



## Welcome

# To JW Dental Legal News

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### Welcome!

Here it is our long awaited electronic version of **JW Dental Legal News**. Brought to you on our revamped website. You may print a copy of this issue if you wish.

In this issue you will find the saga of Hans and Gretel, two dental technicians who sued for wrongful dismissal, the sequel to **Implants Won't Stick Part 4**, a bit of humour and much much more.

As always your feedback is welcome! Your comments will be included in our Website Forum so that your wisdom and criticism can be shared with colleagues and the public at large.

I hope you enjoy this issue and our new site. It is a labour of love.

**JW**

### The Dental Touch

#### or When Time is Not Enough!

In 1980 Lisa first visited Dr. Tom. She was 13 years old. She lived with her parents and five sisters. Her dad was a labourer; her mom was an office cleaner. Lisa was a student at a Catholic school. The day Lisa visited Tom she had a sore tooth. She didn't have a regular dentist. Her friends suggested Dr. Tom. His office was near her home.

So Lisa and her older sister Lydia, who was 15 at the time, went to Tom's office. They didn't have an appointment. Lisa and Lydia were shown into the dentist's office. Lisa sat in the dental chair and a nurse placed a dental bib around her neck then left. After awhile Dr. Tom came into the office. First Tom looked at Lisa. Then he shifted his attention to Lydia. Tom backed Lydia into a corner and started to rub his body up against her. Lisa was disgusted by what she saw. She said to her sister in Greek, "Do you see what he is doing?" Lisa quickly asked Lydia In English, "Whether her boyfriend was coming to meet them at the office soon." Immediately Tom stopped what he was doing and told Lisa to return another day for treatment.

Five days later Lisa returned to the office. She still had a toothache. She went alone thinking in her innocent fashion that Tom was in love with her sister. Without Lydia present she thought there would not be a problem. That turned out to be an erroneous analysis.

*See Dental, continued on page 2*

### Implants Won't Stick Part 4

In the summer 2000 issue of **JW Dental Legal News** reported the continuing saga of Mary the recovering Alcoholic, who traded her full mouth denture for implants and a fixed denture. Mary sued Dr. Peter her prosthodontist for creating an overdenture, which was not fit for the purpose. Her implants failed. She complained to the Royal College of Dental Surgeons Of Ontario (R.C.D.S.O.). The R.C.D.S.O. sent Mary copies of her dental records, which she carefully reviewed. Mary soon realized that Dr. Sammi, the oral surgeon, who placed her implants, had altered her dental chart. His chart showed that he advised her of the risks and limitations of the implant treatment, when in fact he had not done so. Dr. Sammi failed to assess Mary's level and quality of maxillary bone.

*See Implants, Continued on page 3*

*Dental, Continued from Page 1*

Again Lisa was taken into Tom's office, seated in the dental chair. The nurse placed a bib around her neck and left. Tom came in. He came over and looked at her mouth, and started to feel her jaw and around her neck. Tom took her bib off and started to feel further down her neck. He then unbuttoned the top of Lisa's blouse put both of his hands down her shirt and under her bra. He was fondling her breasts.

Lisa asked Tom what he was doing. Tom answered. "I am trying to determine how far down the abscess has gone." Lisa replied, "It couldn't be in my chest", and tried to get off the chair. Tom let her get up. Lisa left the office.

Lisa went home. She didn't tell her parents what happened nor did she discuss it with any of her sisters. She felt somehow her parents and in particular her father would think it was her fault.

Lisa led a troubled teenaged life after the sexual assault by Dr. Tom. Her home life became difficult. She suffered from flashbacks of the event and nightmares. Her relationship with her dad deteriorated. He was about the same age as Dr. Tom.

Lisa moved out of her parent's home at age 18. She blocked the memory of the attack by then. At the same time she developed an eating disorder, bulimia.

Eventually Lisa married and had a family. The marriage only lasted three years. Part of the reason for the end of the marriage was Lisa's sexual difficulty. She could not enjoy sex and could not trust anyone she perceived was trying to take advantage of her. Lisa remarried in 1996 however problems, which plagued her first marriage, again arose.

In 1995 Lydia called Lisa and advised her that Dr. Tom was the subject of an on-going criminal investigation. Lisa called the police and told them about her encounter with him when she was only 13 years old. Tom was charged criminally. Lisa was called to give evidence at the preliminary inquiry. Dr. Tom eventually plead guilty. Around that time Lisa began to have the same nightmares, which she had as a child.

Lisa decided to sue Dr. Tom. She claimed that she suffered from post-traumatic stress syndrome as a result of the sexual touching she underwent fifteen years earlier. She claimed

damages for intentional infliction of mental and emotional distress in the amount of \$175,000; she alternatively claimed damages for sexual assault and battery in the same amount. Lisa also claimed exemplary or punitive damages in the amount of \$200,000. Tom's lawyer launched a limitations defence. He argued that Lisa was out of time to initiate a claim.

Lisa's case was tried in May 2001. The judge's written decision addressed two issues. Did the *Limitations Act* preclude Lisa from commencing her claim for damages? If not, what were Lisa's assessed damages?

The *Limitations Act* permits a claim for damages caused by a sexual assault to be made within four years. Lisa sued Tom 15 years after the sexual assault took place. In this case the passage of time could, preclude a claim for damages caused by the sexual assault.

However, the judge analyzed the relationship between Lisa and Tom, the patient and the health provider before concluding that the Limitation Act was not a bar to Lisa's claim.

He considered whether Tom was in a fiduciary relationship with Lisa. He reviewed the requirements, which establish a fiduciary duty:

- The fiduciary (Tom) must have scope to exercise power
- The fiduciary (Tom) must be able to unilaterally exercise power so as to affect the beneficiary's (Lisa) legal or practical interests and;
- The beneficiary (Lisa) must be peculiarly vulnerable or at the mercy of the fiduciary who holds the power

The judge concluded that dentists like medical professionals are generally held to stand in a fiduciary relationship with their patients. They hold the power to advise and treat the patient and can frequently do so in a unilateral way. The patient is also generally vulnerable to and at the mercy of the power, which the dental practitioner holds.

The judge found that Lisa was a vulnerable 13 year old. She perceived that Tom had power over her and she was particularly susceptible to its misuse. The judge concluded that Tom was in a fiduciary relationship with Lisa and that

Tom's admission of criminal guilt constituted a clear breach of the fiduciary duties, which he owed Lisa. This conclusion allowed the claim to proceed since breach of a fiduciary duty is not susceptible to the limitations defence.

The judge then assessed Lisa's damages. He heard the expert testimony of Dr. Small, a psychiatrist. He agreed with Dr. Small that Lisa suffered from post-traumatic stress syndrome caused by the assault. However the judge balanced what he considered the minor sexual touching by the dentist with positive elements in Lisa's present life. Lisa had a good job, supportive family, and many friends. Consequently he awarded \$50,000 for general and aggravated damages. He did not award punitive damages. The law does not permit punitive damages where a person is already convicted and sentenced to a criminal penalty. Tom had already faced the music when he plead guilty to the criminal offence.

**Editorial comment:** Now you may ask yourselves what is the point of this case? What important legal principle can dentists glean from the DENTAL TOUCH?

**THE LESSON:** Time does not stop running when a person is wronged by a dentist simply because it may be decreed so, in a written regulation or statute. Time may be extended if a fiduciary relationship is held to exist and a fiduciary duty is found owing; the patient will then be able to proceed with a claim. A law suit such as this will be allowed and damages for the wronged patient can be assessed!

Synopsis by Joyce Weinman, based upon a recently reported legal case

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**Implants, Continued from page 1**

Faced with this bony insufficiency during surgery he inserted an unapproved artificial bone substance, Hydroxylapatite (HA). He hoped to augment her deficient maxillary alveolar ridge. Mary was furious. She asked her lawyer to add Dr. Sammi on as a co-defendant. She claimed that Dr. Sammi should not have placed the implants if she was not a suitable candidate. In addition Mary discovered that the implants were predestined to fail when used in conjunction with HA.

Disillusioned with the legal services she received, she fired her lawyer. However, Mary craved closure. She decided to settle her case with Dr. Peter on her own. In August 1998 she signed a Release, which she believed dealt with the above the gum line damages caused by Dr. Peter. It protected Dr. Peter and any third party who might claim contribution or indemnity from Dr. Peter. Before signing the Release she did not receive independent legal advice.

Unfortunately Mary still had major oral problems and her general health had deteriorated. Now she had neither a fixed prosthesis, nor implants.

She decided to sue Dr. Sammi, for damages for negligent advice and care in the implant placement procedure. She also decided to take her former lawyer to task and added him as a co-defendant for failure to include Dr. Sammi in the first lawsuit against Dr. Peter. Both Dr. Sammi and her former lawyer initiated third party claims against Dr. Peter drawing him back into the fray. They tried to rely on the Release, which Mary signed.

**The Motion**

Dr. Peter's lawyer decided to put an end to Mary's second dental malpractice lawsuit once and for all. He brought a Motion to Stay, which would nip Mary's claim in the bud. He contended that Mary's claim constituted an abuse of process. He alleged that she should be bound by the Release. Since she received her settlement funds from Dr. Peter she should never be allowed to pursue any other person even if the damages now claimed were not contemplated in her first lawsuit. Mary's lawyer brought a cross-motion. Her lawyer argued that the Defendants could not rely on the Release.

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**Piece Work****A Technologist's Worst Nightmare**

The Motion to Stay and cross motion was argued in the spring of 2000. Despite the able and thorough arguments put forth by Mary's lawyer Judge Dimmer concluded: that Mary was seeking to avoid the contribution and indemnity clauses provided within the Release. Dimmer further decided that once Mary acted on her own behalf she did not take on the responsibility for the documents that she signed, nor did signing the Release without the benefit of independent legal advice prejudice Mary. Judge Dimmer granted the Third Party motion and stayed Mary's claims and the Third Party proceedings. To make matters worse he ordered Mary to pay the motion costs of all parties.

**The Appeal**

Mary's lawyer was convinced that Judge Dimmer's decision was wrong. Mary decided to appeal.

Dimmer had ignored the leading Ontario Court of Appeal case, which supported Mary's position. The case stands for the principle that a person who is not a party to a Release cannot rely on it. Neither Dr. Sammi nor Mary's first lawyer were parties to the Release which Mary signed discharging Dr. Peter for liability. Therefore they could not rely upon the Release now to defend against Mary's new allegations of negligence against themselves. In addition an Ontario Rule of Court provided that a third party such as Dr. Peter can only assert against the plaintiff those defences available to the defendants. The third party Dr. Peter could not rely on the Release since it was not available to Dr. Sammi or Mary's lawyer to bring a motion to stay. The co-defendants and third party were trapped.

The Court of Appeal rendered their unanimous decision in December 2000. They set aside the lower court decision of Judge Dimmer. Mary's lawsuit was given the green light. Her claim was reinstated. Mary was awarded her costs of the Appeal and the Motion before Judge Dimmer. The costs were ordered paid equally and jointly by the co-defendants and Dr. Peter.

Mary is cautiously optimistic that her case can be settled with Dr. Sammi and her former lawyer. We will follow Mary's search for justice in future issues of **JW Dental Legal News.**

The Bern Institute of Dental Technology in Switzerland is renowned worldwide. Its graduates are among the best in Europe. They quickly advance to become masters of their craft and attract the highest salaries.

Hans Torkelman graduated from the Institute at the top of his class in 1995. He immediately found permanent and secure employment at the Dentale Laboratory Schwarz in Zurich. His skill was apparent. He quickly moved through the ranks and became a Master Dental Technologist in January 1999.

Hans grew restless. He had reached the top of his profession quickly. He needed a new challenge.

Best Dental Laboratory, located in Vancouver B.C., was expanding. The economy was booming. There was a severe shortage of trained Dental Technologists in Canada. Best had more work than it could possibly handle.

The owner of Best, Peter Graves, decided to place an advertisement in the Journal of Swiss Dental Technology. He invited applications from highly skilled ceramists and gold technicians with a specialty in full mouth reconstruction and advanced implant restorations. Best offered an excellent salary and benefits.

Hans Torkelman saw the ad. He had no idea where Vancouver was but decided to apply for the job. He sent his resume and glowing references to Best. He told Best in a covering letter about his high academic placement and quick advancement to Master Technologist. He also said in the letter that although his employment at Dentale Laboratory Schwarz was secure he wanted greater challenges and responsibilities and his goal was to perfect his craft to the highest possible standard.

Peter Graves immediately sent a fax to Mr. Torkelman in Switzerland extending an invitation to him to interview at the lab in Vancouver, all expenses paid.

Within two weeks Hans Torkelman was on the plane to Vancouver. High over the Atlantic he thought to himself "if I get the job my career might take off... I might eventually even be able to open my own lab ... but leaving Switzerland means leaving behind my mother, father, brothers,

sisters and the love of my life, Gretel Weiss.”

Hans arrived at Best Dental Laboratory in Vancouver. Peter Graves was immediately impressed with what he saw. Hans was overwhelmed by the high tech environment of the lab and the professionalism of the technicians.

Best Dental Laboratory offered Hans Torkelman the position of Supervisor of Ceramics and Implantology on the spot. The terms of employment included a starting salary of \$75,000 annually increasing to \$100,000 annually after three months, one month vacation, a pension plan and extended comprehensive health benefits. Best offered to pay the cost of an airline ticket from Switzerland together with all reasonable moving expenses.

Hans Torkelman hesitated out loud. Would his job be as secure in Canada as it was in Switzerland? What about Gretel? She was a junior Dental Technologist.

Peter Graves saw an opportunity in Hans Torkelman's hesitation. Peter told Hans that Best Dental Laboratory had a junior position available for Gretel and would pay for both of them to come to Canada from Switzerland.

The deal was sealed. On February 1, 2000 Hans Torkelman and Gretel Weiss started working as Dental Technologists at Best Dental Laboratory in Vancouver, B.C.

At first the new job was everything that Hans thought it would be. Hans and Gretel quickly settled in and were happy. Peter Graves appeared to be delighted with Hans's technical ability. Even though Gretel was a junior technician it was clear to Peter that she had tremendous potential. In addition to enjoying their work, living in Vancouver reminded Hans and Gretel of Switzerland, which helped considerably whenever they became homesick.

The first three months passed quickly. It was now early May. On a gray, drizzly, cold Vancouver day the honeymoon between Best Dental Laboratory and Hans Torkelman ended.

Peter Graves called Hans into his office. The probation period was now over. Peter told Hans that his contract of employment was to be changed. Rather than an annual salary, Hans would now be remunerated based on the number of crowns he produced. In other words, to earn \$100,000 annually, Hans would have to produce an average of 10 completed crowns each work day.

Hans was devastated. He had never worked in a piece work environment. He was never told by Best Dental Laboratory that piece work would become part of the conditions of his job after he had passed the probationary period. Quite the contrary. He was deeply concerned that remuneration based on piece work, while increasing his production, would decrease the quality of his work. But Hans only told his worries to Gretel.

Over the next few weeks Hans tried to work under the new regime but he couldn't keep up with the demand to produce 10 completed crowns each work day. Finally he asked to see Peter Graves. He told Peter that he couldn't work under the conditions of piece work. He said it was affecting the quality of his crowns and his morale. He pointed out that he was never hired on those terms in the first place. Hans confessed that had he known what the true terms of his employment were to become he would never have given up his life and security in Switzerland.

The meeting between Hans and Peter Graves quickly deteriorated into a yelling match. Peter said “that's too bad...all senior employees in this lab work on piece work... and if you don't like it I will have you deported back to Switzerland. “

The next day Hans made an appointment to see me. I advised him that in my opinion Best Dental Laboratory had constructively breached his contract of employment. He could either accept the new terms and conditions of work thereby constructively entering into a new contract with Best or he could accept the termination as a wrongful dismissal and sue for damages. I also offered the opinion that he could not be deported back to Switzerland for refusing to accept a change in the conditions of his employment. In my view the laws of Canada applied equally to Hans regardless of his immigration status in Canada.

Hans decided that he had little choice but to return to work at Best Dental Laboratory but he grumbled and complained to his co-workers. He made it clear to everyone that he did not except the change in his conditions of work.

Two days later Peter Graves confronted him at his workstation and said “everyone in this lab at your level works on piece work...get out...I've had enough of you.” Hans left, immediately followed by Gretel.

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Hans came back to see me. He instructed me to immediately sue Best Dental Laboratory in the British Columbia Superior Court, for constructive dismissal. He stated in his Claim that he was entitled to carry the same seniority that he had in Switzerland, to his new employer in Canada. Despite the fact that Hans had only worked at Best Dental Laboratory for 31/2 months, he claimed damages based on at least six months pay in lieu of notice.

Hans also applied for Employment Insurance Benefits. In his Application he stated that he had been constructively fired without cause.

An official of the Employment Insurance Commission investigated the termination. Peter Graves was interviewed. Peter told the official that Hans had quit his job without notice after physically assaulting him. The official then interviewed Hans who denied the allegation. The official accepted Hans's version of the termination and allowed Employment Insurance Benefits to begin without deduction.

Best appealed the finding of the official to the Employment Insurance Tribunal. A hearing was held. The Tribunal unanimously dismissed the employers appeal. The Tribunal concluded that Best Dental Laboratory gave conflicting testimony with regard to the facts, there was a lack of written evidence to support a finding of misconduct and Hans was entitled to the benefit of the doubt.

Shortly after the hearing Hans instructed me to amend his lawsuit against Best to include a claim for defamation of character. A trial for wrongful dismissal and defamation is scheduled to take place shortly.

In the next issue of **JW Dental Legal News** I will report the conclusion to Piece Work - A Technologist's Worst Nightmare.

Joyce R. Weinman R.D.H., LL.B.

*The names, events and circumstances depicted in this article are fiction. Any resemblance to an actual case is purely coincidental.*

## The Little Fly

### A Story with a Moral

There once was a happy little fly buzzing around a barn one day, when she happened upon a large pile of fresh cow manure. Since it had been hours since her last meal and she was feeling hunger pangs, she flew down to the irresistible delicacy and began to munch out. She ate... And ate... and then .. she ate some more!!!

Finally, she decided she'd had plenty. She washed her face with her tiny front legs, belched a few times, then attempted to fly away. But alas...she had pigged out far too much and could not get off the ground. She looked around, wondering what to do about this unpleasant situation, when she spotted a pitchfork leaning upright against the barn wall. She'd found a solution!! She realized if she could just become airborne she'd be able to fly again. So, she painstakingly, climbed to the top of the handle. Once there, she took a deep breath, spread her tiny fly wings, and leaped confidently into the air. She dropped like a rock and splattered all over the floor...

Dead Fly....

The moral of this sad story:

"Never fly off the handle when you know you're full of shit."

## Our Readers Say

I am looking to start an in house business in custom formed mouthguards for sports. I have checked into legislation and the dental acts. I know that all questions fall into the impression procedure. Have found that there are companys that do whitening of the teeth through the mail and the consumers are taking their own impressions. Would I be able to use this same concept of consumers doing their own impresions? I am not confident to go further with this venture until I am more clear on the legal facts. I am sure the laws will change from province to province and country. Health Canada rates it as an therapeutic device and would have to follow some regulations there but it just this impression procedure. If you can help with any information it would be greatly appreciated thankyou in advance. Sincerely,  
Kodie Nelson