112 Manitoba Reports (2d) 216
(112 Man.R.(2d) 216)

D.J. Provencher Limited (plaintiff)
v. Tyco International of Canada Ltd.,
Tyco International of Canada Ltd.,
operating as "Grinnell Fire Protection"
and as "Grinnell Fire Protection Systems
Company" and Tom Glenewinkel
(defendants)
(File No. CI 94-01-79587)

Indexed As: Provencher (D.J.) Ltd. v.
Tyco International of Canada Ltd. et al.

Manitoba Court of Queen's Bench
Winnipeg Centre
Clearwater, J.
October 18, 1996.

Summary:

An owner retained the services of a fire protection company to repair a leaking overhead sprinkler system in its warehouse. The warehouse flooded. The owner sued the company and its employee in negligence and breach of contract for damages. At issue was liability and the owner's entitlement to recover labour costs for its own employees for the cleanup of the inventory and premises after flooding.

The Manitoba Court of Queen's Bench apportioned liability equally between the owner and the defendants. The court concluded that the owner was not entitled to recover the labour costs of its own employees.

Contracts - Topic 2123

Terms - Express terms - Exclusionary clauses - Notice of - After completing initial repairs negligently and in breach of contract, a repairer had the customer's employee sign the order form - The bottom of the original and the employee's copy stated "SEE REVERSE SIDE FOR SPECIFIC TERMS" - The reverse of the original had a "limitation of liability" clause - The copy's reverse side was blank - On completion of the repairs, the repairer delivered similar documents, except that the copy's reverse side was in French and referred to the original for English terms and conditions - The repairer did not expressly mention terms and conditions - No evidence that the customer could read French - The Manitoba Court of Queen's Bench held that the limitation clause was not part of the contract - Although the relationship involved two commercial enterprises, the repairer was still obligated to take reasonable steps to incorporate specific terms into the contract - See paragraphs 43 to 51.

Contracts - Topic 9706

Contracts for work, materials and services - Contracts for services - Repairs - A warehouse's heating system was not working - The sprinkler system froze and was leaking - The sprinkler system could not be repaired until thawed - The repairer believed that the interior water valve was shut off and did not have the external valve shut off - The interior valve was broken and did not shut off - The heating system was repaired - The sprinkler system thawed - The warehouse flooded - The Manitoba Court of Queen's Bench held that the repairer was negligent and in breach of contract for not taking all reasonable steps to insure that the water was properly shut off - See paragraphs 1 to 42 - The owner's failure to comply with various fire codes (requiring that the owner have an extra watch service on duty) was contributory negligence which "proximately" caused or contributed to the loss - The court apportioned liability equally - See paragraphs 52 to 55.

Contracts - Topic 9711

Contracts for work, materials and services - Contracts for services - Duty of performer - Plumbers and pipefitters - [See Contracts - Topic 9706].

Contracts - Topic 9721

Contracts for work, materials and services - Contracts for services - Breach - General - [See Contracts - Topic 9706].

Damages - Topic 201

Entitlement - Requirement of loss - A plaintiff's warehouse flooded - The Manitoba Court of Queen's Bench denied the plaintiff damages for the labour costs of its own employees for cleanup after the flooding - There was no evidence to indicate that the plaintiff incurred additional costs (or loss) because the plaintiff's employees worked at the warehouse on a task that they would otherwise not have had to perform and were away from their work at the plaintiff's retail store - See paragraphs 56, 57.

Torts - Topic 49.2

Negligence - Standard of care - Plumbers or pipefitters - [See Contracts - Topic 9706].

Torts - Topic 4153

Suppliers of services - Duties of repairers - Standard of care - [See Contracts - Topic 9706].

Torts - Topic 6608

Defences - Contributory negligence - General - Requirement of causal connection - A warehouse's sprinkler system was leaking and frozen - A repairer failed to take all reasonable steps to ensure that the water supply was properly shut off - The premises flooded - In addressing the issue of contributory negligence, the Manitoba Court of Queen's Bench held that the warehouse owner was negligent (and in breach of various regulations or codes) respecting inspection of the interior valve control for the water supply and inspection and maintenance of the heating systems and in failing to prevent the warehouse from freezing - However, none of those acts of negligence could be said to be "proximate" to the resulting loss - If the repairer had ensured that the water supply was off, the loss would not have occurred - See paragraphs 52, 54.

Torts - Topic 6608

Defences - Contributory negligence - General - Requirement of causal connection - [See Contracts - Topic 9706].

Torts - Topic 6628

Defences - Contributory negligence - Failure to take preventive action - [See Contracts - Topic 9706].

Torts - Topic 6968

Defences - Disclaimer or exclusion of risk - Requirement of notice - [See Contracts - Topic 2123].

Cases Noticed:

Crocker v. Sundance Northwest Resorts Ltd., [1988] 1 S.C.R. 1186; 86 N.R. 241; 29 O.A.C. 1; 51 D.L.R.(4th) 321, consd. [para. 48].

London Drugs Ltd. v. Brassart and Vanwinkel, [1992] 3 S.C.R. 299; 143 N.R. 1; 18 B.C.A.C. 1; 31 W.A.C. 1; [1993] 1 W.W.R. 1; 97 D.L.R.(4th) 261; 73 B.C.L.R.(2d) 1, consd. [para. 51].

London Drugs v. Kuehne & Nagel - see London Drugs Ltd. v. Brassart and Vanwinkel.

McLaughlin v. Long, [1927] S.C.R. 303, appld. [para. 54].

Canadian Pacific Railway v. Fumagalli (1962), 38 D.L.R.(2d) 110 (B.C.C.A.), consd. [para. 56].

Miller Dredging Ltd. et al. v. Ship Dorothy MacKenzie et al., [1995] 1 W.W.R. 270; 51 B.C.A.C. 105; 84 W.A.C. 105 (C.A.), consd. [para. 56].

Canadian National Railway Co. v. Norsk Pacific Steamship Co. and Tug Jervis Crown et al., [1994] 2 F.C. 318; 71 F.T.R. 47 (T.D.), consd. [para. 57].

Greaves & Co. Contractors Ltd. v. Baynham Meikle & Partners, [1975] 3 All E.R. 99 (C.A.), refd to. [Schedule].

Wood and Wood v. Cuvelier (1979), 34 N.S.R.(2d) 261; 59 A.P.R. 261 (T.D.), refd to. [Schedule].

Gale et al. v. Box and Box Repair Ltd. (1987), 50 Man.R.(2d) 3 (Q.B.), refd to. [Schedule].

Farnel v. Main Outboard Centre Ltd. (1987), 50 Man.R.(2d) 13 (C.A.), refd to. [Schedule].

Morrison v. McCoy Brothers Group, [1987] 3 W.W.R. 301; 78 A.R. 161 (Q.B.), refd to. [Schedule].

McCutcheon v. MacBrayne (David) Ltd., [1964] 1 All E.R. 430 (H.L.), refd to. [Schedule].

Tilden Rent-A-Car Co. v. Clendenning (1978), 83 D.L.R.(3d) 400 (Ont. C.A.), refd to. [Schedule].

Marmac Credit Jewellers Ltd. v. Dominion Electric Protection Co. (1978), 3 B.L.R. 144 (Ont. H.C.), refd to. [Schedule].

Ailsa Craig Fishing Co. v. Malvern Fishing Co. and Securicor (Scotland), [1983] 1 All E.R. 101 (H.L.), refd to. [Schedule].

Trigg v. MI Movers International Transport Services Ltd. et al. (1991), 50 O.A.C. 321; 4

O.R.(3d) 562 (C.A.), refd to. [Schedule].

Eagle Dancer Enterprises Ltd. v. Southam Printing Ltd. - Imprimerie Southam Ltée (1992), 6 B.L.R.(2d) 45 (S.C.), refd to. [Schedule].

Kordas v. Stokes Seeds Ltd. (1992), 59 O.A.C. 58; 9 B.L.R.(2d) 266 (C.A.), refd to. [Schedule].

Moss v. Richardson Greenshields of Canada Ltd. and Davies, [1989] 3 W.W.R. 50; 56 Man.R.(2d) 230 (C.A.), refd to. [Schedule].

Turnbull v. Hsieh (1990), 108 N.B.R.(2d) 33; 269 A.P.R. 33 (C.A.), refd to. [Schedule].

Authors and Works Noticed:

C.E.D. - see Canadian Encyclopedic Digest.

Canadian Encyclopedic Digest (West.) (3rd Ed. 1991), vol. 7, pp. 333 to 334, para. 254 [Schedule].

Jackson, Rupert M., and Powell, John L., Professional Negligence (1982), generally [para. 19, Schedule].

Waddams, S.M., The Law of Damages (Rev. 2nd Ed. 1991) (Looseleaf Ed.), generally [Schedule].

Counsel:

M.G. Finlayson and G. Stefanson, for the plaintiff;

W. Gange and J. Collins, for the defendants.

This case was heard before Clearwater, J., of the Manitoba Court of Queen's Bench, Winnipeg Centre, who delivered the following judgment on October 18, 1996.

Introduction

[1] Clearwater, J.: The plaintiff seeks general damages of $151,421.21 plus interest and costs, alleging negligence and (or) breach of contract causing water damage to the plaintiff's inventory. At the material times (December 1992 and January 1993):

(a) the plaintiff, as franchisee, carried on the business of a Canadian Tire store on Isabel Street, in Winnipeg;

(b) the plaintiff leased and occupied a warehouse on Roseberry Street for storing its products or inventory;

(c) the corporate defendant (operating under the business names of Grinnell Fire Protection and Grinnell Fire Protection Systems Company ("Grinnell")) carried on a fire protection business which included the supply, installation, and repair of sprinkler systems;

(d) the defendant Tom Glenewinkel ("Glenewinkel") was an employee of Grinnell and was acting in the course of his employment.

Issues

1) Liability

[2] The plaintiff alleges concurrent liability for negligence and breach of contract. The plaintiff retained the services of the defendants to repair a leaking overhead sprinkler system in its warehouse. The evidence with respect to liability raises the following issues:

(a) what duty, if any, is owed by the defendants in the circumstances (this requires an analysis of the appropriate standards by which the defendants' obligations are to be measured)?

(b) did the defendants breach any duty of care or obligation that may be owed by them (either in tort or in contract)?

(c) if the defendants acted negligently or breached their contract, are they relieved from liability by a "limitation of liability" clause located on the reverse side of some, but not all, pages of the defendants' printed form of contract documents?

(d) did any negligence of this plainly contribute to the plaintiff's loss and, if so, to what extent?

2) Damages

[3] Without admitting liability the defendants admitted, without formal proof, the plaintiff's special damages to the extent of $148,101.21. The issue as to damages is whether or not the plaintiff is entitled to recover an additional $3,320 which it claims as labour costs for its own employees relating to the cleanup of the inventory and premises after the flooding.

Background

[4] After several years experience as the owner/operator of a Canadian Tire franchise in Moose Jaw, Saskatchewan, the Provencher family, through their corporation (the plaintiff), moved to Winnipeg in the early 1990's and took over the operation of the Canadian Store at 45 Isabel Street. Since January 1992 the plaintiff had leased and occupied a warehouse at 592 Roseberry Street, where it regularly stored its inventory. The warehouse was equipped with an overhead sprinkler system and an alarm system for fire protection purposes. Grinnell is, and has been for many years, regularly involved in the design, installation and maintenance of sprinkler systems for fire protection purposes in most parts of Canada. The defendant Glenewinkel is an experienced journeyman sprinkler fitter who has worked on fire protection sprinkler systems since approximately 1977 and has, since 1984, been continuously employed with Grinnell.

[5] The plaintiff's warehouse was of concrete block construction with somewhere between 6,000 and 8,000 square feet of storage space. The plaintiff's products were stored throughout the building, generally on one of four levels of shelving. The shelving in question would extend up to 100' in length and was approximately 18' to 20' high. The warehouse was heated by four natural

gas furnaces or heaters; a main furnace located at floor level and three heaters suspended from the ceiling in three different locations.

[6] For a few days prior to the incident in question (which occurred between January 4 and January 6, 1993), the weather in Winnipeg had been extremely cold. On December 31, 1992, at or shortly before the close of business for New Year's Eve, Michael Provencher ("Michael", an employee of the plaintiff and the son of the owner of the plaintiff corporation) had occasion to attend at the warehouse. On that attendance he observed no problems with the heating system and the water or sprinkler system.

[7] The next time that anyone attended at the warehouse over the New Year holiday season was on Monday, January 4, 1993 at approximately 12:30 p.m. when Michael and another employee went to the warehouse. They discovered that the building was cold and that some of the sprinkler pipes had frozen and broken. Water was visibly dripping from the overhead sprinkler piping and ice was visible on the concrete floor of the warehouse. At that point no particular damage to the inventory was observed. Upon observing these conditions, Michael phoned his brother David Provencher ("David"), the manager of the plaintiff's store, for assistance. The sprinkler system in question had originally been installed by Vipond, a competitor of the defendants. David was unable to obtain the services of Vipond and he then called Grinnell's offices. Grinnell sent out Glenewinkel to analyze the problem and to effect the necessary repairs. Michael waited at the warehouse for the attendance of Glenewinkel.

[8] Glenewinkel responded promptly to the call. He (and the plaintiff's two employees) quickly determined that the heating system had malfunctioned. Glenewinkel testified that the overhead sprinkler system, or at least part of it, was frozen. Although there is some difference in the evidence as to whether or not Glenewinkel instructed the closing of the interior main control valve of the sprinkler system while he was at the premises or whether or not someone from Grinnell had instructed the closing of this valve by phone prior to Glenewinkel's attendance, it was clear to all concerned (or should have been if it wasn't) that it was necessary for the water supply to the overhead sprinkler system to be shut off and that the heating problem be rectified so that the system could thaw out and then be repaired.

[9] The supply of water for the sprinkler system in the warehouse was controlled by two valves: firstly, a "curb valve" located underground, outside the building near the property line and, secondly, by an interior main control valve located approximately 4' above the floor in a 4" diameter vertical water pipe (the "riser") which came up through the floor of the building, against or near a perimeter concrete block wall, and about 3' to 4' from an exterior entrance door. This interior valve could be opened and shut by turning a crank. There was an exterior indicator on the valve which was designed to indicate to any user of the crank whether the valve was open or shut.

[10] Either on the advice of Glenewinkel and in his presence (or on the advice of some other representative of Grinnell earlier by telephone), Michael turned the crank on the interior control valve and observed the indicator as it moved to a "closed" position.

[11] It is common ground that while in attendance at the warehouse on the afternoon of January 4

and after Michael had turned the crank on the interior valve until the valve indicator showed that it was shut, Glenewinkel was able to replace and did replace a 4" elbow or coupling in the sprinkler system at or near the ceiling of the building and well to the "downstream" side of the interior valve (well above the interior valve). Whatever the situation (either the valve in question was closed or the system was frozen solid or otherwise blocked below the point of repair), one thing is certain; Glenewinkel could not have replaced this 4" elbow or coupling if water had been flowing through the 4" riser and the 4" main where the elbow or coupling was located. He installed a cap on one of the frozen lines and he also opened a valve on a 2" vertical drain pipe located a few inches to the left of the 4" main riser in which the interior shut off valve was located. This valve on the 2" drain pipe and the drain pipe itself are located "above" the interior shut off valve in question; that is, to the downstream side of the shut off valve. The theory was that when the overhead pipes thawed out, any remaining water would run out through the drain pipe.

[12] Glenewinkel and the plaintiff's employees assumed that the main interior shut off valve was closed (and accordingly no water would flow through the sprinkler system when the heating system was repaired and the pipes thawed). The plaintiff made arrangements for a furnace repair company to attend that same afternoon to repair the furnaces. Glenewinkel agreed to return and repair the sprinkler system once the furnaces had been repaired and heat was restored to the building (and the pipes thawed). Before leaving on January 4, Glenewinkel had Michael sign a document (which may be described as an "invoice" or a "work order") acknowledging the minor repairs that Glenewinkel had done on this first attendance and stating:

> "spkr. system has been temporarily shut off by customer until bldg. gets heated"

Glenewinkel also advised Michael to call whoever monitored the alarm system in the building (which Michael or someone on behalf of the plaintiff did), to advise the people who monitored the alarm system to ignore any alarms that might occur over the next short while because such alarms would be triggered by water running out or leaking out as the pipes thawed. He advised Michael to inform the plaintiff's manager to tell the insurance company and the fire department that there was no fire protection (Ex. 8). There is a difference in the evidence of Glenewinkel and Michael as to whether or not Glenewinkel advised him of the need for someone to be there, on watch, if the fire protection system was down.

[13] According to the witnesses the plaintiff was unaware, until Michael's attendance on January 4, 1993, of any problem with the natural gas heating system in the warehouse. Sometime after this date the plaintiff first learned from another employee (Joel Sontag) that back in the winter of 1992 he (Sontag) had knocked out the wiring to the overhead natural gas heater located closest to the interior shut off valve and 4" main riser. This particular heater had not worked since the winter of 1992 and the plaintiff did not realize this until Sontag's belated admission. When the natural gas heaters were repaired by Winnipeg Supply later during the afternoon of January 4, 1993, this particular heater (suspended and located closest to the valve in question) could not be repaired; the wiring had been broken by Sontag and an electrician had to be called in later. Winnipeg Supply repaired the next closest heater to the valve in question; this heater was located approximately 100' to 150' from the valve. In addition, the main furnace was not working and was

repaired; the main furnace was located only approximately 20' from the valve. Michael returned to the warehouse at approximately 8:30 p.m. that evening and observed that the building was getting warmer but noticed no other problems at that time. David had earlier stopped in at the warehouse around 5:00 p.m. that day and observed "ice mounds" on the floor and a crack in a pipe near the door.

[14] On the morning of January 5, 1993, David received a call at the store and was told that an alarm had gone off at the warehouse. Michael went to the warehouse and as he approached the entrance door he observed water coming out through or under the door. He opened the door and large volumes of water that had accumulated on the warehouse floor poured out into the parking lot. It was readily apparent that the water supply to the overhead sprinkler system had not been shut off as assumed on January 4. With the repairs to the heating system done that afternoon, the sprinkler system was warmed to the point where it thawed out and with the resumption of water pressure (through the valve and the 4" riser) the entire warehouse was flooded by the leaking overhead pipes and sprinkler heads (previously frozen and broken) throughout the warehouse. In turn, the inventory located on the shelving throughout the warehouse was significantly damaged. Upon discovering this flooding on January 5, personnel from the City of Winnipeg's water department were called and they shut off the exterior curb valve. By then the damage was done.

[15] It was not until the next day (January 6) that Glenewinkel came back to complete the repairs to the sprinkler system. It was then that he discovered that the interior shut off value was broken internally. Although the indicator showed the valve (described as a "butterfly valve") to be in a closed position, it was not in fact closed inside the 4" pipe. This allowed the water to flow freely from the City water mains through the 4" vertical water pipe (the riser) that supplied the overhead sprinkler system. He replaced this valve and effected all of the necessary repairs to the overhead pipes and sprinkler heads. He again had Michael, who was present at the warehouse on January 6, sign another document entitled "ORIGINAL CUSTOMER'S INVOICE". The defendants' documents presented by Glenewinkel and signed by Michael for the plaintiff contain limitation of liability wording which is also the subject matter of this action.

Positions Of The Parties

[16] The plaintiff alleges that the defendants were negligent and (or) in breach of contract in failing or neglecting to arrange for the City of Winnipeg to close the curb valve outside the building (at the street) on January 4, 1993. Alternatively, they were negligent or in breach of contract in failing to see that the interior main shut off valve was in fact closed before leaving the premises to await the thawing of the pipes.

[17] The defendants deny any responsibility for arranging the closing of the exterior curb valve by the City of Winnipeg in the circumstances or for the failure to close the main interior shut off valve. Further, the defendants submit that the parties are bound by the terms and conditions contained in the documents signed by Michael on January 4 and January 6, whereby, they say, the plaintiff agreed as follows:

(a) that the defendants would not be liable for special or consequential damages;

(b) that any liability of the defendants for any loss arising out of the contract is limited to the repair or replacement of any defective materials or workmanship supplied or performed by the defendants.

The defendants also allege that the plaintiff was negligent in failing to properly maintain its heating system and its sprinkler system and in failing to monitor the premises after the initial attendance of Glenewinkel on January 4, 1993 and until heat was restored to the building and the frozen pipes thawed on January 4 or 5.

[18] I am satisfied that the maintenance, service and repair of commercial sprinkler systems such as this does call for the use of some special skills. That being the case, the defendants must not only exercise reasonable care in the performance of their work but they must also measure up to a standard of competence of a reasonably skilled person engaged or employed in the industry in question. In the case before me the parties strongly disagree as to what is the standard of skill and care against which the conduct of the defendants should be measured. The defendants deny that it is a common practise in the industry or that it is reasonable in the circumstances for contractors in their position to automatically and always arrange for the water supply to be shut off at the curb valve. It is, the defendants say, sufficient for them to shut off the water supply by closing the interior control valve as was done in this case. Unknown to either of the parties, and the defendants say that this was such an unusual and unique occurrence that they could not reasonably have foreseen its happening, the ■" steel shaft inside the valve control was broken or sheared. When the crank was turned (as was done in this case with a view to closing the valve), the valve itself did not close although the outside "indicator" moved to the closed position, thereby leaving the operator of the crank with the impression that the valve was closed.

[19] This area of professional negligence is canvassed in the 1982 text, Professional Negligence, by Rupert M. Jackson and John L. Powell, in a discussion of the myriad of cases dealing with the implied contractual obligation and the duty of care in tort owed by a professional person who must exercise reasonable skill and care. Their analysis, written in 1982, is still applicable today and is as follows:

"... The cases abound with paraphrases of this term and explanations of what it means, and some of these are quoted in the chapters concerning individual professions. No single formulation commands universal consent. It is common ground that the standard of skill and care must be determined by reference to members of the profession concerned, rather than the man on the Clapham omnibus. Where the authorities differ, however, is on the question whether the requisite standard is (a) that which members of the particular profession do in fact achieve ordinarily or (b) that which, in the opinion of the court, members of the profession ought to achieve. The distinction is frequently blurred, for example in definitions which refer to the standard attained by 'reasonably competent' members of the profession. These definitions, however, properly fall into the second category, since it is for the court to decide what is meant by 'reasonably competent' members of the profession. They may or may not be equated with practitioners of average competence.

"It is submitted that of the two approaches discussed in the preceding paragraph, the

second is correct. Suppose a profession collectively adopts extremely lax standards in some aspect of its work. The court does not regard itself as bound by those standards and will not acquit practitioners of negligence simply because they have complied with those standards. Thus, evidence as to general and approved practice, although of very considerable importance, is not automatically conclusive in every case."

[20] The plaintiff submits that if the standard in the sprinkler industry does not require, in situations such as this, that the water be shut off at the curb valve, then the standard is not reasonable and the court should impose a higher standard. The defendants, on the other hand, submit that Glenewinkel satisfied a reasonable standard of care in the circumstances by observing the plaintiff's employee turn the crank and move the indicator to the closed position. The defendants say that the broken shaft was not something that Glenewinkel could have, or should have, reasonably foreseen.

The Evidence Re
Negligence And (Or)
Breach Of Contract

[21] On the issue of whether or not there exists an industry standard requiring professional sprinkler service firms to have the water shut off at the curb valve whenever there is freezing in a building, the plaintiff called Larry Humphries, a 26 year employee of Vipond (a major competitor of Grinnell). Between them, Vipond and Grinnell have approximately 60% of the market in Canada. This particular system was installed by Vipond and Vipond had last attended to service this particular building in 1987 when the pipes had frozen at that time. In 1987 Vipond, in order to effect repairs, made arrangements with the City of Winnipeg to close the water at the curb valve. Mr. Humphries' evidence was that it was Vipond's policy to contact the City on all occasions to have the water shut off at the curb valve because, according to him, interior valves such as the one in question here might be damaged or might not hold properly. The reason for this policy goes back to an instance in 1985 or 1986 when Vipond was servicing a system in a Beaver Lumber store which was frozen and had not bothered to have the water shut off at the curb valve, with resultant flooding from an 8" main. Following that incident, Mr. Humphries testified that he instructed all his employees that where there is freezing Vipond will have the City shut off the water outside of the building.

[22] Mr. Humphries, in cross-examination, admitted that he had no knowledge as to what Grinnell's practise was in that regard and he did not have any knowledge as to what other companies in the industry did in similar situations. By the end of his cross-examination, Mr. Humphries had admitted he was simply testifying as to what Vipond's practise or policy is and why Vipond follows this policy (the problem that occurred in the Beaver Lumber store).

[23] The plaintiff called Mr. Roberts, a professional engineer with over 20 years experience, and qualified him to give opinion evidence in the area of metal stress or metal fatigue and the fracturing of metal such as occurred with respect to the ■" steel shaft in this valve. His expertise in this area was admitted by counsel for the defendants. He received the valve in question on January 8, 1993, dismantled it and inspected it visually. He prepared a diagram or schematic as to

how it was designed to work (Ex. 24). His inspection of the fracture revealed no corrosion and he described it as a bright recent fracture; a brittle fracture typical of hard steel. The shaft broke right at the point where it changed from a round shaft to a square shaft. He described this as a weak point or a stress point and opined that it broke from tortional stress; that is, from someone attempting to turn the valve. He observed some rubbing or "spalling" on the edges which indicated to him that the shaft may have been turned several times, consistent with the shaft being turned while the butterfly valve itself was encaked in ice. In his opinion the fracture was caused by the turning of the crank and shaft while the butterfly valve itself was stuck in the ice. He is also of the opinion that it was "possible" that not a great deal of force would be required on the crank to do this but he was unable to give any precise estimate as to how much force would be required. There is reference in Mr. Roberts' report (Ex. 10) to obligations of building owners with respect to the fire codes but in that area he acknowledged that he did not have expertise and that he was relying on David Cross, who had expertise with or knowledge of the regulations. Mr. Roberts came to four conclusions:

1) as previously stated the fracture in the shaft occurred when attempts were made to close the valve while it was frozen solid;

2) no watch was provided for the premises during interruption of the sprinkler system as required by Manitoba Fire Code, s. 6.5.2.2;

3) arrangements should have been made by the sprinkler service company to have water service shut off by the City (at the curb) "since the main valve and piping above and below it were known to be frozen and could have been anticipated to have suffered damage (emphasis added by underlining). In direct examination he acknowledged that he was relying on Mr. Cross for that conclusion;

4) the sprinkler system had not been maintained and inspected as required by the Manitoba Building Code, the Manitoba Fire Code and the National Fire Protection Association Regulations.

[24] Mr. Roberts never talked to Michael and, therefore, never asked anyone exactly how much force was used when the crank was turned on January 4. When told that Michael's evidence in court was that it turned easily, with one hand, Mr. Roberts expressed the opinion that if it turned that easily the shaft was likely broken before he turned it; that is, broken before Michael turned the crank. Mr. Gange attacked him on his conclusion #3 where he assumed that there was ice above and below the valve in question. He could not identify who told him this because he never talked to Michael or Joel Sontag or the defendant Glenewinkel. Whether he was told this or assumed it from whatever he saw, received, or heard, I am satisfied he was right. I accept his opinion to the effect that the system was probably frozen below the valve, through the valve, and above the valve. This opinion is supported by the uncontradicted evidence of David when he observed ice mounds still on the floor and a "crack" in a pipe near the door at approximately 5:00 p.m. on January 4 (after the heaters were repaired and the building was starting to warm up). David was not cross-examined on this observation.

[25] The plaintiff also called Mr. Hutton who has worked 30½ years for the City Works and

Operations Department supervising water and sewer operations. The freezing of both domestic and commercial sprinkler systems in Winnipeg in the winter is a common occurrence. He has dealt with hundreds of these over the years and testified that there were approximately 1,000 such occurrences last year. It was common to be contacted by fire protection companies to turn off water at the curb valves so that repairs could be effected. It is a fairly simple procedure for the City to turn off water at the curb valve, even in the coldest of winters. When the City receives a call it radios out to workers in the field who attend to shut off the gate valve which is located approximately 8' to 9' underground. There is no cost or charge to the owner of the property or to the sprinkler company in these situations. The City notifies emergency services when sprinklers are shut off. If there is ice or snow covering the valve in the winter the City worker who attends has a steam boiler on his truck and it takes approximately 10 minutes to thaw out the location sufficient to permit the curb valve to be shut off.

[26] On cross-examination Mr. Hutton acknowledged that a qualified repairman (such as Glenewinkel) would know whether or not the interior valve was shut off by looking at the gauges. This is not particularly helpful if the gauges are frozen solid and I am satisfied, notwithstanding Glenewinkel's testimony to the contrary at trial, that these gauges were probably frozen, either wholly or at least partially.

[27] The plaintiff also called David Cross, a professional mechanical engineer since 1963 with considerable work experience and practice in building services, heating, plumbing and sprinkler systems. He is licensed in several provinces and designs and consults fire protection systems. He is fully familiar with this type of sprinkler system and with the regulatory codes which apply to the situation. He inspected the premises on January 11, 1993 with Mr. Roberts, the previous witness, an insurance adjuster, and David. His evidence is contained in his comprehensive report dated January 17, 1993 (Ex. 10). His report includes photos of the scene, a summary of his observation and discussion, and the applicable provision of the Manitoba Fire Code, the National Fire Code of Canada, the National Building Code, and the National Fire Protection Association Regulations for the maintenance of sprinkler systems.

[28] When he attended on January 11 he confirmed that the valve and 4" riser were only a couple of feet from the main door and approximately 8' from the overhead door. He had been told that the line had frozen on January 4, a 4" elbow was broken on the main riser, there was ice and water on the floor, the heat was out, and many sprinkler heads had broken and fallen on the floor. In his opinion, if water is frozen in an elbow 25' in the air, this would suggest that the whole building is frozen top to bottom. Heat rises, cold stays down, and two of the three malfunctioning heaters were at ceiling level. The butterfly valve was approximately 4' above the floor and there was ice on the floor. In his opinion, given those conditions, the 4" main line (the riser) would be frozen all the way to the floor and it was, or should have been, clear that the valve was within a frozen area. In that instance it was mandatory for the repairman to call the City and turn the water off at the curb valve. In his opinion, a valve in a frozen line could not be relied upon. For a gear-operated valve of this type one could not turn the crank if it was frozen in ice. If he is right in this opinion, and if it is reasonable to know or expect that the valve was frozen in ice (which I think they should have expected or known), then anyone who understood the valve, including Glenewinkel, should have immediately become suspicious when the crank turned "easily" as

Michael described. It should not turn easily, if at all, in a frozen pipe. Those facts should have led Glenewinkel to conclude that it was necessary to shut water off at the curb valve.

[29] Mr. Cross referred to the location of the butterfly valve, the 2" drain valve to the left, and the pressure gauges as they appear in Ex. 10, photo #2. If there was no freezing in the line and if the valve was closed the pressure should stay the same on both gauges. If one opens the relief valve to the left, the top gauge and the bottom gauge should drop. Both gauges are installed above the butterfly valve and one of them is connected below the drain valve (relief valve). If one assumes the entire system was frozen the gauges would likely stay at the same point. They would be frozen and they would not move (Glenewinkel testified that these gauges did move when he opened the drain valve and, therefore, he says, the system was not frozen in this area). One could easily test to see if the pipes were frozen below and in the broken 4" gear valve by opening the 4" gear valve and opening the 2" relief valve (drain valve). If the 4" main riser and the gear valve were blocked with ice, little or no water could run through and out the 2" drain valve. If the water did run through and drain out the 2" pipe, it would be clear that the system was not frozen at this point and that the 4" gear valve was working.

[30] On cross-examination Cross was referred to an error in his report (Ex. 9, p. 1) where he states that Grinnell closed the valve. The evidence is that Michael closed it, either before Glenewinkel arrived or in his presence. Whoever turned the crank on January 4, Cross was firm in his opinion that if the butterfly valve was frozen and if the crank turned easily, then the shaft must have been broken prior to the incident. He acknowledged that if a maintenance check had been done earlier, before the freezing problem, the broken shaft would have been detected. Mr. Cross acknowledged no one told him that the riser below the valve was frozen on January 4 and he never talked to Michael, Sontag or Glenewinkel. However, he confirmed that the main riser was right beside the door and he was firm in his opinion that if pipes were frozen at the ceiling and if the heat was out one should expect freezing in the 4" riser.

[31] Perhaps the best evidence of whether or not the 4" riser and the gear valve were frozen on January 4 comes from the examination for discovery of Glenewinkel conducted on November 24, 1994. After clearly establishing Glenewinkel's familiarity with this type of valve at that time, and the fact that it was a standard valve in the industry (Q. 51-57, Ex. 28), plaintiff's counsel had Glenewinkel acknowledge that in January 1993 he (Glenewinkel) was not in the practice of arranging for the main water line from the City to be closed or shut off when he attended a building where the sprinkler system was frozen, but he has followed that practice since this loss (Q. 60-62, Ex. 28). Glenewinkel went on to answer some questions about tests that might be performed if a system is not frozen to see if the valve is operating or not and then he made the following admissions when he was asked by plaintiff's counsel at Q. 155 (Ex. 28) as to whether or not the gear valve in question was frozen on January 4, 1993: A. "I imagine it was."

Defendants' Evidence Re
Negligence And (Or)
Breach Of Contract

[32] Glenewinkel is a 38 year old journeyman sprinkler fitter, with significant experience working

with fire protection systems such as this going back to 1977. He served a four year apprenticeship and obtained his journeyman's interprovincial sprinkler fitter's licence in 1981. He has many years work experience. He has worked both in the construction end of the business (installing or building new systems) and, since 1985, in the service end of the business with Grinnell.

[33] In his direct examination Glenewinkel acknowledged that when he attended the building on January 4, 1993 he walked through the building and observed a large amount of damage to the areas high up; there was clearly visible damage to the piping at the ceiling level. This in itself would almost certainly mean that it was colder at the floor level (or even 4' about the floor) unless there were furnaces working at the floor level and that was not the case in the area of the 4" main riser and the butterfly gear valve. In his letter of April 26, 1993 Glenewinkel described a "most severely damaged sprinkler pipe above the shipping and receiving doors" (only a few feet from the riser and the valve).

[34] Glenewinkel testified that Michael shut the valve off and that he observed Michael having no difficulty in turning the crank. Michael testified that he believed that he turned the valve off before Glenewinkel arrived as a result of instructions over the phone from someone at Grinnell. On this point I accept that both witnesses are doing their best to recall the sequence of events as to who operated the crank on January 4. Given the fact that the crank turned almost effortlessly, combined with Mr. Robert's evidence (Ex. 10, p. 2) of the spalling on the extremities of the shaft which indicated that it had been operated several times, I am satisfied that it had fractured sometime prior to the occasion when Michael turned the crank on January 4.

[35] Glenewinkel testified that he could not do much more work that day; it was essential that the system be thawed out and drained before he could repair it. He did, however, use a ladder and go up and replace a 4" coupling or elbow that was broken at the ceiling area (approximately 25' off the floor) and he acknowledged that it was freezing that caused this coupling or elbow to break. Notwithstanding this, at trial Glenewinkel continued to insist that there was nothing to indicate that the water line was frozen around the 4" butterfly valve (approximately 4' above the floor). It was only at trial that Glenewinkel stated for the first time (either under oath or by way of any of his prior statements) that he now had a recollection of the pressure gauges actually working when he opened the 2" relief valve. I do not accept this part of his evidence. Glenewinkel knew the seriousness of the problem on January 5 or 6, 1993. As soon as the loss occurred he knew that he and Grinnell had a problem if he had not taken reasonable care to insure that the water supply was shut off on January 4. Knowing this, I find it inconceivable that he would not have recalled the gauges working (therefore not frozen) and he would not have told this to the adjuster in his April 26, 1993 statement (Ex. 8), made some three to four months after the event. I simply do not believe Glenewinkel when he had the "sudden" or "recent" recollection at trial, of the gauges being in operation that day. Moreover, in his statement to the adjuster on April 26, 1993, Glenewinkel described the scene upon his attendance in Ex. 8 as follows:

"When I arrived at the above described address, it was apparent that the sprinkler system was indeed frozen due to the fact the heating system in the building had not been turned on. Not only was there damage to the sprinkler system but also the water pipes in the washrooms were frozen and the toilet bowls were completely destroyed from freezing." (emphasis supplied by

underlining)

[36] In short, on January 4, 1993, Glenewinkel knew that the system was frozen solid at the ceiling level (approximately 25' above the concrete floor) when he repaired the coupling or elbow. Moreover, he knew, as he observed, that the system was frozen solid at the floor level (with toilet bowls being broken, etc.). Why he would assume (or later convince himself) that the 4" water main and the butterfly gear valve at a point approximately 4' above the floor would not be frozen is not for this court to speculate upon. Glenewinkel's evidence in this area is not consistent with the physical facts.

[37] In ordinary circumstances one could agree with Glenewinkel's opinion that the fracturing of a ■" steel shaft in a butterfly gear valve such as this was highly unusual and not something that could be reasonably expected. However, when it is, or ought to have been, clear that the water in the butterfly gear valve and in the 4" main riser above and below it was probably frozen solid, it was, or ought to have been, obvious that the butterfly valve could not turn in solid ice and thereby close. It was the obligation of Grinnell (and Glenewinkel) to insure that the water supply was shut off until they could do the repairs or, alternatively, to insure that the plaintiff's employees who were present were given proper advice so that they themselves could make sure that the water supply was shut off.

[38] I am satisfied that given the apparent freezing conditions, particularly at the level of the butterfly gear valve and the 4" riser, Glenewinkel was both negligent and in breach of Grinnell's contract with the plaintiff in failing to conduct any reasonable test to insure that the 4" gear valve was in fact closed when he had already made the decision not to have the City shut the water off at the curb valve. There are only two places this water could be shut off; at the curb valve or at the butterfly valve. If the butterfly valve was frozen (and it is apparent that it was), then Glenewinkel should have called the City or advised the plaintiff's inexperienced employees to call the City, to shut the water off at the curb.

[39] When Glenewinkel was referred to his aforementioned admissions on his examination for discovery (Q. 152-156, Ex. 28), in cross-examination, he acknowledged that when he was examined for discovery (in November 1994) he did believe that the entire system was frozen. Glenewinkel went on, however, to testify on cross-examination that he has since changed his mind "because things I did led me to believe the valve was not frozen". This was a reference to his recently recollected evidence about the gauges working. As I previously stated, I do not accept his evidence as to the gauges. Moreover, at another point in cross-examination he admitted that "in hindsight" he now knows that the 4" main riser was frozen but acknowledged that this thought did not enter his mind on January 4, 1993.

[40] I am mindful of the opinion evidence called by the defence. Mr. Fronczak, an expert witness presented by the defence and an officer of the Canada Automatic Sprinkler Association ("CASA") canvassed three people in the industry and proffered the opinion that there was no standard in the industry whereby one automatically shuts the water off at the curb valve in a freeze up situation. He further testified the gear operated butterfly valve in question was a common type of valve and he would expect all sprinkler fitters to be aware of the design. From the design it is apparent that

if the shaft breaks the exterior indicator would turn even though the butterfly valve itself would not turn. Having said this, he testified he would not have expected his own staff to know that if the shaft broke the indicator would still work, although an analysis of the design done after this incident establishes this fact. He described this as "not a normal experience" or "a normal occurrence" and he did not consider it a defect in the design of this valve such that CASA would or should do anything to alert the trades about this problem (even though many of these valves remain in use today). This is a strange position for an officer of an industry standards association to take. I cannot accept Mr. Fronczak's persistence in opining that when it was apparent that the butterfly gear valve area was frozen, it was still not necessary to do any "test" by using the 2" drain and allowing some water to flow through, before accepting that the gear valve was properly closed. In my view this is a simple thing to do and Glenewinkel should have done it. Mr. Fronczak formulated his opinion for the purpose of trial by relying on the information he received from defendants' counsel (Ex. 27) and from the three people he consulted, as referred to in his report. He acknowledged that there was nothing in Ex. 27 or in any other information he had received, which informed him of the following facts (in effect, he had not been given these facts when he prepared his opinion):

1) the close proximity of the exterior doors to the 4" butterfly valve in question (which obviously puts the valve in a cold location if the heaters are not working);

2) the fact that Glenewinkel had seen the toilet bowl close by at floor level and observed that it was already destroyed from freezing when he attended on January 4;

3) that at least 16 of the overhead sprinkler heads had frozen and popped in the warehouse;

4) the fact that there was sufficient freezing at the ceiling level (approximately 25' above the floor) that a 4" coupling or elbow was broken and had been replaced by Glenewinkel on his first attendance on January 4.

[41] I cannot accept that Mr. Fronczak's opinion would necessarily have been the same if he had been aware of these facts (as opposed to having been made aware, very generally, that Glenewinkel was working in a "freezing" environment). It was extremely important for him to know the degree of freezing as evidenced by the apparent physical conditions.

[42] The fact that Michael acknowledged, on his cross-examination, that when he went to turn off the valve he "saw no indication that the pipe was frozen solid below the valve" or that "there was no indication that the pipe and the fire protection system was frozen solid anywhere" does not detract from the physical facts. Michael was not trained to be alert to these situations and he is simply wrong in his answer. It is an undisputed fact that this system was frozen solid enough to break a 4" coupling or elbow 25' off the ground. In short, neither he nor Glenewinkel directed their mind to the obvious. I accept Michael's evidence, and that of his brother David, when they described "mounds of ice" or "ice" on the floor on their respective attendances on January 4. There is ample evidence to conclude that the butterfly valve was encased in ice when the crank was turned on January 4 and the expert, Glenewinkel, ought to have known this. He simply did

not think about it. If he had considered that the valve was probably encased in ice, he would have been alerted to some problem when the crank turned "easily" as described by all witnesses. The crank would not turn easily if the butterfly valve was encased in ice (unless the shaft was broken as was the case). An experienced journeyman sprinkler fitter knows, or ought to know, the high risk of flooding damage to premises when the pipes thaw out after being frozen (as was the case here), and visibly broken (as was the case here). The necessary degree of care was not taken in these particular circumstances.

The Limitation Of
Liability Clause

[43] The defendants submit that a "limitation of liability" clause was incorporated in and forms part of the contract between the plaintiff and the defendants for the work and materials in question. The plaintiff denies that the clause in question was incorporated in or formed part of the contract in the particular fact circumstances of this case. If the "limitation of liability" clause does form part of the contract in question, each party advances several authorities on the issue of whether or not this particular clause is satisfactory or sufficient to limit the liability of the defendants, or either of them, in the circumstances.

[44] For the following reasons I conclude that the clause in question in Grinnell's contract document did not form part of the agreement for the work done and materials supplied on January 4, 1993. I am also satisfied that it was not incorporated into the agreement at a later date (by the subsequent documents executed on January 6, 1993 when further work was done).

[45] On January 4, 1993 and only after the advice in question as to shutting off the sprinkler system and the initial work as described was completed, Glenewinkel filled out a portion of the front page of a Grinnell contract document which is described on the green original, at the bottom, as "CUSTOMER'S ORDER COPY" (Ex. 4). He then had Michael sign on behalf of the plaintiff and, upon signing, Glenewinkel provided Michael with a yellow carbon copy of this document which has the words "SALESMAN'S COPY" printed at the bottom (Ex. 14). On the lower right-hand corner of both the green original (Ex. 4) and the yellow carbon copy (Ex. 14) are printed in block letters, in English and in French, the following words:

"SEE REVERSE SIDE FOR SPECIFIC TERMS
VOIR LES CONDITIONS SPÉCIFIQUES AU VERSO"

On the reverse side of the green original (Ex. 4) one finds at the top, in large letters, a heading, "General Terms and Conditions", followed by a series of separate paragraphs each designated by a heading. The following paragraphs are particularly relevant to the issues in this case:

1) the paragraph entitled "ENTIRE CONTRACT" provides that the provisions on the back of this document constitute "all of the terms and conditions of this contract". Moreover, the "purchaser's" (in this case the plaintiff) "order shall be governed by only the terms and conditions appearing herein". "A definite acceptance or a written confirmation which is sent to the Seller" (Grinnell) "within the time specified in the Purchaser's" (plaintiff's) "order operates as an

acceptance of the terms specified herein".

2) Under the heading "LIMITATIONS OF LIABILITY", Grinnell has provided:

"In no event shall Seller be liable for special or consequential damages. Seller's liability on any claim for loss or liability arising out of or connected with this contract, or any obligation resulting therefrom, or from the manufacture, fabrication, sale, delivery, installation, or use of any materials covered by this contract, shall be limited to that set forth in the paragraph entitled 'Warranty'."

3) Under the heading "WARRANTY", Grinnell provides that it will for a period of 90 days after completion of work, repair or replace at its own expense any defective materials or workmanship supplied or performed by it. Grinnell does not guarantee the operation of the system and it excludes all other express or implied warranties of merchantability or fitness, or "otherwise".

[46] Glenewinkel did not make any specific reference to the fact of "terms and conditions" being on the reverse side of the original of the green document he had Michael sign (Ex. 4). Moreover, for some unexplained reason Glenewinkel kept Ex. 4 (which is stated to be the "CUSTOMER'S ORDER COPY") in his possession and gave the yellow carbon copy (Ex. 14 - "SALESMAN'S COPY") to Michael. Also for reasons that were not canvassed or explained at trial, although Ex. 14 says on the front, in the lower right corner, that there are specific terms on the reverse side, the fact is that the reverse side of Ex. 14 was blank. What good is this? What warning is this, particularly when it is given after the work is done? In any event, and notwithstanding the urgency of the situation from the point of view of the plaintiff (they needed to get the repair work done right away) and notwithstanding Michael's admission (as a rather unsophisticated employee of the corporation plaintiff) to the effect that he would have signed whatever contract document or contract terms were put in front of him at that point in time, I am satisfied that the particular limitation clause in question was not effectively incorporated into the contract made between the plaintiff and the defendants on January 4, 1993. Whether or not this same clause was incorporated into any agreement between the parties by the invoice document signed by Michael on January 6, 1993 (when the subsequent repair work was done) is, in my view, irrelevant. In the absence of a very express agreement made on January 6, 1993 (and there is no evidence of same), the January 6 documents cannot (and should not) relieve the defendants from liability for the damages flowing from their negligence on January 4, 1993.

[47] On January 4, 1993 it was the obligation of the defendants to insure that the water supply to the sprinkler system in question had been temporarily shut off (whether Glenewinkel turned the crank, which he did not, or whether he or someone else from Grinnell instructed or observed the employee, Michael, turning the crank). Neither the plaintiff nor its employees have any experience or expertise in the operation of these valves. The defendants are experts in this area and they have a duty to take all reasonable steps to insure that the water system has been properly shut off if it cannot be repaired in its frozen condition. As I have found, they breached that duty.

[48] The decision of the Supreme Court of Canada in Crocker v. Sundance Northwest Resorts

Ltd., [1988] 1 S.C.R. 1186; 86 N.R. 241; 29 O.A.C. 1; 51 D.L.R.(4th) 321, creates minimum obligations if one wishes to incorporate a limitation of liability term or condition into a contract in circumstances such as this. As was the case in Crocker, here the defendants did not take reasonable steps to draw the limitation of liability term or clause to the attention of the plaintiff either before it entered into the original agreement on January 4, 1993 or at any time thereafter before the damages occasioned by their negligence and breach of contract occurred. It was too late by January 6, 1993. While it is correct that Glenewinkel had Michael sign the front page of the original green copy (Ex. 4) and while the copy did refer to specific terms being on the reverse side, Glenewinkel did not give Michael a true copy of this document. He gave him a yellow carbon copy (Ex. 14) and the reverse side did not contain anything. He did not give Michael any opportunity to look at the reverse side of the green copy (Ex. 4) which he kept in his possession. Nor did he refer the limitation of liability clause to Michael or otherwise mention it at all. The fact that Michael or David (or for that matter any other employee, officer, director or shareholder of the plaintiff corporation) may well have signed the document containing this clause if they were fully aware of it is interesting but relevant only if they had a reasonable opportunity to consider it and they decided to agree. That is not what happened. It is not good enough simply to point to the words on the lower right-hand corner of Exs. 4 and 14 at trial when one did not give any opportunity to the plaintiff, at least before the damage occurred, to look at the reverse side of Ex. 4 (and when the reverse side of Ex. 14 is blank).

[49] As I stated previously, I am of the opinion that the preparation and delivery of similar documents by Glenewinkel to Michael on January 6, 1993 following completion of the installation of a new butterfly valve and the repair of the leaking system is not of any assistance to the defendants. On that date Glenewinkel prepared the original white copy of a document entitled at the bottom "ORIGINAL CUSTOMER'S INVOICE" (Ex. 5) and he had this document signed at the lower left-hand corner by Michael. It contains the same reference in the lower right-hand corner to specific terms being on the reverse side and it contains the same "general terms and conditions" on the reverse side as the green work order (Ex. 4). Having completed the original of Ex. 5 on January 6, Glenewinkel then gave a white carbon copy of Ex. 5 to Michael, entitled at the bottom "DUPLICATE CUSTOMER'S INVOICE". This carbon copy also has a reference in the lower right-hand corner to specific terms being on the reverse side, but when one turns to the reverse side one finds that all of the paragraphs are printed in French. At the very bottom of the reverse side of Ex. 15 I found the following words in English: "FOR ENGLISH TERMS AND CONDITIONS SEE ORIGINAL INVOICE COPY". The original invoice copy was retained by the defendants on January 6 with the French copy being given to Michael. Again, no mention was made of the terms of conditions by Glenewinkel and, in any event, there is no evidence that Michael could read and understand the French version of these terms and conditions.

[50] Counsel for the defendants established that the plaintiff, in its retail Canadian Tire store operation, regularly used printed form invoices or contracts whereby it purported to limit its liability for materials and workmanship (particularly on its motor vehicle repair invoices). The defendants categorize the relationship between the plaintiff and the defendants as being a relationship between two sophisticated commercial enterprises, as opposed to a relationship between a sophisticated commercial enterprise and an unsophisticated consumer. I am satisfied that this is a relationship between two commercial enterprises (as opposed to a consumer -

commercial relationship), but nevertheless reasonable steps have to be taken to incorporate specific terms into the contract. In my view they were not taken in this instance and, accordingly, the defendants cannot rely on the so-called limitation of liability "clause".

[51] If I have erred in my conclusion that this particular clause did not form part of the contract for materials and services provided on January 4, 1993 (the breach of which caused the damages in question), I am satisfied that the wording of the clause in question is sufficient to exclude recovery by the plaintiff for the special or consequential damages it claims in this action. Moreover, I am satisfied that the employee Glenewinkel would be entitled personally to the protection afforded by this clause. As stated by the majority of the Supreme Court of Canada in London Drugs Ltd. v. Brassart and Vanwinkel, [1992] 3 S.C.R. 299; 143 N.R. 1; 18 B.C.A.C. 1; 31 W.A.C. 1; [1993] 1 W.W.R. 1; 97 D.L.R.(4th) 261; 73 B.C.L.R.(2d) 1, Glenewinkel was acting in the course of his employment with Grinnell and he was performing the very services provided for in the agreement between Grinnell and the plaintiff when the loss occurred. The plaintiff knew that the services in question had to be performed by employees or other representatives of Grinnell. When one takes into account all of the circumstances of this agreement, it is reasonable, in my opinion, to interpret the word "seller" where it is used in the contract to designate "Grinnell" and Grinnell's employees acting in the course of their employment. The physical work in question had to be done by someone; it could not be done by a corporation without the use of employees or other representatives. To deny Glenewinkel the protection of this clause would, in my opinion, be inequitable.

Contributory Negligence

[52] The defendants plead and rely on the provisions of the Tortfeasors and Contributory Negligence Act, R.S.M. 1987, c. T-90; C.C.S.M., c. T-90. There is clear evidence that the plaintiff was negligent in several respects. The real issue is whether or not the plaintiff's negligence can be said to have contributed to the loss in question and, if so, to what extent. Clearly the plaintiff was negligent in permitting or allowing the heating system in question to deteriorate to the point where two, if not three, of the four natural gas furnaces used to heat the building were either malfunctioning partly or completely inoperable. From the time it took possession of the warehouse in January 1992 the plaintiff had never inspected, tested, serviced or otherwise repaired or maintained any of the four natural gas furnaces in the building. Moreover, the plaintiff's employee Sontag had broken or damaged the wire to the suspended heater nearest the location of the water main riser and valve in question more than one year before the event. He neglected to tell the plaintiff (his employer) of what he had done and the plaintiff never checked the heaters or noticed the problem (between January 1992 and January 1993). Moreover, the plaintiff had never inspected, tested, serviced or otherwise maintained or repaired the sprinkler system in question, notwithstanding the requirements of the various codes (for example, the Manitoba Fire Code (part of Ex. 9) requires the plaintiff to take reasonable steps to prevent freezing and, under s. 6.5.4 headed "Maintenance", the plaintiff is required to keep all sprinkler control valves maintained and in operable conditions at all times). Specifically under s. 6.5.4.1, the plaintiff is required to check all valves controlling the water supply to sprinkler and alarm connections "weekly" to insure that they are in the open position (except for electrically suspended valves which is not the case here). Drain tests are to be performed after any sprinkler

system control valve has been operated. The plaintiff did none of this. Moreover, the fire codes provide that when a sprinkler system such as this is shut down for repair (or for any reason) "extra watch service" is to be placed on duty. Glenewinkel testified that he told Michael about the need to have someone watch the premises when the system was shut off. Michael denies that Glenewinkel told him this. On this point I do accept Glenewinkel's evidence as it appeared to be common practice for him to give this advice to customers in such situations. Notwithstanding that the reason for this regulation, and the advice of Glenewinkel, is to protect against fire when the sprinkler system is down, nevertheless the presence of someone on watch following Glenewinkel's temporary repair on January 4 and until the system was repaired would have meant that when the system warmed to the extent that the water pressure in the 4" main riser forced its way through the ice (as the ice melted) the plaintiff would have quickly detected the problem. The intense water pressure and the flooding into the entire building through the broken sprinkler system would have been immediately apparent. Even if one accepts Michael's evidence (he does not recall being told about the need for a watch at the premises), these codes are, by regulation, the law. The plaintiff should have been aware of them.

[53] If the plaintiff had placed someone on watch at the premises, as required by the fire codes and as suggested by Glenewinkel, the defendants' failure to insure that the 4" main was shut off would still have resulted in flooding, but it is impossible to say that the nature and extent of the damages would have been anywhere near as significant as what occurred. It must be remembered that the flooding would be readily apparent to anyone on duty in the building once the ice melted in the valve area. The water through the 4" main riser from the floor and through the valve is under significant pressure and it would have taken the City some reasonable time to respond to a call and to shut off the water at the curb valve when the problem became apparent.

[54] In considering the defendants' plea of contributory negligence, I am mindful of the fact that it is not enough for the defendants to establish, as they have here, that the plaintiff itself was negligent generally. The law, established by the Supreme Court of Canada in the case of McLaughlin v. Long, [1927] S.C.R. 303, remains applicable today. Not only must each party be negligent, but their respective negligence must have "proximately" caused the loss. Having found that the plaintiff was negligent (and in breach of the Regulations or Codes) in failing to properly inspect and test the interior valve control in question and in failing to inspect and properly maintain the natural gas heaters and furnace, and in failing to prevent the premises from freezing, nevertheless, these acts of negligence cannot be said to be "proximate" to the loss in question. If Glenewinkel had fulfilled his obligation of insuring that the water supply was in fact shut off in the circumstances which he was presented with when he attended on January 4, 1993, the loss would not have occurred. However, I am satisfied that the plaintiff's failure to either follow Glenewinkel's advice to having someone watch the premises when the fire protection system was down or (even in the absence of any such advice from Glenewinkel) its failure to comply with the Fire Code and to have an extra watch service on duty is negligence which "proximately" caused or contributed to the loss. If someone had been watching the premises in compliance with the Codes, damage would still have occurred when the ice in the valve area melted and until the City could be contacted and attend to close the curb valve.

[55] Any assessment of the degree of contributory negligence on the part of the plaintiff and the

extent of the damage caused by this contributory negligence is not practicable in the circumstances. Accordingly, as provided in s. 6 of the Tortfeasors and Contributory Negligence Act, I find the plaintiff and the defendants equally negligent and their negligence contributed equally to the damages. Pursuant to s. 4 of the Tortfeasors and Contributory Negligence Act the plaintiff shall recover 50% of its damages from the defendants.

Quantum Of Damages

[56] There was agreement between the parties on a vast majority of the plaintiff's damages; that is, to the extent of $148,101.21. The only issue as to quantum is to whether or not the plaintiff is entitled to recover an additional $3,320 which it claims as labour costs for its own employees relating to the cleanup of the inventory and the premises after the flooding. The $3,320 claimed by the plaintiff represents the amount paid to several of its employees, being their usual and regular wages for the hours worked by them at the warehouse in cleaning up the premises. There is no dispute that they actually worked these hours and were paid these amounts. The problem is that the plaintiff led no evidence to indicate that because these employees spent time working at the warehouse on a task that they would otherwise not have had to perform, and were away from their work at the retail store, that any additional cost (or loss) was incurred by the plaintiff. The plaintiff points to the 1962 decision of the British Columbia Court of Appeal in Canadian Pacific Railway v. Fumagalli (1962), 38 D.L.R.(2d) 110, where the issue before the Court of Appeal in that case was whether or not certain charges for fringe benefits, superintendents, and handling of materials should be allowed on top of wages for the plaintiff's own work forces that had been allowed by the trial judge. Unfortunately, the report of this decision does not deal in any way with why the trial judge allowed the wages; that is, whether or not the plaintiff proved, in that case, that it incurred some additional or extra "wage" costs for which it should be compensated. The plaintiff also refers to a more recent decision of the British Columbia Court of Appeal in Miller Dredging Ltd. et al. v. Ship Dorothy MacKenzie et al., [1995] 1 W.W.R. 270; 51 B.C.A.C. 105; 84 W.A.C. 105. In this case the plaintiff used its own work forces and equipment to repair pipeline damage caused by the defendants' negligence. Again, there was no issue before the Court of Appeal on the wages that the trial judge awarded ($35,616.28 in that case). The issue was with respect to an allowance for overhead costs on labour and equipment costs. Here the plaintiff proved, at least with respect to the equipment costs, that the equipment in question was working elsewhere at the time of the loss and the plaintiff then charged the equipment time in repairing the loss to the defendants, at the same time deducting it from the contract it was working on. With respect to the labour costs allowed, there was insufficient information in the appeal decision to determine whether or not the plaintiff incurred "extra" or "additional" labour costs of $35,616.28 because of reassigning its work forces to this task.

[57] The principle enunciated by Goldie, J.A., in the Miller Dredging case (supra), at pp. 273-274 W.W.R., is correct:

"In principle the respondents are entitled to recover as damages such sums as will put them in as good a position, so far as money is capable of doing this, as they would have been in but for the effect of the appellants' negligence: that is, full compensation but no more than full compensation for the financial loss inflicted."

Although I have some sympathy for the plaintiff's position on this point, I am satisfied that the defendants' position in law is correct; that is, the evidence before me does not establish that the plaintiff incurred a financial loss of $3,320 (or a specific amount). The defendants refer to the decision of Reed, J., of the Trial Division of the Federal Court in Canadian National Railway Co. v. Norsk Pacific Steamship Co. and Tug Jervis Crown et al., [1994] 2 F.C. 318; 71 F.T.R. 47, which, in somewhat similar fact circumstances limited the amount recoverable for wages paid to temporary supervisors transferred from their regular position to other work caused by the negligence of the defendants, to the amount proven as being an increase in cost over their regular salary. In that case four supervisors were transferred out of their regular area of work because of the damage to the bridge caused by the defendants and the plaintiff was able to establish that it paid "additional" wages to temporary supervisors who were called in to do the work regularly done by the four in question. Recovery was allowed only to the extent of the extra amount that the individuals were paid over and above their normal wages. In short, there is simply no evidence before me on which I can allow the plaintiff's claim for the additional $3,320.

Conclusion

[58] In summary, the plaintiff's damages are assessed at $148,101.21 and the plaintiff will recover 50% of this amount from the defendants. The plaintiff will have prejudgment and post-judgment interest and costs in accordance with the Court of Queen's Bench Act, S.M. 1988-89, c. 4; C.C.S.M., c. C-280, and the Queen's Bench Rules. For purposes of the tariff this action will be classed as a Class IV proceeding. If the parties are unable to agree on costs they may be spoken to and set by me, or taxed as the parties may agree.

Judgment for plaintiff.

Editor: Gary W. McLaughlin/ham

Appendix A

Schedule Of Statutes And Authorities

Contributory Negligence

-- The Tortfeasors and Contributory Negligence Act, R.S.M. 1987, c. T-90; C.C.S.M., c. T-90

-- McLaughlin v. Long, [1927] S.C.R. 303

AUTHORITIES

Negligence and (or) Breach of Contract

-- Professional Negligence by Rupert M. Jackson and John L. Powell (1982 Ed.)

-- Canadian Encyclopedic Digest (West.) (3rd Ed. 1991), vol. 7, pp. 333-334, para. 254

-- Greaves & Co. Contractors Ltd. v. Baynham Meikle & Partners, [1975] 3 All E.R. 99 (C.A.)

-- Wood and Wood v. Cuvelier (1979), 34 N.S.R.(2d) 261; 59 A.P.R. 261 (T.D.)

-- Gale et al. v. Box and Box Repair Ltd. (1987), 50 Man.R.(2d) 3 (Q.B.)

-- Farnel v. Main Outboard Centre Ltd. (1987), 50 Man.R.(2d) 13 (C.A.)

-- Morrison v. McCoy Brothers Group, [1987] 3 W.W.R. 301; 78 A.R. 161 (Q.B.)

Limitation of Liability Clauses

-- McCutcheon v. MacBrayne (David) Ltd., [1964] 1 All E.R. 430 (H.L.)

-- Tilden Rent-A-Car Co. v. Clendenning (1978), 83 D.L.R.(3d) 400 (Ont. C.A.)

-- Marmac Credit Jewellers Ltd. v. Dominion Electric Protection Co. (1978), 3 B.L.R. 144 (Ont. H.C.)

-- Ailsa Craig Fishing Co. v. Malvern Fishing Co. and Securicor (Scotland), [1983] 1 All E.R. 101 (H.L.)

-- Crocker v. Sundance Northwest Resorts Ltd., [1988] 1 S.C.R. 1186; 86 N.R. 241; 29 O.A.C. 1; 51 D.L.R.(4th) 321

-- Trigg v. MI Movers International Transport Services Ltd. et al. (1991), 50 O.A.C. 321; 4 O.R.(3d) 562 (C.A.)

-- Eagle Dancer Enterprises Ltd. v. Southam Printing Ltd. - Imprimerie Southam Ltée (1992), 6 B.L.R.(2d) 45 (S.C.)

-- Kordas v. Stokes Seeds Ltd. (1992), 59 O.A.C. 58; 9 B.L.R.(2d) 266 (C.A.)

Employee Responsibility

-- Moss v. Richardson Greenshields of Canada Ltd. and Davies, [1989] 3 W.W.R. 50; 56 Man.R.(2d) 230 (C.A.)

-- London Drugs Ltd. v. Brassart and Vanwinkel, [1992] 3 S.C.R. 299; 143 N.R. 1; 18 B.C.A.C. 1; 31 W.A.C. 1; [1993] 1 W.W.R. 1; 97 D.L.R.(4th) 261; 73 B.C.L.R.(2d) 1

Damages

-- The Law of Damages by S.M. Waddams (Rev. 2nd Ed. 1991) (Looseleaf)

-- Canadian Pacific Railway v. Fumagalli (1962), 38 D.L.R.(2d) 110 (B.C.C.A.)

-- Turnbull v. Hsieh (1990), 108 N.B.R.(2d) 33; 269 A.P.R. 33 (C.A.)

-- Canadian National Railway Co. v. Norsk Pacific Steamship Co. and Tug Jervis Crown et al., [1994] 2 F.C. 318; 71 F.T.R. 47 (Federal Court, Trial Div., Reed, J.)

-- Miller Dredging Ltd. et al. v. Ship Dorothy MacKenzie et al., [1995] 1 W.W.R. 270; 51 B.C.A.C. 105; 84 W.A.C. 105 (C.A.)