CIVIL FAX Vol. 8, No. 2

Fletcher v. Manitoba Public Insurance Corp.

Administrative - Bias -Political Contributions to Party - Pecuniary Interest - Chairman Insurance - Automobile - Benefits Payable - Political Bias of Tribunal

December 15, 2004 C.A., Huband, Kroft and Hamilton, JJ.A. 34 paras, 9 pages
S. Green, Q.C. for Appellant 2004 MBCA 192
T.D. Gisser and S. Hyman for Respondent
J.R. Shaw for Intervenor http://www.canlii.org/mb/cas/mbca/2004/2004mbca192.html

Cases Considered: *Wewaykum Indian Band v. Canada, [2003] 2 S.C.R. 259; R. v. S. (R.D.), [1997] 3 S.C.R. 484; Szilard v. Szasz, [1955] S.C.R. 3*; *Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369*

Statutes Considered: *The Manitoba Public Insurance Corp. Act, ss. 131, 138, 175, 176, 178, 179*

Appellant, president of the Progressive Conservative Party of Manitoba, appealed a decision which held that there was no reasonable apprehension of bias because the chairperson of the appeal panel hearing his case had made donations to the New Democratic Party of Manitoba. Appellant argued the issue was political in nature as it concerned the additional attendant care costs he would incur as president. Appellant also questioned the pecuniary interest of the chairperson who was re-appointed as deputy chief commissioner with a full-time salary.

HELD: Appeal dismissed. The issue was not political as it largely concerned benefits and the threshold test for bias was not met. The decision was unanimous and that was an important consideration regarding the request to nullify a decision of an administrative tribunal. The pecuniary interest argument was too remote and speculative to have merit.

Seshia v. The Health Sciences Centre et al.

Practice - Costs - Solicitor-Client Costs - Assessment - Voluminous Brief

December 6, 2004 Q.B., Winnipeg, Duval, J. 28 paras, 6 pages
E. Beth Eva for Applicant http://www.canlii.org/mb/cas/mbqb/2004/2004mbqb272.html
Richard J. Handlon for Respondents 2004 MBQB 272

Cases Considered: *Chicago Blower Co. v. 141209 Canada Ltd. and Transregent Holdings Ltd., (1986) 43 Man. R. (2d) 130; Godwin v. Storrar, [1947] 1 K.B. 457*

Statutes Considered: *The Court of Queen's Bench Act, s. 96(1); Queen's Bench Rule 57*

Texts Considered: *Orkin on The Law of Costs, 2nd ed., 2003*

Respondents were ordered to pay 75% of Applicant's solicitor-clients costs and argued that the quantum of $112,000 was excessive. Respondent argued that Applicant had filed a voluminous brief relying upon many needless authorities which wasted the Court's time. Respondents further sought a reduction regarding the preparation of an affidavit, 40% of which was struck. Applicant argued that they reduced much of their costs already and that Respondents contested all issues and Applicant was successful on all but one. The case concerned Applicant's position and reputation in the medical community.

HELD: Costs reduced by approximately $13,000. Respondents cannot blame Applicant for preparing a case on issues that it refused to admit, especially when the matter was as serious as protecting Applicant's professional livelihood. The brief however, was excessive. The cost of preparing it should be reduced from $53,000 to $40,000. Solicitor-client costs should be assessed more liberally than a taxation of a solicitor's account and the Court should also respect the 25% reduction previous made.

Sparrow v. The Manufacturers Life Insurance Company et al.

Employment - Wrongful Dismissal - Human Rights Violation - Conditional Stay
Human Rights - Wrongful Dismissal - Conditional Stay - Commission's Process
Practice - Stay-Conditional-Striking Claim- Amending Claim - Administrative Tribunal

December 17, 2004 Q.B., Winnipeg, Suche, J. 52 paras, 8 pages
Carolyn Frost for Plaintiff http://www.canlii.org/mb/cas/mbqb/2004/2004mbqb281.html
Tyler Kochanski for Defendant New Flyer Industries Limited 2004 MBQB 281

Cases Considered: *Glenko Enterprises Ltd. v. Keller, [2000] M.J. No. 444 (CA); Seneca College of Applied Arts and Technology v. Bhadauria, [1981] 2 SCR 181; Tenning v. Manitoba, [1983] M.J. No. 79 (CA); Orpen v. Roberts, [1925] SCR 364; Varnam v. Canada (Min. of National Health and Welfare) (1987), 12 FTR 34*

Statutes Considered: *The Human Rights Code; Q.B.R. 21.01(3); Human Rights Code (Ontario)*

Defendant sought to strike or stay a claim as a abuse of process on the grounds that the matter was under consideration by a human rights adjudicator. Plaintiff developed an illness affecting his eyesight and was subsequently fired. Plaintiff sought general damages including damages for "humiliation, loss of self-respect" as stipulated in *The Human Rights Code* ("Code"). Defendant pointed out that general damages were not available for breach of an employment contract. Plaintiff argued the case was one of wrongful dismissal, but was relying on the Code's requirements and sought leave to amend claim to seek damages for wrongful dismissal. The claim was filed before the Human Rights Commission ("Commission") in 2003 and no further action has been taken by it.

HELD: Motion to strike claim dismissed. Motion to stay granted conditionally for four months. Part of the claim regarding humiliation and loss of self-respect was struck. Plaintiff's motion to amend claim granted. The Court would like more information regarding the Commission's process before deciding on a permanent stay. Plaintiff has a novel claim and there is no reason why it cannot be heard by the Court if the Commission fails to address the matter in a timely fashion.

Zelenski v. Jamz et al.; Zelenski v. Houston

Evidence - Production of - Failure to - Breach of Discovery - Dismissal of Action
Practice - Dismissal of Claim - Failure to Produce Evidence - Costs - How to be Paid
Wills & Estate - Costs - Solicitor / Client Costs - Plaintiff's Share of Estate

November 19, 2004 Q.B. Winnipeg, Scurfield, J. 36 paras, 11 pages
Allan P. Baker for Plaintiff http://www.canlii.org/mb/cas/mbqb/2004/2004mbqb256.html
Allan L. Dyker for Defendant Randall Jamz 2004 MBQB 256
William K.A. Emslie for Defendants Sheli Houston and Estate of the late William Zelenski
No appearance for Defendants East St. Paul Police and R.M. of East St. Paul ("East St. Paul")

Cases Considered: *Law Society of Manitoba v. Eadie (1988), 54 Man. R. (2d) 1 (C.A.); Cobbe's Plumbing and Heating Ltd. v. Westfair Properties Ltd., [2004] M.J. No. 73 (Q.B.); Pelisek v. Pelisek (2003), 180 Man. R. (2d) 211 (C.A.)*

Plaintiff claimed that he deposited $150,000 over 15 years into his father's account when he lived him prior to his death and that his siblings stole $14,000 in cash that he had hidden in his father's room. Plaintiff could not produce proof he had earned that money and he refused to cooperate during numerous attempted discoveries. Defendants, other than East St. Paul, sought to dismiss the claim on that ground and also for delay and abuse of process. Court orders had been filed regarding the production of evidence with which Plaintiff refused to comply. The claim against East St. Paul was for alleged complicity in the alleged theft.

HELD: Claim dismissed against all Defendants, except East St. Paul. Plaintiff intentionally conducted the litigation in bad faith as Defendants were still not in a position to put the matter down for trial. The case would fail on credibility and Plaintiff's conduct had indicated that his claim had little merit. The Court noted that dismissal for breach of discovery should only be granted where no other sanction would suffice. Plaintiff was also to pay solicitor-client costs payable out of his share of the estate.

Sergeant F. and Constable S. v. Peters J., and Nicol

Administrative - Law Enforcement Review - Effect of Previous Complaints
Government & Public Authorities - Police - Requirement for a Public Hearing
Statutory Interpretation - Misquoting Statutory Provision - Effect of

November 22, 2004 Q.B., Winnipeg, Menzies, J. 33 paras, 7 pages
B. Mayes for Applicants http://www.canlii.org/mb/cas/mbqb/2004/2004mbqb259.html
Jennifer Kubas for Minister of Justice 2004 MBQB 259
N. Sims, Q.C., for Complainant

Cases Considered: *Baker v. Canada (Min.of Citizenship and Immigration) [1999] 2 SCR 817; Roncarelli v. Duplesses, [1959] SCR 121; Slaight Communications Inc. v. Davidson, [1989] 1 SCR 1038*

Statutes Considered: *Law Enforcement Review Act, s. 13*

Texts Considered: *Administrative Law: Case, Text and Materials by Evans, Janisch and Mullan (4th)*

Applicant sought judicial review of a decision ordering a L.E.R.A. hearing after Complainant's initial grievance was refused on the grounds that she had made prior complaints to the police and that it was abusive. Complainant had previously complained on many occasions about a neighbour's dog with the authorities failing to respond. Complainant attempted to leash the dog and its collar came off which she kept until the neighbour was charged for his dog running at large. She tried to return the collar to City Hall on several occasions but they refused to accept it. The police eventually went to Complainant's home and demanded the collar, but she refused to return it if they did not sign for it. Instead the police handcuffed Complainant, hurting her wrists in the process, and brought her in to the station. The judge misquoted the legislation which provided that a hearing should be held "or take such other action" by replacing the "or" with an "and". As a consequence, he decided there was no choice but to hold a hearing. The judge also noted it was improper to consider Complainant's previous complaints.

HELD: Application dismissed, a public hearing to be held. The judge did misquote the remedy provision of the legislation, but a hearing was mandated due to the facts of this case. The judge was correct that if the complaint had substance, all previous complaints were irrelevant. There was no point in referring the complaint back to the Commissioner who had previous dismissed the complaint as frivolous.

Concordia Hospital v. Local 27 of the Manitoba Nurses' Union

Administrative - Bias - Writing Style of Decision-Maker
Employment - Union Grievance-Employer's Control Over Decision-Calling Witnesses
Medical - Nurses - Union Grievance - Employer's Control Over Decision

November 24, 2004 Q.B., Scurfield, J. 57 paras, 14 pages
E. Olson, for Applicant ("Hospital") http://www.canlii.org/mb/cas/mbqb/2004/2004mbqb261.html
R. Deeley, for Respondent ("Union") 2004 MBQB 261

Winnipeg Regional Health Authority ("WHRA") created a Critical Care Transport Team and decided to use trained therapists for it, instead of nurses employed by Hospital, as was the usual practice. Union complained about the new procedure and the Arbitration Board ruled against Hospital, although it agreed that Hospital was not responsible for establishing the service. Hospital appealed against the decision and argued the chairman was biassed as he made comments and awarded the decision in a tone indicating that he had this position "from the outset". The decision was also written with a number of exclamation marks. The Arbitration Board criticized Hospital for not calling a nurse during the hearing, but there was a nurse present on WRHA's decision making body. Union argued Hospital conducted itself in a fashion which disturbed the harmonious relationship between the parties.

HELD: Appeal allowed, decision quashed. The writing style indicated the chairman was emotionally invested in the decision. The bias was apparent as the reasoning also did not follow the result, as Hospital should not be punished for something out of its control. The criticism of Hospital for not calling a nurse was inconsistent with its earlier finding that Hospital had no ability to influence the decision.

Estate of Marinus Johannes (Rien) Roelofs

Wills & Estates - Execution of Will - Lack of Witness - Revocation - Eyewitness

December 16, 2004 Q.B., Winnipeg, Jewers, J. 19 paras, 4 pages
J.S. Fergusson for Public Trustee of Manitoba 2004 MBQB 280
No appearance for Patricia Steele http://www.canlii.org/mb/cas/mbqb/2004/2004mbqb280.html
No appearance for Tanja Kroos-Van der Woude
No appearance for Marc Van der Woude

Cases Considered: *Downey Estate v. Foster, [1991] O.J. No. 3475 (Ont. Gen. Div.)*

Statutes Considered: *Wills Act, ss. 16, 20(1), 23 ("Act")*

Texts Considered: *Shorter Oxford English Dictionary, vol. 1*

Public Trustee applied to be appointed litigation administrator and sought direction regarding the revocation of the last will of Deceased. Deceased was married twice and subsequently entered into a relationship with another person. He made one will leaving his estate to his second wife (the "first will") and a subsequent will (the "second will") revoking the first will in favour of the new person in his life. The second will only had one witness and was not made in accordance with the Act. Deceased later wrote “Void” on the second will and a witness testified that he said it was “no good”.

HELD: Litigation guardian estate granted, both wills revoked resulting in an intestacy. The second will was effective under s. 23 of the Wills Act which thereby revoked the first will. Deceased’s subsequent actions revoked the second will as well, as that can be done in writing. The eyewitness’s testimony was sufficient to indicate Deceased’s intention.

Assessor (City of Winnipeg) v. Loveday Mushroom Farms Ltd. et al.

Municipal - Business Tax - Exemption - Use of the Premises
Statutory Interpretation - Tax Statute - Intent of Legislation - Scope of Exemption
Tax - Business - Exemption - Use of the Premises - Intent of Legislation

November 24, 2004 Q.B., Winnipeg, J. 19 paras, 7 pages
D. Pambrun and L. Craven for Applicants ("City") 2004 MBQB 260
C. Chappell and A. Bowler for Respondents
http://www.canlii.org/mb/cas/mbqb/2004/2004mbqb260.html

Cases Considered: *Québec (Communauté Urbaine) v. Corp. Notre-Dame de Bon-Secours, [1994] 3 S.C.R. 3; Asper v. Winnipeg (City) Tax Collector, [2004] MBCA 52; Manitoba (Provincial Municipal Assessor) v. Seagram Co., [2003] MBCA 128; St. Boniface General Hospital v. Assessor for the City of Winnipeg, [2003] MBCA 8; Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27*

Statutes Considered: *The City of Winnipeg Charter ("Act"), ss. 315-17*

Texts Considered: *Elmer A. Driedger, Construction of Statutes, 2nd ed.*

City appealed the Board of Revision's decision that Respondent did not have to pay business taxes for its mushroom farm. Respondent argued the preponderant use of the premises was for the growing and packaging of mushrooms, not for making a profit. Board agreed with a narrow technical reading of a provision which exempted premises where "the use of which is not for the preponderant purpose of earning a profit".

HELD: Appeal allowed. The legislation was read too narrowly as almost all premises would fall under such an exemption, which was not the intent of the Act. It made no sense to relate the exemption to the premises as a premises cannot make a profit by itself.

Ball v. Canada Safeway Limited et al.

Real Property - Occupiers' Liability - Actions of Another
Torts - Occupiers' Liability - Actions of Another - Negligence Advice - Reliance

December 3, 2004 Q.B., Schulman, J. 32 paras, 11 pages
Timothy J. Lach for Plaintiff http://www.canlii.org/mb/cas/mbqb/2004/2004mbqb268.html
Jamie A. Kagan and Thomas W. Percy for Defendant 2004 MBQB 268

Cases Considered: *Sandberg v. Steer Holdings Ltd. (1987), 45 Man.R. (2d) 264; Qually v. Pace Homes Ltd. (1993), 84 Man.R. (2d) 262; LeClerc v. Westfair Foods Ltd. (2000), 148 Man.R. (2d) 156 (CA); Forsberg v. Westfair Foods Ltd. (2000), 151 Man.R. (2d) 281 (QB); Howden v. Westfair Foods Ltd. (2001), 154 Man.R. (2d) 118; Sentinel Storage Corp. v. Dyregrov (2003), 180 Man.R. (2d) 85; Maracle v. Travellers Indemnity Co. of Canada, [1991] 2 SCR 50; Marischuk v. Dominion Industrial Supplies Ltd., [1991] 2 SCR 61; Keewaticappo v. Clearsky (1992), 79 Man.R. (2d) 311 (CA)*

Statutes Considered: *Occupier's Liability Act, ss. 3(1),(2)*

Texts Considered: *Professor Feldthusen, Economic Negligence, 4th ed.*

Plaintiff sued Defendant Occupier and an unidentified Defendant in regards to a trip and fall accident she had at Occupier's store. The unidentified Defendant had apparently put down his basket while shopping and Plaintiff subsequently tripped and fell. Plaintiff requested that Occupier get name of Defendant, but was told by the assistant manager not to worry because the Occupier was responsible for everything that happened in the store. Occupier later told Plaintiff they were not responsible as the floor was swept. Plaintiff argued the baskets should have a warning flag and that Occupier was liable for not obtaining the unidentified Defendant's name. Plaintiff also waited approximately two years before she contacted a lawyer.

HELD: Claim dismissed. Occupier did breach its duty in not obtaining the other Defendant's name, but Plaintiff suffered no damages because her accident was due primarily to her own negligence. Plaintiff also did not rely on the advice of Occupier's manager as she made no effort to insist Occupier obtain the name of the unidentified Defendant.

Todosichuk v. Daviduik

Trusts - Fiduciary Duty - Committee - Improperly Expending Money
Vulnerable Persons - Committee - Fiduciary Duty - Repayment - Best Method
Wills & Estate - Committee - Improperly Expended Money - Repayment Method

December 13, 2004 C.A., Scott, C.J., Twaddle and Monnin, JJ.A. 31 paras, 6pages
R. M. Beamish and M.E. Bowman for Appellant 2004 MBCA 191
J.G. Collins for Respondent http://www.canlii.org/mb/cas/mbca/2004/2004mbca191.html

Cases Considered: *Mackenzie v. Van Helvert, [1995] M.J. No. 311 (QB); Hodgkinson v. Simms, [1994] 3 SCR 377; Norberg v. Wynrib, [1992] 2 SCR 224; Blueberry River Indian Band v. Canada, [1995] 4 SCR 344; Wewaykum Indian Band v. Canada, [2002] 4 SCR 245; Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 SCR 534; Canadian Aero Service Ltd. v. O'Malley, [1974] SCR 592; Soulos v. Korkontzilas, [1997] 2 SCR 217; M.(K) v. M.(H), [1992] 3 SCR 6*

Statutes Considered: *The Mental Health Act, Part 9, ss. 78, 83; Queen's Bench Rules 72*

Texts Considered: *Hon. J.R.M. Gautreau, "Demystifying the Fiduciary Mystique" (1989), 68 Can. Bar Rev. 1; Mark V. Ellis, Fiduciary Duties in Canada*

Appellant argued that the trial judge had no jurisdiction to order her, the Committee of deceased Respondent's estate ("the Estate"), to repay improperly expended moneys back to the Estate. Appellant substantially renovated deceased's premises that was to be inherited by Appellant's son. Appellant also argued the judge erred in ordering that the net amount of the renovations be paid to the Estate, given that probate had not been applied for and no money "left the estate".

HELD: Appeal dismissed. In cases of such shameful conduct and flagrant breach of fiduciary duty, the appropriate remedy would be to repay the Estate. In this case, it would be more prudent if the moneys were paid into court until probate and then into the Estate. If there was some other disposition of the home other than as provided in the will, the issue of unjust enrichment could be resolved by the Court.

Marinou v. Ziesmann

Contracts - Medical - Breach - Guaranteeing Results to Patient
Damage Awards - Contract - Failure to Reduce Breast Size
Medical - Breach of Contract - Promising Results - Emotionally Unstable Patient

December 7, 2004 Q.B., Winnipeg, Clearwater, J. 21 paras, 13 pages
Richard M. Beamish for Plaintiff http://www.canlii.org/mb/cas/mbqb/2004/2004mbqb274.html
Gregory M. Fleetwood and Betty Gabriel for Defendant 2004 MBQB 274

Cases Considered: *Hopp v. Lepp, [1980] 2 S.C.R. 192 (S.C.C.); Cherewayko v. Grafton, [1992] M.J. No. 639 (Q.B.); Reibl v. Hughes, [1980] 2 S.C.R. 880 (S.C.C.); Arndt v. Smith, [1997] 2 S.C.R. 539; Rybak v. Plastic Surgery Associates of Winnipeg, [1999] M.J. No. 435 (Q.B.);*

Statutes Considered: *Stedman's Medical Dictionary, 4th ed.; Webster's College Dictionary; Lorne Rozovsky, The Canadian Law of Consent to Treatment*

Plaintiff sued for damages regarding breast implant surgeries that left some scarring and left her with an undesired breast size. Her testimony that she would never had agreed to a mastoplexy was contradicted by another physician with whom she had consulted. Defendant had an extensive practice, but there was evidence that the procedures may have been explained to her when she was drunk. Plaintiff had an alcohol and drug addiction and other doctors refused to operate on her. Defendant acknowledged that he did not explain the possibility that the surgery may be unsuccessful.

HELD: Judgment for Plaintiff for $8,000 plus costs. Defendant breached his contract as he assured Plaintiff that he could reduce her breast size to the desired amount. Such a failure should be treated as any other breach of contract as there was no hint of negligence or malpractice. Plaintiff was emotionally unstable and her testimony was not credible. Damages would have been $17,500 for the scarring had Defendant been found liable.

Doe et al. v. The Government of Manitoba

Constitutional - Charter ss. 2(a), 7, 15 - Physical and Psychological Harm - Abortion
Government & Public Authorities - Provincial - Abortions - Waiting Times
Medical - Abortions - Payment of - Right to - Waiting Times

December 22, 2004 Q.B., Winnipeg, Oliphant, A.C.J.Q.B. 92 paras, 14 pages
Robert L. Tapper, Q.C. and Christopher C. Wallum and Myfanwy Bowman for Plaintiffs
Holly D. Penner and W. Glenn McFetridge for Defendant ("Government") 2004 MBQB 285
http://www.canlii.org/mb/cas/mbqb/2004/2004mbqb285.html

Cases Considered: *Lexogest Inc. v. Manitoba (A.G.) (1993), 85 Man.R. (2d) 8 (CA); R. v Morgentaler, [1988] 1 SCR 30; Law v. Canada (Min. of Employment and Immigration), [1999] 1 SCR 497; R. v.Oakes, [1986] 1 S.C.R. 103; Podkriznik v. Schwede (1990), 64 Man.R. (2d) 199 (CA); Mathias Colomb Band of Indians v. Sask. Power Corp., [1994] 2 WWR 457 (Man CA); Dumont v. Canada (A.G.), [1990] 1 SCR 279; Hunt v. Carey Canada Inc., [1990] 2 SCR 959; Somers Estate (Public Trustee of) v. Maxwell (1995), 107 Man.R. (2d) 220 (C.A.); Hercules Management Ltd. v. Ernst & Young (1997) 115 Man.R. (2d) 241 (SCC); MacKay v. Manitoba, [1989] 2 SCR 357*

Statutes Considered: *Manitoba Regulation 46/93, s. 2(28) ("Regulation"); The Health Services Insurance Act, ss. 116(1)(h),(2); Charter of Rights, ss. 1, 2(a), 7, 15*

Plaintiffs argued that the Regulation requiring that Government will only pay for abortions done at a hospital was inconsistent with the *Charter*. Plaintiffs had decided to pay for their abortions at a private clinic due to the long waiting list at the hospitals. Plaintiffs claimed the wait would increase their emotional turmoil. Plaintiffs sought summary judgment against Government, except for the issue of damages, in response to Government's motion to strike the claims as an abuse of process.

HELD: Summary judgment for Plaintiffs granted. There was no logic in the Regulation that prevented abortions from being done in a timely way. Making women wait violated ss. 2(a), 7 and 15 of the Charter as the impugned legislation imposes physical and psychological harm because of the delay.

McNeil v. Dr. Yamamoto

Damage Awards - Hematoma - $25,000 - Medical Procedure - Provisional Award
Medical - Battery - Informed Consent - Material Risk
Torts - Battery - Negligence - Informed Consent - Material Risk

December 3, 2004 Q.B., Winnipeg, Kennedy, J. 124 paras, 19 pages
Pamela M. Reilly for Plaintiff http://www.canlii.org/mb/cas/mbqb/2004/2004mbqb271.html
Lori T. Spivak and Tyler J. Kochanski for Defendant 2004 MBQB 271

Cases Considered: *Reibl v. Hughes, [1980] 2 S.C.R. 880; Hopp v. Lepp, [1980] 2 S.C.R. 192; Desjardin v. Penner, [1992] M.J. No. 243 (Q.B.)*

Plaintiff sued for battery and lack of informed consent regarding a hematoma and ongoing pain she suffered after Defendant Doctor operated upon her. The procedure involved the removal of a nodule in the vaginal area that may have been the source of Plaintiff's initial pain. Doctor gave Plaintiff pamphlets regarding the process and Doctor commented that the risk of bleeding was rare. Expert testimony confirmed that the outcome Plaintiff suffered was not common. Plaintiff argued that Doctor gestured that the procedure was a slicing motion and that she would not have consented to removal of the whole nodule. Doctor argued that removal of nodule meant removing it completely. Plaintiff had another child a year later and suffered no other debilitating consequences from the hematoma.

HELD: Judgment for Defendant Doctor. Plaintiff had not proven that ongoing pain she suffered was attributable to the hematoma. Plaintiff agreed with the decision to remove the nodule, therefore she can make no claim in battery. The risk was not common, therefore it was not one in which Doctor had to disclose as material. Had Plaintiff been successful, she would have been awarded $25,000 in general damages.

Heinicke v. Cooper Rankin Ltd. et al.

Construction - Non-Dangerous Defect - Residential Home - Economic Loss
Practice - Question of Law - Hypothetical - Benefit of Trial - Pure Economic Loss

December 6, 2004 Q.B., Winnipeg, MacInnes, J. 21 paras, 4 pages
Dave Hill for Plaintiff http://www.canlii.org/mb/cas/mbqb/2004/2004mbqb273.html
Kelly L. Dixon for Defendant Cooper Rankin Ltd. 2004 MBQB 273
Michael G. Finlayson for Defendant City of Winnipeg ("City")

Cases Considered: *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co., [1995] 1 S.C.R. 85; Fraser-Reid v. Droumtsekas, [1980] 1 S.C.R. 720*

Statutes Considered: *Queen's Bench Rule 21.01(1),(2)*

Texts Considered: *Linden, Canadian Tort Law, 7th ed.*

Plaintiff moved under Rule 21.01(1) for the Court to consider whether it can recover for pure economic loss for a non-dangerous defect in a residential home. Plaintiff also sought an answer as to when a cause of action for a 1993 negligent design by an architect and an alleged 1993 negligent building inspection by City accrued. The house was constructed in accordance with Defendant architect's guidelines which included pine shakes, something not suitable for Manitoba roofs.

HELD: Motion dismissed. None of the questions should be answered under the Court rules because any answer in the affirmative would change the existing law. Some of these questions may turn out to be hypothetical as the case could be decided on other issues.

Beatty et al. v. Hulley

Communication & Transportation - Liability for Accident-Turn Signal - Illegal Passing Practice - Small Claims - Jurisdiction - Vehicle Accident - Damage to Vehicle

December 8, 2004 Q.B., Minnedosa, Clearwater, J. 12 paras, 5 pages
Brian Midwinter, Q.C. for Plaintifss 2004 MBQB 248
Defendant acted in person http://www.canlii.org/mb/cas/mbqb/2004/2004mbqb248.html

Statutes Considered: *The Court of Queen's Bench Small Claims Practices Act ("Act"), s. 3(1)(b)*

Plaintiff appealed the liability finding regarding a motor vehicle accident. Plaintiff was operating a tractor trailer and started to make a left hand turn on a highway when he noticed Defendant approaching from behind. Plaintiff denied being way over to the right before making the left hand turn. Defendant could not stop in time and slid into Plaintiff's vehicle. There was evidence that Plaintiff's rear turn signal may not have been functioning. Plaintiff had apologized at the time of the accident. Defendant attempted to pass the Plaintiff's vehicle when the road had two solid lines.

HELD: Both parties 50% liable. Both parties tailored their evidence to suit their needs, but Plaintiff was liable as he probably moved too far to the right and his turn signal was not working. Defendant was also liable for attempting to pass over solid lines indicating that it was not legal to do so. The Court commented it may not have jurisdiction to hear the case under the Act since Plaintiff's vehicle was damaged, but heard it anyway.