breton District Health Authority feel it would be beneficial for our staff members to have the opportunity to have an individual consultation with you to review their results. Staff are concerned whether there are possible short and long term health effects for themselves or their children. They are questioning whether treatment is necessary and if so what type of treatment and are there potential effects?"

[144] At the same time it was decided with the assistance of the two local unions at the hospital that a Dr. Ted Haines who was involved with the occupation health clinic for Ontario workers come to the area at the same time as Dr. Nieboer's visit. The intent was to provide education to the local physicians on metal toxicity, chelation therapy and environmental illness related to indoor air quality.

[145] Mr. MacLellan said he arranged the visit by Dr. Haines and Dr. Nieboer for April 29 and 30, 2004.

[146] Mr. MacLellan also said that in late 2003 the hospital contacted the Department of Health in Halifax and requested that they find a person that would come to the area and review the procedures the hospital was using in dealing with the health concerns raised by the staff. Dr. Lesbia Smith was advanced, as such a person and she attended the JOS committee on January 06, 2004 to answer questions from committee members. She also prepared a report dated January 23, 2004 (Exhibit 92, Tab 4 A). In that report she said at page 18:

> "Without a documented exposure at the hospital, and with normal or explainable concentrations of metals in the urine of staff tested, it is not possible to attribute unusual metal exposure from the hospital environment to those who are experiencing illness. Staff should be encouraged to seek second clinical opinions locally regarding their diagnosis of metal toxicity, as this diagnosis and the recommended treatment appears to be creating considerable concern among sick staff off work, and among working staff, as reported in the meetings of January 6, 2004. Facilities which can offer comprehensive assessments of non-specific symptomatology exist in the area and are covered by the provincial health plan (personal communication, Dr. Roy Fox, January 16, 2004). Additional support could be provided in the form of information sessions with professionals expert in metal exposures, measurements, and occupational investigations."

[147] Mr. MacLellan said that after the visit by the two doctors from Ontario the JOS committee and he felt that the heavy metals issue had run its course and they went back to consider the ventilation issue at the hospital. He said they engaged a firm to look at solutions to the ventilation issue.

[148] Upon receipt of the report on the ventilation system its recommendations were put in force and extensive work was done on the system of the hospital in 2005.

[149] The ventilation system at the hospital consisted of outside air being brought into the hospital and distributed to the hallways only. The system does not allow for the recapture of air in the hallways. The bathrooms on each floor have exhaust vents taking air from them to the outside. The intent of the system is that the fresh air introduced into the building through the vents would go into the rooms from the hallway and out open windows.

[150] After hearing from Mr. MacLellan I conclude that the response by the defendant to the claim of illness arising from the work place at the hospital was completely appropriate. I found Mr. MacLellan to be a completely credible and reliable witness and he appeared to show a great deal of concern for the staff at the hospital. He used

the words that no stone was left unturned to find a solution to the problem. I agree with his assessment.

[151] The tests ordered and done by the defendant to deal with the claim of poor air quality and heavy metal toxicity went well beyond what could be expected in the circumstances.

[152] There is no question that the air quality at the hospital was not good. The ventilation system installed I assume in 1965 at the time of the construction of the hospital did introduce fresh air into the buildings. If the air outside was hot that air was pumped into the building. If the air outside was polluted that air was pumped into the building. No air conditioning was done. The conditions as described by the plaintiff was one which caused the hospital to be very hot in summer. Opening windows did not help on hot days.

PROBLEMS EXPERIENCE BY OTHER STAFF

[153] The plaintiff led evidence from other staff at the hospital.

[154] Sherry McMullen is an R. N. who worked for the plaintiff from April, 2001 to August, 2002. Her job was to deal with patients and to assist him with surgical procedures.

[155] Her position about the dust problem at the hospital has already been dealt with in this decision. Clearly she felt that there was a major dust problem at her work site and that it happened while she was pregnant. She delivered her baby Lindsay on February 10, 2003 and found out that she was pregnant in June, 2002. She left the plaintiff's office in August, 2002 and went to work at the Sydney Hospital.

[156] Ms. McMullen told about symptoms she had while working for the plaintiff. These included nausea, fatigue, and headaches and a slight bit of dizziness. She said it was not like symptoms she had during her first pregnancy.

[157] In August, 2003 the plaintiff talked to her about having tests done and she did that on August 27 when she went to see Dr. Boucher in Port Hawksbury. She had high levels of a number of metals (Exhibit 70) selenlum, aluminum, copper, zinc,chromium, iron, cobalt, sulfur, vanadium, antimony, barium, nickel, strontlum.

[158] The following day August 28, 2003 she submitted samples after having apparently having a challenge dose of the chelation therapy. The results of the pre-challenge and post challenge urine tests are interesting.

[159] On August 27, 2003 she had a lead level of 2.4 nmol/L with a converted result for creatinine of 0.73 while after the challenge dose her levels were 26.1 and 1.88. The corrected levels were was not considered high as the reference range is 0.00 to 1.91.

[160] The information that I have is that when urine is tested the creatinine level is the significant one.

[161] In reviewing Ms. McMullen's lab results it is note worthy that her aluminum result after the challenge dose was 23.7 while the pre-challenge level was 105.6. The reference range for aluminum is 0.0 to 82.9. The same situation is noted in reference to barium which had a pre-challenge level of 7.50 and a post challenge level of 1.78 and a reference range of 0.00 to 3.35.

[162] I would have expected the post challenge numbers to be higher or at least the same as the pre-challenge levels. There is no apparent explanation why her post challenge levels would be lower in these metals.

[163] Based on the lab results Ms. McMullen was advised by Dr. Boucher to have chelation therapy. She consulted her family doctor who advised against it and she did not become involved in chelation treatments.

[164] Ms. McMullen had her child Lindsay tested. That was done on September 28, 2003 and she had a significant number of high levels. Dr. Boucher did not recommend chelation treatments for her because of her age.

[165] Ms. McMullen's husband was tested in March, 2004. He showed some high urine levels (Exhibit 72) for cooper, zinc, sulfur and antimony but none were above the reference range when the creatinine factor were used.

[166] Ms. McMullen's other daughter who was four years old at the time was tested in March 04. She had a number of high urine levels after applying the creatinine factor.

[167] It is difficult to understand how to interpret the tests results of Ms. McMullen and her family. She had different results from her pre-challenge tests to her post challenge test. He daughter Lindsay had high readings but she was not conceived at the time of the renovations on the second floor of the hospital. Her other daughter had high levels despite not being exposed to anything at the hospital.

[168] After reviewing the material on Ms. McMullen's lab results I can only conclude that I must be very careful in coming to any conclusions from lab tests themselves. I believe that was the conclusion arrived at by Dr. Nieboer and Dr. Haines and I now have some insight into how they came to that conclusion.

LYNETTE MACVICAR

[169] Lynette MacVicar worked in the housekeeping staff at the New Waterford Hospital. She was there during the renovations of 2001 and 2002 on the second and third floor. Her description of the dust problem has already been reviewed. She considered the problem a major one. She is a smoker and in January 2002 she started having a throat problem. She went to her doctor and was referred to a specialist. A number of tests were done but nothing was found. She had bladder control problems which made her get up about six times per night. She had headaches and sore feet. She was 38 years old and went into menopause in August 2003.

[170] In the spring of 2003 she heard about the plaintiff's problems and she talked to Peggy Forward the occupation and safety nurse at the hospital. She understood from her that staff were to be tested. She waited all summer but no tests were arranged. In the fall she talked to the plaintiff and he recommended Dr. Boucher. She went to see him in October, 2003. He arranged for lab tests and the results (Exhibit 20) showed high levels of cadmium and barium.

[171] She agreed to proceed with a challenge chelation test and later took chelation therapy. She showed high levels of a number of metals after the chelation treatment.

[172] She took chelation therapy with Dr. Boucher starting in December, 2003 for six months. She would go to his office with other women from the hospital. She stopped chelation treatments in May 2004 because she ran out of money.

[173] She said that she continued to have symptoms but by three months after she stopped chelation she was feeling better. At some point she was off work because of a surgery not related to her heavy metals problem.

CELESTE MACLEAN

[174] Mrs. MacLean worked as a housekeeper at the hospital during 2001 and 2002 while the renovations were done. She described the dust problem she encountered during that work. She was a float person and therefore could be assigned to work in any area of the hospital. She would clean up the dust.

[175] In 2003 she had some medical problems. She had a laceration to her finger that did not heal and she had to see a plastic surgeon to deal with it. She also had an ear infection problem and an infection on her face.

[176] She said that she also had some balance problems and she would stagger sometimes. She said she also noticed a foul odour around the bathroom area of the hospital.

[177] In November 2003 she was tested for metals as a result of the tests done by the hospital. Her results (Exhibit 21) showed above reference range for nickle and cadmium. She spoke to Dr. Mike Ryan about these and took no action to deal with the matter.

[178] JoanneGillis is a licensed practical nurse who worked at the hospital on the third floor dealing with long term patients.

[179] In March, 2002 she started having problems with her ears. She was referred by her family doctor to a specialist but nothing was found. She had dizziness, nausea,

joint pain and weakness. These symptoms would normally appear when she went to work. She would feel better after she left work and was in the fresh air.

[180] She continued to work until September, 2002 when because of her symptoms she went off work. She was seen by a neurologist and cardiologist and had a number of tests done. No diagnoses was ever made. Her problems persisted for a year and in the fall of 2003 she was trying to get back to work. In October she read an article in the Cape Breton Post (Exhibit 26, Tab 2) about staff at the hospital having medical problems. She said she felt that the description given in the article was about her.

[181] She discussed the issue of heavy metals with her family doctor and lab tests were arranged. The court has not had the results but Ms. Gillis said she had high levels of heavy metals including cadmium. She had been a smoker for the period of 2002 to 2003.

[182] She took her lab results to Dr. Boucher in Port Hawkesbury and he recommended chelation therapy. She did treatment from December 03 to April 04. By the spring of 2004 her symptoms had subsided and she went back to work in July

2004 when she started working two hours per day. By October, 2004 she was back full time.

HELEN PRENTICE

[183] Helen Prentice worked as a dental assistant to the plaintiff from November, 1999 to May, 2003. She was there during the renovations and observed how the plaintiff's medical condition developed to the point that in April, 2003 he stopped work. He suggested that she get testing done and it was arranged in May, 2003. Ms. Prentice did not have her test results but indicated that she had some high levels. She had no symptoms, she attended at Dr. Boucher's office and had five chelation treatments.

DEANNA BRAY

[184] Ms. Bray worked as the plaintiff's secretary and office manager for four and a half years up to and including April, 2003.

[185] She testified that the renovation work done on the second floor of the hospital was done directly across from her office location. She described how much dust was

generated by that renovation and that it was not contained within the area where the work was being done.

[186] In the spring of 2002 she noticed how the plaintiff started to show signs of illness and that he looked tired all the time with a grey look on his face.

[187] She said that she started to have similar type symptoms of dizziness, nausea, fatigue and headaches. She also had some memory and concentration problems with generalized weakness. She said she discussed her symptoms with her co-workers at the hospital. She said she found out that the plaintiff apparently had a viral infection and she thought that might be the cause of her problems.

[188] She went to see Dr. Glenna Morris in the fall of 2002. She prescribed supplements which she said helped a little.

[189] She consulted Dr. Leckey a neurologist and had a CAT scan done but the results were negative.

[190] After the plaintiff closed his office in April, 2003 he suggested to her that they go to see Dr. Boucher in Port Hawkesbury. They went there together on May 13, 2003 and following that started a regular treatment program of chelation therapy over the course of the rest of 2003 and into 2004.

[191] She also went with the plaintiff to the Sanoviv clinic in Mexico.

[192] Ms. Bray has started an action against the hospital.

[193] She testified that recently she has been diagnosed with M.S. and acknowledged that many of the symptoms of M.S. are similar to the symptoms from heavy metal toxicity.

[194] Based on the evidence from other staff personnel at the hospital it appears that a number of them experienced similar symptoms of dizziness, nausea, and weakness.

[195] This evidence about other staff having medical problems in the time period following the renovations is some evidence that might suggest that the medical problems experienced by them is somehow connected to the fact that they all worked

at the hospital. I accept that as far as it goes, however, no direct correlation can be drawn to the actual renovations and the alleged release of heavy metals.

[196] It is not enough here for the plaintiff to simply say something at the hospital was causing the staff at the hospital and himself to get sick. The plaintiff is basing his case on negligence by the defendant in the manner in which its employees did the renovations. The hospital can not be blamed if the air in the area of the hospital was contaminated and that air was brought into the hospital by the ventilation system unless the hospital was aware of a problem and did nothing to remedy it.

[197] The negligence alleged here is a failure to properly protect against the release of heavy metals by the demolition work done on the second and third floor. The plaintiff must prove that heavy metals were released and caused the sickness suffered by the plaintiff.

[198] The fact that other staff had elevated levels of heavy metals does not mean that they got these levels from the dust generated by the renovations. They, like the plaintiff lived in the same area as the plaintiff. They were probably exposed to the same elements as he was in his life away from the hospital.

[199] The evidence that persons who had no contact with the hospital also had high levels is very compelling evidence to suggest that the levels are not directly connected to the hospital.

[200] To properly assess whether heavy metals were released by the construction at the hospital I believe it is important to consider whether in fact the plaintiff has heavy metal toxicity.

[201] If he has heavy metal toxicity that would be some evidence that he ingested them from the hospital dust. If he does not have heavy metal toxicity then obviously it would be strong evidence to support the suggestion that no heavy metals were released by the construction work.

DOES THE PLAINTIFF HAVE HEAVY METAL TOXICITY?

[202] I have received very large volumes of information about the plaintiff's medical condition. A large number of lab results have been put into evidence before me in regard to a number of witnesses. They were not very helpful unless there was an explanation offered about the results by a qualified professional.

[203] The plaintiff has subjected himself to many, many courses of treatment from alternative medicine personnel. He has gone to Mexico on two occasions for treatment. He has gone to New York to be treated at the clinic to deal with survivors of the 911 attach on the Twin Towers. He has consulted far and wide about treatments for his symptoms. He has clearly come to believe that he has been poisoned by heavy metals he ingested when the renovations were done at the New Waterford Hospital.

[204] Because he was so consumed by that fact and supported by Dr. Ben Boucher he often misstated some significant facts about his condition to medical personal. He misinformed Dr. Falchuk in Boston about how he came to be exposed. He misinformed Dr. Perlmutter about when he became sick relative to the renovations. He did not advise Dr. Perlmutter that his family had elevated levels of metals.

[205] He started an action against his disability insurance company and even at that point when he was asked on discovery in October, 2005 (Exhibit 119) when the renovations at the hospital were completed he responded:

> "In the ... they lasted for approximately a year on the third and second floor. They started in the spring of 2002, spring/summer , and they finished in the spring/summer of 2003 when I got sick."

[206] I can only explain the plaintiff's confusion about the facts because of his belief that the renovations must have caused the problem because there was no other explanation.

[207] I will now deal with the conflicting medical opinions about the plaintiff's medical condition.

THE MEDICAL OPINIONS:

[208] The plaintiff's treatment for heavy medical toxicity started when he first saw Dr. Boucher on May 13, 2003. He was referred by Dr. Glenna Morris a naturopathic

doctor because she felt that Dr. Boucher had experience dealing with heavy metal toxicity.

[209] Dr. Boucher testified that he is a G. P. working in a clinic in Port Hawkesbury, Nova Scotia. He started practising in 1979 and worked at the Inverness Hospital until 1990. In 1990 he took a three day course in California on chelation therapy and started using it in his practice. He did that until 1994 and then stopped for four years because he was working at the Straight Richmond Hospital and that therapy was not covered by M.S.I.

[210] In 1998 he resumed doing chelation therapy in his wellness clinic in Port Hawkesbury. He said his clinic has four doctors who now attend to about 4,000 patients. He said about five percent of the patients are patients needing chelation therapy. At present he said that he is the only doctor in the province doing that therapy. It is not covered by M.S.I. and each treatment costs about $100.00. Chelation therapy is used to deal with heavy metal toxicity and also to attempt to remove plaque from a patient's arteries.

[211] The court has heard that presently in the United States a major study trial has been undertaken to access chelation therapy in relation to the removal of plaque in heart patients.

[212] Dr. Boucher said that he saw 11 patients from the New Waterford Hospital for suspected heavy metal toxicity. He felt that six or seven of them undertook chelation treatment from him. He did not have his file material with him when he testified at the trial.

[213] Dr. Boucher testified that when he first saw the plaintiff he made a diagnoses of metal toxicity based on the plaintiff's symptoms which had started in May, 2002. The symptoms were vertigo, nausea, dizziness, sever pounding headaches, hypersensitivity to sound, tingling in legs, very painful joints, irritability, rages, fatigue and insomnia. At that point he had received the plaintiff's hair sample results showing traces of lead, cadmium, barium, bismuth, nickle, silver and uranium.

[214] He also received urine results with lead being mid range, mercury also mid range and antimony high.

[215] His notes from that initial consultation indicate a diagnoses of metal toxicity despite the fact that he testified that you can not make a complete diagnoses just on the test results. He then administered a challenge dose of chelation to confirm his diagnoses. His notes indicate that he started the plaintiff on a full treatment of chelation as of May 15, 2003 but in fact did not receive the results from the challenge dose until May 28, 2003 as indicated in his notes for that day. That is surprising in light of his generally stated belief that you should not jump into treatment quickly. He said that was the philosophy of his wellness clinic.

[216] Over the course of the next six years Dr. Boucher continued to treat the plaintiff with chelation therapy. During that period of time he never discussed his treatment of the plaintiff with the plaintiff's family doctor. He also acknowledged that the plaintiff has had more chelation treatments then any other patient he has ever had.

[217] Dr. Boucher surprisingly testified that he was not aware that the plaintiff's family members were tested and showed some elevated levels of metals. He said that if he had known that it would be of interest to him especially if they had symptoms. He said he was never told by the plaintiff that his family members had symptoms similar to his own.

[218] Much of Dr. Boucher evidence dealt with his efforts to counter, what he considered to be the approach advanced by the administration of the hospital. That involved making public statements about the hospital situation. He wrote a letter to the Cape Breton Post in which he explained his thinking of how heavy metals ended up in the hospital through the intake ventilation system.

[219] He was also upset that when Dr. Haines and Dr. Nieboer met with local doctors at the yacht club for the purpose of providing assistance to them in dealing with patients complaining about symptoms from the hospital, that he was not allowed to attend that meeting. He felt strongly that his side of the story should have been presented. I interpret his evidence on that issue to mean that he felt he knew why the staff were having symptoms being that they had been exposed to heavy metals while the two doctors from Ontario were convinced that it was not heavy metals that was causing the symptoms experienced by staff at the hospital.

[220] On cross-examination it was suggested to Dr. Boucher that his treatment of the plaintiff might be misguided because of the failure of the chelation treatments to solve the plaintiff's medical problems. He maintained that he was aware of some patients

that needed as many treatments as the plaintiff. He was questioned whether he considered any other sources for heavy metals toxicity instead of the hospital and he indicated that he had not.

[221] He was also asked if he considered the possibility that since the plaintiff was not able to eliminate all the heavy metals from his system that he might be continuing to be exposed. He said that was a good point and that he had not considered that. He did acknowledge that if the plaintiff's levels increased despite chelation he would look else where for a source.

DR. DAVID PERLMUTTER

[222] Dr. David Perlmutter testified for the plaintiff. He is a neurologist qualified to give opinion evidence on the diagnoses, treatment and prognoses of patients with toxic metal poisoning. Dr. Perlmutter runs a clinic in Maples Florida. He has been treating patients for heavy metal poisoning for 15 years.

[223] He interviewed the plaintiff by phone in July, 2006 at which time he agreed to have him come to his clinic for treatment. The plaintiff went there in August of 2006 at which time he was treated by Dr. Perlmutter.

[224] Dr. Perlmutter prepared a report dated February 8, 2009 (Exhibit 53) in which he outlined his opinions about the plaintiffs medical condition.

[225] In that report he reviewed the background of the plaintiff's situation and stated (Exhibit 53, Page 5):

> "DISCUSSION:
>
> In reviewing both my personal history and examination as well as information from those other treating physicians and independent evaluators, it seems clear that there is some evidence to indicate that Dr. MacIntyre has had elevation of heavy metals in various of his laboratory studies. It appears that the specific evaluation of the work environment, however, did not indicate that the renovation exposed him to levels of heavy metals which could account for his laboratory abnormalities. None the less with the environmental challenge he experienced at the time of the hospital renovation, there was an abrupt and, so far, persistent change in Dr. MacIntyre's health for the worse. Dr. MacIntyre is totally disabled at this time and, as mentioned, has spent considerable resources and emotional energy in attempting to regain his health. I agree that his examinations from a physical perspective as well as from a neurologic perspective are normal. Further, his objective studies have proven essentially unremarkable save for a mild abnormality noted on a PET scan and the above described abnormalities with reference to heavy metals. I would agree that there is no compelling evidence indicating a significant heavy metal toxicity issue with reference to these laboratory studies of Dr. MacIntyre. None the less, some individuals are specifically and exquisitely sensitive to even low levels of specific

heavy metals. Thus, despite having significantly normal laboratory values with reference to mercury and/or other heavy metals, some individuals can have significant physiological and neurologic compromise even at low levels of exposure. For example in an article entitled "Apolipo Protein E. Genotyping as a Potential Biomarker for Mercury Toxicity (Journal of Alzheimer's Disease Volume 5) 3, page 195 2003 by Godfried, ME., Et Al.) it is noted that some individuals who have a genetic predisposition carrying the APO E4 allele are at increased risk for "Adverse effects of chronic mercury exposure". Interestingly that report describes a urinary mercury challenge (getting a chelating agent) as being a "simple inexpensive procedure that provides objective confirmatory evidence."

While various of the above described reports have provided conjecture as to the validity of the thesis that Dr. MacIntyre has suffered heavy metal toxicity, I would indicate that it is quite likely Dr. MacIntyre is exquisitely sensitive to even low levels of heavy metal exposure, significantly below the threshold that would otherwise cause illness in other individuals. This statement is based upon my review of his temporal profile with reference to changes in his clinical presentation over the past several years with various attempts to both chelate heavy metals as well as up regulate a neuro-function as noted above.

• • •

In summary I would indicate:

1. Dr. MacIntyre is suffering from heavy metal toxicity and does seem to show improvement to a minimal degree with chelation therapy, a medically approved treatment for heavy metal toxicity.

2. Dr. MacIntyre experienced an abrupt change in his overall good health at the time of the environmental challenge as a resulting from the renovation at the hospital in which he was working.

3. Dr. MacIntyre was totally disabled at the time I examined and treated him.

> 4. Within a reasonable degree of medical probability Dr. MacIntyre will remain totally disabled for the rest of his life."

[226] On cross-examination Dr. Perlmutter was questioned about his report.

[227] He was asked whether he was aware that the plaintiff's family had tested for high levels of some metals. He said he did not know that and if he had it would have to use his words "be an important part of the puzzle". He was also questioned about some of the information he was given by the plaintiff about when he became sick in relation to when the renovations were done at the hospital. He indicated that he understood from the plaintiff that the renovations took one year to complete and that six months into the them the plaintiff first had symptoms.

[228] He was also asked about the suggestion that the plaintiffs symptoms steadily worsened when in fact the plaintiff had improved considerably at one point and then changed back to the worse again. Specifically that after his treatment in New York when he developed sever pain on the top of his head, a symptom which he did not have previously.

[229] Dr. Perlmutter also acknowledged that it would have been important to him if he had known that the plaintiff had in the past times when his body shut down from his work load. He was not made aware of that by the plaintiff.

DR. H. VASKEN APOSHIAN

[230] Dr. Aposhian was qualified as an expert toxicologist. He filed two reports (Exhibit 29 and Exhibit 30) he testified at the trial.

[231] Dr. Aposhian is not a medical doctor. He did not examine or treat the plaintiff. His opinion was (Exhibit 29, Page 4):

> "• Dr. DuncanMacIntyre has been exposed to low levels of a number of toxic heavy metals.
>
> • The synergistic action among those metals causes them to be more toxic in combination than individually at these low doses.
>
> • The chelation therapy, which Dr.MacIntyre has undergone, is an accepted treatment for heavy metal poisoning. It has not caused or contributed to Dr.MacIntyre's ongoing symptoms.
>
> • The metals to which Dr.MacIntyre has been exposed were present in the building materials in the New Waterford Hospital renovations."

[232] He explained his theory of synergistic effect as follows (Exhibit 29, Page 23):

> "**It appears that Dr.MacIntyre is suffering from the synergistic toxicities caused by exposure to a mixture of heavy metals (lead, cadmium, arsenic and perhaps mercury) at low concentrations. It needs to be pointed out that the toxicology of metal mixtures is different from the toxicology of a single toxic metal. Intensive studying of the toxicology of mixtures is just beginning.**"

DR. BETH BAKER

[233] Dr. Baker is a medical doctor with specialities in medical toxicology and occupational and environmental medicine and was qualified to give opinion evidence in these fields.

[234] She is an assistant professor at the School of Public Health at the University of Minnesota and assistant professor at the Department of Internal Medicine at the University of Minnesota Medical School.

[235] She has a private company called Medical and Technological Counselling Services Limited by which she does assessments for employers in regard to employees having medical problems at the job site.

[236] She was engaged by the plaintiff's disability insurance company to do an assessment of the plaintiff to determine if he was disabled and unable to continue his dental practice.

[237] Dr. Baker saw the plaintiff on November 19, 2003 for an independent medical assessment. She prepared a report (Exhibit 60) and a follow up report (Exhibit 61) and she testified at the trial.

[238] In her report and in her evidence Dr. Baker was of the opinion that the plaintiff does not suffer from heavy metal toxicity and that heavy metals are not causing any physical symptoms he has experienced over the last number of years.

[239] Dr. Baker was provided with a large number of previously prepared reports in regard to the plaintiff and in her report she reviewed the said reports.

[240] The heart of Dr. Baker's report is set out in her following conclusions (Page 8):

> " 2. Review of Dr. MacIntyre's medical notes indicates that he has had normal physical exams with no objective findings on the majority of his exams. Again, as previously stated, he has had and extensive workup including multiple scans and laboratory tests performed. At one point he had a mildly elevated non-fasting blood sugar, but repeat fasting blood sugar and glucose tolerance test was normal. He had a hypofunctional right labyrinth by ENG in December of 2002. The majority of his laboratory work prior to chelation has been normal except as noted above. He did have an elevated urine antimony prior to chelation.
>
> Dr. MacIntyre has a diagnosis of heavy metal poisoning but that is not adequately substantiated in the medical chart. Dr. MacIntyre had a normal blood cadmium, lead, mercury, thallium, antimony, nickel, and arsenic on April 30, 2003. This was done prior to any chelation. Dr. MacIntyre also had a normal urine lead, cadmium, mercury, thallium, barium, beryllium, nickel, silver, uranium, and arsenic on April 30, 2003. The only compound that was mildly elevated on Dr. MacIntyre's labs in April of 2003 was a urine antimony of 0.96 nanomoles per liter with normal being 0-0.46. Most toxicologists feel that urine and blood levels are more accurate than hair levels. Hair level results are less reliable than urine and blood levels and the results of the hair assay may be variable and unreliable depending on what lab performs the analysis. There was an article in the Journal of the American Medical Association in January 3, 2001 titled "Assessment of Commercial Laboratories Performing Hair Mineral Analysis." Hair mineral analysis was found to be unreliable from multiple laboratories and they recommended that health care practitioners avoid using such analysis to assess individual nutritional status or suspected environmental exposures.
>
> Dr. MacIntyre then proceeds to tell health care providers that he did have high heavy metal testing results but the only elevated heavy metal prior to any chelation was the urine antimony. Antimony exposure may cause respiratory, eye, and skin irritation. Dr. MacIntyre does not complain of eye, nose, or throat irritation nor does he complain of a skin rash. I do no think that Dr. MacIntyre's symptoms are consistent with heavy metal poisoning nor are his labs consistent with heavy metal poisoning. The only lab that

shows elevated metals prior to chelation, excepts the elevated urinary antimony, is hair testing and hair testings reliability has been questioned repeatedly in the past.

• • •

7. I do not feel that Dr. MacIntyre absorbed excess amounts of toxic heavy metals in the building and this is borne out by the fact that his blood metal and urine metal testing except for the elevated antimony were normal.

8. I am quite concerned about Dr. MacIntyre's ongoing chelation treatment. As most toxicologists know there is always a trade off between the benefits of chelation and side effects of chelation. The chelators pull off not only potentially harmful metals such as lead, but also will pull off essential metals that are needed by the body such as sulfur, manganese, magnesium, and iron. It is important that these metals be present in the body as they are used by enzyme systems and other body processes. Dr. MacIntyre complains of muscle fasciculations during and after treatment, and at one point had chest pain after chelation treatment. At this point Dr. MacIntyre appears to have had an excessive amount of chelations treatment and I would be concerned that some of the fluid shifts or loss of essential minerals are actually potential causes of Dr. MacIntyre's ongoing symptoms. Dr. Leckey expressed similar concerns in his September 9, 2003 letter. At this point I do not think that Dr. MacIntyre needs any further chelation."

[241] Following receipt of that report Dr. Baker was asked to provide a follow up

report after being advised of the testing done on the plaintiff's family members.

[242] On June 21, 2006 she provided the following to counsel for the insurance company (Exhibit 61):

> "1. **Is there any material information provided from a comparison of Dr. MacIntyre's test samples to those of his family members?**
> The urine and hair results on Dr. MacIntyre and his family from 2003 show that all members of his family have had elevated hair and urine metal levels. I have summarized their results as follws:
>
> a) April 9, 2003: Duncan MacIntyre hair results: elevated barium, bismuth, cadmium, lead, nickel, silver
>
> b) June 18, 2003: Anne MacIntyre urine results: elevated beryllium, selenium, strontium, sulfur, thallium, vanadium
>
> c) June 4, 2003: Ainsley MacIntyre hair and urine results: elevated aluminum, antimony, barium, cadmium, nickel, thallium, uranium
>
> d) June 4, 2003: Duncan MacIntyre Junior hair and urine results: elevated aluminum, antimony, barium, beryllium, nickel, titanium
>
> e) June 4, 2003: Alexandra MacIntyre hair and urine results: elevated aluminum, antimony, barium, nickel, titanium, uranium
>
> f) June 4, 2003: Olivia MacIntyre hair and urine results: elevated antimony, barium, beryllium, nickel, titanium, uranium

The hair and urine results are from London Laboratory Services and the two most likely explanations for the above results are as follows:

1. That laboratory results are not accurate or reliable and the entire family does not have multiple elevated metal levels. It is possible the results are false positives or due to some external contamination.

2. The entire family is exposed to excess amounts of a variety of metals resulting in elevated metal levels in all family members. This would suggest that the entire family shares some type of common exposure that may be occurring such as in their home or from other sources of exposures that they are all exposed to."

DR. RICHARD PARENT

[243] Dr. Richard Parent testified for the defendant. He is a toxicology and was asked by counsel for the defendant to review the medical reports filed by the experts for the plaintiff and to undertake some independent research with respect to chelation therapy and also to give an opinion on the opinion filed by Dr. Aposhian with particular emphases on the issue of synergistic action among heavy metals.

[244] Dr. Parent filed his report (Exhibit 92, Tab 3) and testified at the trial.

[245] In his report and in his testimony Dr. Parent took serious issue with the treatment provided by Dr. Boucher to the plaintiff. He said:

> "Apparently, remaining convinced of his alleged intoxication, Dr. MacIntyre went to Dr. Boucher, telling him that he had been poisoned with heavy metals and showing his hair and urine analyses as proof. Dr. Boucher then subjected Dr. MacIntyre to chelation therapy, the first of many treatments, and, not surprisingly, found heavy metals in his urine. To conclude that Dr. MacIntyre was contaminated with heavy metals as a result of his hair, urine, and chelation challenge, is unconscionable. I, therefore, opine that it is highly probable that Dr. MacIntyre was not exposed to heavy metals beyond the normal background level at the New Waterford Consolidated Hospital facility and that his subsequent multiple chelation treatments as administered by Dr. Boucher and others are far beyond any medical practice approved by either the Canadian or American Medical Association."

[246] He also discounted Dr. Aposhian opinion. He said:

> "On the other hand, Dr. Aposhian's report relating to Dr. Duncan MacIntyre is based on erroneous assumptions and little, if any, scientific foundation. He bases his contention that Dr. MacIntyre has been poisoned partly on Dr. Boucher's erroneous diagnosis but, even more importantly, on the assumption that he was looking at urinary excretion data before chelation when he was actually looking at post-chelation data. The implication of this gross error has been discussed previously in this report. Also, Dr. Aposhian puts forth his "synergism hypothesis" and fails badly when he attempts to justify this hypothesis scientifically. I opine that it is highly probable scientifically that Dr. Aposhian's report is without merit since it is based on erroneous assumptions and an unproven hypothesis."

[247] He concluded as follows:

> "Based on all of the information reviewed as indicated above and my own experience in chemistry and toxicology, I opine with scientific certainty:
>
> - that there is no scientific foundation for heavy metal exposure during the 2001- 2002 renovations at New Waterford Consolidated Hospital,
>
> - there is no scientific foundation for the allegations that Dr. MacIntyre was exposed to anything beyond a normal background level of heavy metals during the 2001-2002 renovations at NWCH, and
>
> - that there is no foundation to indicate that Dr. MacIntyre is suffering from medical problems related to an exposure at the NWCH during the 2001-2002 renovations.
>
> I further opine with scientific certainty that Dr. Aposhian's synergism theory as described in this report is without scientific foundation and merit, and that Dr. Boucher's diagnosis of heavy metal toxicity is a sham."

[248] On cross-examination Dr. Parent acknowledged that he is not a physician and that he had not interviewed or had any contact with the plaintiff.

[249] He was asked about Dr. Perlmutter's opinion on the plaintiff's condition and he said that he felt there was no scientific foundation for his opinion about certain people being explicitly sensitive to low levels of heavy metals.

DUST SAMPLES

[250] During the course of this trial evidence was presented in regard to some dust and debris that was collected from the area of the plaintiff's office.

[251] In the summer of 2003 probably in May or June, Darren Burke a member of the cleaning staff at the hospital said he was asked by Lynette McVicar to get a sample of the dust that was generated by the renovations done to the hospital. He understood that the plaintiff wanted such a sample.

[252] He said he went into the pharmacy room which adjoins the plaintiff's office area. He took a ladder and reached into the plaintiff's office above the ceiling tiles and scrapped some dust and debris from the tiles. He put that material including an item he felt was electrical item into a plastic bag. He also went into the plaintiff's office and found a ceiling tile on the floor which had been removed from the ceiling.

[253] He gave the dust debris and the ceiling tile to Judy MacGibbon a staff person at the hospital.

[254] Mr. Burke was shown Exhibit 34 which contains a small plastic bag (Exhibit 34 A) and (Exhibit 34 B) a broken ceiling tile. He identified Exhibit 34 A as being the bag of debris he collected from the plaintiff's ceiling. He did that by the presence of the plastic electrical item in the bag. He said the ceiling tile was not broken when he took it from the plaintiff's office.

[255] Dr. Anne Ready the wife of the plaintiff testified that some time in 2003 Judy MacGibbon called her and said she was prepared to retrieve a sample of dust from the plaintiff's office. She called later and indicated that she was coming to the office with the sample. She arrived at the office and delivered Exhibit 34 containing the small plastic bag and the ceiling tile. Dr. Ready said she put the plastic bag in her safe and the ceiling tile in her unused shower.

[256] In January 2006 Dr. Ready delivered both items to the home of the mother of one of the plaintiff's lawyers.

[257] Counsel have agreed that the items delivered to Halifax by Dr. Ready were the items tested by the Halifax labs. Defendant's counsel does not agree that the items delivered to Halifax were the same items collected by Darren Burke.

[258] Introduced into evidence were a number of lab results (Exhibits 27 and 28) from Dalhousie University and Maxim Analytical which were the results of the testing done on “ceiling tile dust” and ceiling insulation.

[259] The results indicated the presence of a number of elements, however, no attempt was made to explain whether the levels detected were unusual to be found in such dust or whether the results were high.

[260] I am not prepared to conclude anything from Exhibits 27 and 28 that helps the plaintiff in showing the heavy metals were present in the dust generated by the renovations at the hospital.

[261] I do conclude that the dust analysed by the two labs was the dust and debris collected by Darren Burke from above the ceiling tile in the plaintiff’s office.

[262] Counsel have agreed that testing done on the ceiling tile did not establish the presence of any asbestos in the ceiling tile.

UNCAPPED SEWER PIPE

[263] Another issue that arose during the trial was the discovery of an uncapped sewer pipe.

[264] Ricky Bennett was questioned by counsel for the plaintiff about an uncapped sewer pipe. He indicated that in 2005 while work was being done on the ventilation system in the hospital, the workers set up a negative air system and following that a foul odour was detected in the offices previously occupied by the plaintiff.

[265] He said the odour was traced to an interior wall and when the wall was opened up an uncapped inch and a half cooper vent pipe was discovered. Mr. Brennick said he arranged for a cap to be put on the pipe. He felt that the pipe was connected to other vent pipes within the hospital.

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

THE CAUSATION ISSUE:

[267] In assessing the differing medical opinions advanced in this case I must always be aware that the burden is on the plaintiff to prove on a balance of probabilities that his medical condition which started to develop in May, 2002 was caused by exposure to heavy metals while he worked at the hospital.

[268] The legal standard of proof is the "but for" test as set out by ***The Supreme Court of Canada*** in the leading case of ***Athey v. Leonati [1996] 3 S.C.R. 458*** where the court stated the issue as follows:

> "13 Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell,* [1990] 2 S.C.R. 311; *McGhee v. National Coal Board,* [1972] 3 All E.R. 1008 (H.L.).
>
> 14 The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren,* [1972] S.C.R. 441.
>
> 15 The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of injury: *Myers v.*

Peel County Board of Education; [1981] 2 S.C.R. 21, *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.); *McGhee v. National Coal Board, supra.* A contributing factor is material if it falls outside the *minimis* range: *Bonnington Castings, Ltd.v. Wardlaw, supra*; see also *R. v. Pinske* (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.), aff'd [1989] 2 S.C.R. 979.

16 In *Snell v. Farrell, supra*, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

17 It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (*The Law of Torts* (8th ed. 1992) at p. 193), a "fire ignited in a wastepaper basket is . . . caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth". As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence."

[269] Our ***Court of Appeal*** stated the issue in the case of ***McNaughton v. Ward, 2007 NSCA 81*** where Saunders, J. A. said:

"**Causation**

> [102] While deciding the issue of causation may in some cases be difficult, it is not an especially complex exercise. At the end of the day the trier must decide on the evidence before it whether the plaintiff has proved that the defendant's tortious conduct caused or materially contributed to the plaintiff's injury. The causation test should not be applied too rigidly: **Snell v. Farell**: [1990] 2 S.C.R. 311. Causation need not be resolved with scientific precision: **Alphacell Ltd. v. Woodward**, [1972] 2 All E.R. 475. Causation is essentially a practical question of fact which can best be answered by ordinary common sense (per Sopinka, J. in **Snell**, supra, at page 328). Causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: **Myers v. Peel County Board of Education**, [1981] 2 S.C.R. 21. A contributing factor is material if it falls outside the *de minimis* range: **Athey**, supra; **R. v. Pinske** (1998), 30 B.C.L.R. (2d) 114 (BCCA) aff'd [1989] 2 S.C.R. 979."

[270] ***The Supreme Court of Canada*** revisited the issue of causation in the case of ***Resurfice Corp. v. Hanke [2007] 1 S.C.R. 333*** Chief Justice McLachlin stated:

> "20 Much judicial and academic ink has been spilled over the proper test for causation in cases of negligence. It is neither necessary nor helpful to catalogue the various debates. It suffices at this juncture to simply assert the general principles that emerge from the cases.
>
> 21 First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.
>
> 22 This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in *Athey v. Leonati*, at para. 14, *per* Major J., "[t]he general, but not conclusive, test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant". Similarly, as I noted in *Blackwater v. Plint*, at para. 78, "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities"

> 23 The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p. 327, *per* Sopinka J."

[271] All the medical experts gave their opinions not only about the plaintiff's medical condition but also about the cause of that condition.

[272] Dr. Boucher, Dr. Aposhian and Dr. Perlmutter were all of the opinion that the plaintiff suffers from heavy metal toxicity and that it was caused when he was exposed to dust from the renovations at the hospital.

[273] Dr. Baker and Dr. Parent question whether the plaintiff does in fact suffer from heavy metal toxicity.

[274] Both Dr. Perlmutter and Dr. Aposhian offered no clear evidence as to why they felt that any heavy metals found in the plaintiff's system came about as a result of his ingestation of dust during the renovations.

[275] Dr. Perlmutter apparently was not aware that the plaintiff's family members had some elevated heavy metal levels.

[276] Dr. Aposhian's report was based on his understanding that the first lab results on the plaintiff were pre-chelation when in fact they were post chelation results when this was pointed out he surprisingly suggested it did not effect his opinion.

[277] Dr. Perlmutter in his report suggests that because the plaintiff (Page 6) "experienced an abrupt change in his overall good health at the time of the environmental challenge as a resulting from the renovation at the hospital in which he was working".

[278] That opinion I believe is to some extent based on his understanding of the factual situation. In his July 24, 2006 interview with the plaintiff on the telephone he noted (Exhibit 1 B, Page 904):

> "His problems began some 4 ½ years ago. He was working in a hospital that underwent renovation. It was an eleven-month renovation and, six months into it, he began feeling "shaky." He states he felt "different." With time, he felt more and more ill experiencing chest pain, headache, joint pain, and "neuropathic pain" involving the left ear and throat. Ultimately, his symptoms became so severe that he was unable to work and, indeed, has not been able to work for the past 3 ½ years."

[279] After that interview he concluded as follows:

> "I have obviously not had the opportunity to examine this gentleman. Nonetheless, he has a history as described above with a sudden and profound decline in his health with specific neurologic issues and generalized fatigue, as described above, which are likely a consequence of the toxic exposure he experienced. Indeed, other people that were working near him at the time of the exposure have had similar, if not more severe compromise, with apparently one orthopedic surgeon developing a severe bilateral footdrop and now being also unable to work. Others have also developed footdrop, Dr. MacIntyre report."

[280] It would appear that Dr. Perlmutter at that point had accepted the proposition that the "sudden and profound decline in his health" had closely followed the alleged exposure and that it must therefore have been caused by the exposure.

[281] I conclude the Dr. Perlmutter was at that point more interested in offering treatment to the plaintiff then to investigate the cause of his medical condition. He was being presented with a patient who was looking for help and who was already undergoing chelation therapy by a doctor in Nova Scotia for heavy metal toxicity. I do not believe Dr. Perlmutter ever directed his mind to the issue of whether the sources of the heavy metals was the plaintiff's work place or some other source. I do not believe that was important to him when he started to treat the plaintiff.

[282] Dr. Perlmutter was a very impressive witnesses. He is obviously competent in his field and deals with heavy metal issues on a daily basis. He talked about how important it is to deal directly with a patient as opposed to simply looking at reports. He did a complete physical examination of the plaintiff before he started treatment. He concluded that most of the plaintiff's symptoms could be consistent with heavy metal toxicity. He also felt that many of the symptoms including "chest pain, headaches, joint pain and neuropathic pain involving the left ear and throat" could be symptoms experienced by many people and not necessarily only from heavy metal toxcity.

[283] Dr. Perlmutter was not able to produce what if any material was sent to him by the plaintiff prior to that first interview in July, 2006.

[284] He was also not aware of the suggestion that in the past the plaintiff had times when he had to shut down because of the pressure of his work. He was shown Exhibit 18, Page 61 where the plaintiff told Dr. Johnathan Fox of the Nova Scotia Environmental Health Centre that he had a pattern of "body shutting him down".

[285] Dr. Perlmutter said that he was not aware of that medical history of the plaintiff and it would have been very important to his evaluation of the plaintiff.

[286] He also acknowledged that if he had known the plaintiff became sick months after the renovations it would influence his opinion about the cause of the heavy metal issue.

[287] Dr. Ben Boucher's opinion is that the renovations caused the situation which led to the plaintiff having heavy metal issues. He initially felt that the cause was from the intake of bad air at the hospital. He felt the location of the hospital in proximity to the coal burning generating plant and the Sydney steel smelting plant was a significant factor.

[288] In a letter to Dr. Mike Ryan on January 8, 2004 (Exhibit 2, Tab 31) Dr. Boucher stated:

> "My knowledge of the exposure to toxic metals at the New Waterford Hospital is this:
>
> The hospital was probably exposed to air pollutants (taken into its air exchange system) from the Sydney steel smelting plant and the Lingan electrical generating

> station, both coal fired facilities. Coal fired activities can produce various air pollutants including numerous toxic metals such as arsenic, lead, cadmium, beryllium, antimony and others. The air exchange system, if not cleaned on a regular basis and/or filters not replaced regularly could account for accumulation of these metals with recirculation, concentration and further recirculation. Employees would have chronic exposure to those metals.
>
> There were two renovations at the hospital- one for approximately one year on the 3rd floor and another for approximately six weeks on the 2nd floor. The possible problems with the renovations were that they were apparently not done by experts in the field; the areas renovated were apparently not adequately isolated; there was apparently no negative air flow; and there were no pre, during, and post renovation air quality studies."

[289] Following the reports from Helen Mersereau I understand Dr. Boucher's position to be that the renovations were the main cause of the problems suffered by the plaintiff and the other employees of the hospital.

[290] I understand Dr. Boucher's opinion about the cause of the heavy metals to be simply based on the fact that 11 employees he saw as patients all have similar symptoms and all worked at the hospital during the time of the renovations, therefore the renovations must have been the cause of the symptoms. I am not prepared to accept that as a logical conclusion.

[291] Dr. Boucher treated six or seven of these patients for heavy metal toxicity. He also prepared what he described as a cohort comparison chart by which he proposed

to compare 11 patients at the Strait Regional Hospital in Richmond County to 11 patients at the New Waterford Hospital. He suggested that based on this comparison it supported his theory that the problems were caused by the hospital.

[292] I am not prepared to put any weight on this study in dealing with the cause of the symptoms in the staff at the New Waterford Hospital. I am not satisfied that the comparison provides any useful information upon which any conclusion can be based.

[293] Dr. Boucher considered that the cause of the problem with employees at the hospital was the renovations. He did that I believe because he could not refute the scientific information provided by the Helen Mercereau studies about the air quality at the hospital.

[294] In his report (Exhibit 41) Dr. Boucher's only basis for saying that the plaintiff's problems were caused by the renovations was because other staff at the hospital had similar symptoms.

[295] It is difficult to understand why Dr. Boucher would conclude that the renovations caused the problems simply because other staff had similar symptoms.

[296] The report prepared by Dr. Nieboer did not conclude that the staff showed similar symptoms consistent with heavy metals. Peggy Forward testified that the first complaint that she had as the health and occupational safety nurse at the hospital was in May of 2003 from a Ms. Beaton, a nurse working in the OR. That complaint was about air quality and resulted in the testing that was done at the hospital in the summer of 2003.

[297] I am not convinced that Dr. Boucher's opinion that the plaintiff's medical problems as he found them in May, 2003 were attributable to the renovations at the hospital in July of 2001 should be given any weight. To say that simply because a number of people got sick who all work at the hospital and therefore the renovations caused the sickness fails to consider the fact that the testing done at the hospital did not disclose the presence of any heavy metals either in the air or the materials which would make up the walls and floors demolished in the renovations.

[298] Dr. Beth Baker gave her opinion in written form and testified at the trial. At the outset it might appear that her opinion on the plaintiff's medical condition should be carefully scrutinised because she was hired by the company that had to decide if the

plaintiff was entitled to disability benefits from it. She only saw the plaintiff for one fairly short visit and her notes for that interview were somewhat disorganized. However, after reviewing her report and hearing her evidence I have concluded that her opinion about the plaintiff is the most logical and credible.

[299] She made very clear the point that the plaintiff did not have elevated levels of heavy metals before he was started on the chelation therapy regime by Dr. Boucher. She explained how it would be expected that high levels would be observed after chelation. She questioned the number of chelation treatments received by the plaintiff from Dr. Boucher and others.

[300] She expressed the opinion that challenge dose testing for heavy metals is no longer accepted as a method to determine heavy metal toxicity.

[301] Finally and most importantly she felt that if the plaintiff had heavy metal toxicity and had received the amount of chelation he has been subjected to why has the problem not been resolved.

[302] Her view which she said she addresses to medical students as a professor is that if prolonged treatment is not solving the problem maybe a person should look to the original diagnoses and reassess its validity.

[303] I conclude after assessing the conflicting medical opinions that I prefer the opinion of Dr. Baker over that of Dr. Boucher, Dr. Perlmutter and Dr. Aposhian.

[304] The opinions offered by the medical experts called on behalf of the plaintiff are opinions on the ultimate issue in this case. That is whether the plaintiff has heavy metal toxicity and if so what was the cause.

[305] To prove his case the plaintiff must establish that he has heavy metal toxicity and that it was caused by the release of dust into his area of the hospital. That is the basis of his case. Suggestions of other causes or problems at the hospital do not help him prove that issue because there is no suggestion of negligence in regard to the other issues such as the poor ventilation problem.

[306] Clearly the court after hearing all the evidence and after having that evidence tested by cross-examination is in a better position to decide if the renovations and the resulting dust caused the plaintiff to ingest heavy metals into his system.

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

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

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

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

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

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

[312] Clearly the plaintiff wanted to get back to work. He continued to discuss after he stopped working the question of alternative office space in another hospital run by the defendant.

[313] After he started chelation therapy his condition became significantly worse and he had no capacity to work at his profession. I make no comment on his decision to continue with chelation therapy in light of the affect it was having on him.

[314] I would also comment that in documenting the medical condition of other staff persons I have not reviewed the evidence presented by Dr. James Callicutt. He had testified about his medical problem causing him to give up his work as an orthopaedic surgeon. He had a part time office at the New Waterford Hospital.

[315] He explained in his evidence how he was tested and while some tests results were elevated he had no symptoms. He therefore took no action until some months later when he had significant symptoms. He was treated by Dr. Leckey and went to the Mayo Clinic in Boston. He also contacted Mr. Boucher and took chelation therapy for about five months. He gave that up because he felt "it wasn't worth being alive" and that he had further medical problems which required hospitalization but he was able to recover and has hopes of returning completely to his former profession.

[316] I am not able to conclude anything helpful to the plaintiff from Dr. Callicutt's evidence therefore I have decided not to detail his medical condition in this decision.

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

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

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

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

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

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

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

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

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

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

[319] The plaintiff here has suffered a great deal. His life has been torn apart by his illness. He is a good man and a skilled dental surgeon. The court finds no joy in

denying his claim, however, the legal system requires that a plaintiff prove his claim based on certain legal principles including proof of causation.

[320] I conclude that the plaintiff has not met the "but for" test and I dismiss his claim against the defendant.

[321] I award costs to the defendant.

DAMAGES

[322] Despite the fact that I have found against the plaintiff I feel that it is appropriate that I indicate on a provisional basis my position in regard to his claim for damages.

[323] The plaintiff has filed a claim for substantial damages. He has filed a number of exhibits setting out his claim. In exhibit 4 he claims for special damages incurred mainly as a result of the extensive efforts he made to get medical attention for his condition. This involved the cost of his chelation treatments, supplements he took as a result of taking chelation, his trips to Mexico and New York, his colonic treatments

and his trips to Naples, Florida to attend with Dr. Perlmutter and the cost of the treatment received there. His total special damages claim is for $260,000.00.

[324] The defendant has not seriously disputed the amounts claimed but takes the position that a lot of these treatments were unnecessary and done by the plaintiff without advice from his own doctors.

[325] I conclude that had the plaintiff been successful I would have reduced his claimed amount for special damages considerably. I believe he undertook treatment which I find were questionable and unreasonable. The trips to Mexico I find did little to improve his medical condition. His trip to New York was also questionable.

[326] I would conclude that it was reasonable for him to obtain treatment from Dr. Perlmutter in Florida. That course of treatment was recommended by Dr. Boucher.

[327] I would provisionally award an amount of $100,000.00 for special medical expenses.

[328] The plaintiff filed with the court Exhibit 120 which is an actuarial report by Mr. Paul Conrad. Mr. Conrad did not testify at the trial.

[329] Dr. R. K. House filed a report (Exhibit 38) and testified at the trial. He testified that he attempted to predict what the plaintiff's income would be if he had not stopped working and would continue working until he reached the age of 65. He started with his annual income for 1997 to 2002 being his last full year of income. His chart estimated his future claim to be between $10,303,000.00 to $16,153,000.00 and estimated his past income to the end of 2007 at about $3,600,000.00.

[330] His final calculation for total loss of past and future income to be $17,500,000.00.

[331] I am prepared to accept the approach taken by Dr. House in estimating the plaintiff's future income. However, I am not prepared to conclude that he would be disabled until age 65. I conclude that based on the plaintiff's present medical condition that he should be able to return to work within the next three years and therefore based on Dr. House's calculations should be entitled to loss of future income

for three more years. This assumes that he would require some time to be reinstated as a dental surgeon.

[332] Paul Conrad's report has not been questioned by defendant's counsel. He dealt with the plaintiff's cost of future care and his lost associated with domestic capacity.

[333] I am not prepared to accept the assumption in the Conrad report that the plaintiff will continue to have the kind of future medical costs he has incurred up to the present.

[334] I consider that it would be reasonable that he will continue to have future medical costs but not anywhere near what he has had in the past.

[335] For the past six years the plaintiff has spent a lot of money in an attempt to find a solution to his medical condition. I conclude it is time that he step back from the alternative medicine program and back into conventional medicine most of which should be covered by M.S.I. On a provisional basis I would award him the sum of $10,000.00 per year for the next three years to cover his medical costs.

[336] I am not prepared to award any amount for the loss of domestic capacity. No amount has been proven in my opinion.

GENERAL DAMAGES

[337] The plaintiff seeks general damages. Counsel in the pre-trial briefs suggests the sum of $125,000.00. The defendant suggests a range between $99,000.00 and $52,000.00.

[338] If I had found in favour of the plaintiff and had awarded the damages indicated above I conclude that an appropriate award of general damages considering the symptoms suffered by the plaintiff over the past seven years would be the sum of $75,000.00.

PUNITIVE DAMAGES

[339] The plaintiff has claimed punitive damages. I would not in these circumstances have awarded him punitive damages if he had been successful in his action.

MacLellan, J.