

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

GARDEN PARK ESTATES LTD.,)	<u>Counsel:</u>
)	
plaintiff,)	<u>AMANDA E. VERHAEGHE</u>
)	for the plaintiff
)	
- and -)	<u>JAMIE A. KAGAN</u>
)	<u>MICHAEL D. ZACHARIAS</u>
)	for the defendant
POWER VAC SERVICES LTD.,)	
)	
defendant.)	JUDGMENT DELIVERED: December 1, 2020

TURNER J.

I. INTRODUCTION

[1] On January 29, 2015, a fire occurred at the Garden Park Estates apartment building located at 767 Leila Avenue, in the City of Winnipeg (the property). It originated in suite 231. There is no dispute that the fire was caused by fabric lint that ignited within the clothes dryer, which was then pushed through the ducting system by the exhaust fan until it encountered an accumulation of lint in the dryer duct, resulting in the larger fire.

[2] Power Vac Services Ltd. (Power Vac) cleaned the dryer ducts at the property between January 12 and 16, 2015. Garden Park Estates Ltd. (Garden Park Estates) claims that Power Vac must have been negligent in cleaning the ducts because the accumulation of lint in the duct should not have been there just two weeks later. Power Vac counters that there could be a variety of reasons for the accumulation of lint in the duct. It says that Garden Park Estates has not proven that it fell below the standard of care required of a professional duct cleaning company.

[3] While liability is clearly at issue, the parties have agreed to the quantum of damages to which Garden Park Estates is entitled should I rule in its favour.

II. PRELIMINARY ISSUE

A. Request for Expert Witness to Testify by Video

[4] On the first morning of the trial (a Tuesday), Garden Park Estates requested that Ken Swan be allowed to testify by video. It planned to call Mr. Swan as an expert witness. Mr. Swan underwent surgery at the end of June 2020. I was advised that at the time of the trial, it was very difficult for Mr. Swan to stand or sit for lengthy periods.

[5] After making inquiries, I was advised that the Court of Queen's Bench video courtroom was not available for the next two weeks. I was advised that there was a possibility that a Provincial Court courtroom *might* be available Thursday afternoon; however, that was dependent on the Provincial Court's need for the courtroom and equipment.

[6] Garden Park Estates argued that Mr. Swan was an integral witness to its case and to deny it the ability to call him as a witness would unfairly derail its claim entirely.

[7] Power Vac argued that the trial dates were set on May 21, 2020; therefore, Garden Park Estates had over two months to make arrangements for the witness to testify by video. I accept that counsel for Garden Park Estates did not know of Mr. Swan's surgery until late in June 2020. Power Vac was prepared to forgo cross-examination and consent to the filing of Mr. Swan's February 5, 2015 Preliminary Report, February 12, 2015 Report, and May 15, 2017 Technical Evaluation Report.

[8] Given that the earliest a video courtroom would possibly be available was Thursday afternoon, allowing Mr. Swan to testify by video would have inevitably led to scheduling a continuation. The plaintiff's case would have concluded, at the earliest, Thursday afternoon. The defendant's evidence and arguments could not be completed in just one day on Friday.

[9] The dilemma here highlights the difficulties that arise in leaving such logistics to the last minute. Resources, such as video courtrooms, are limited and one cannot assume that equipment and courtrooms will be available on short notice. Given Power Vac's agreement to allow Garden Park Estates to file Mr. Swan's three reports, and Power Vac's giving up its right to cross-examine Mr. Swan, I denied the request to have Mr. Swan testify by video.

[10] The fundamental evidence of this witness should be within the four corners of his expert reports. Although there is always room for clarification during an expert witness's testimony, the substance of the expert witness's opinion is to be contained in his or her report.

[11] Keeping in mind the goal of a just and expeditious trial of a matter, I concluded that in these circumstances allowing Garden Park Estates to file Mr. Swan's three reports and denying its request to allow Mr. Swan to testify by video was the most just and expeditious way for the trial to proceed for both parties.

III. THE PLAINTIFF'S CASE

A. The Evidence of Ken Swan

[12] On January 30, 2015, Mr. Swan examined the property. As noted above, he prepared three reports that were filed as part of Garden Park Estates' case.

[13] Mr. Swan concluded that the fire originated in a single location along the top west wall plate that was shared by the laundry room and bathroom of suite 231 of the property.

[14] The electric elements within the dryer in suite 231 ignited fabric lint. The dryer's exhaust fan then forced the ignited fabric lint into the ducting system. In the duct, the fabric lint met and ignited an accumulation of lint. The heat of the fire in the duct started a fire in the west upper section of the exterior wall. That fire continued to spread to the top wall plate, the underside of the plywood roof

sheathing, the truss assembly, the interior plywood wall sheathing, and the wall studs.

[15] During his inspection of the suite, Mr. Swan noted that a 7-foot-7-inch section of duct was atop the west wall plate and extended through to the bathroom, where it was then vented to the exterior. Charred lint was present throughout the interior of the duct. An accumulation of partially charred lint was also found in the final elbow of the 7-foot-7-inch duct before it extended to the exterior.

[16] Mr. Swan opined that it is logical that lint would accumulate in elbows of ducts. He noted that there were two sets of elbows in the duct from suite 231: one above the dryer where the ducting changed from a vertical orientation to a northbound horizontal run; and a second at the north end of the 7-foot-7-inch sheet metal duct where it extended on an arrangement of elbows to the exterior.

[17] Mr. Swan concluded, in his February 12, 2015 Report at page 3:

It is my professional opinion that lint from the interior of the dryer was ignited, forced through the system by the fan until it encountered an accumulation of lint within the ducting. This type of lint is highly combustible and is easily ignited. The fire spread following the path of fuel that was the lint in the dryer duct. Heat was transferred to ordinary combustibles like conduction through the metal of the steel duct, igniting it. The fire then spread in an ordinary manner on ordinary combustibles, to the top of the wall sheathing and some drop burning onto studs occurred.

[18] In his May 15, 2017 Technical Evaluation Report, Mr. Swan added two points of clarification:

(1) The heating source for the fire was the electrical heating element of the dryer in suite 231. He agreed that the dryer would have required dismantling to access the electrical heating element. He could not comment on the agreement or terms between Garden Park Estates and Power Vac when Power Vac was hired to do the job. Specifically, he could not comment on whether Power Vac was required to clean the lint system within the dryer and the electrical heating element of the dryer.

(2) He clarified that if the metal dryer ducting running to the exterior of the building had been cleaned, it would have had a twofold impact: (i) there would not have been sufficient lint within the ducting to act as a source of fuel for a fire; therefore, the fire would not have ignited within the ducting to transfer heat to the top wall plate; and (ii) a clean duct system would have meant the airflow was not blocked from the dryer, which would have helped prevent heat buildup within the dryer.

B. The Evidence of Harvey Oman

[19] In January 2015, Harvey Oman was the chief financial officer of Winpark Dorchester Properties (Winpark Dorchester), a property management company. The owners of Garden Park Estates hired Winpark Dorchester to manage the property.

[20] Mr. Oman testified that he was generally familiar with the terms of the arrangement between Winpark Dorchester and Garden Park Estates. Winpark

Dorchester would take care of the day-to-day maintenance of the property, arrange for repairs, collect rent, pay bills, and generally take care of the building. This would include Winpark Dorchester hiring third parties to take care of aspects of the property, such as cleaning the dryer vents. Winpark Dorchester had a trust account into which rent payments from tenants were deposited and from which payments to third parties for services were made.

[21] Bonnie Rempel, now deceased, was employed by Winpark Dorchester and was the property manager assigned to deal with the property. The property manager would not contact the owners of Garden Park Estates for routine maintenance under a certain cost. There would have been no reason for Ms. Rempel to contact the owners for the duct cleaning in question.

[22] A caretaker for the property would also be hired as the "eyes and ears" at the property. He or she would be responsible for matters such as providing Power Vac employees access to the suites. The caretaker would be the first person likely to receive any complaints from tenants.

[23] Mr. Oman testified that the property was likely built in the 1970s. He had no knowledge of when or whether the dryers within the suites were replaced. He had no knowledge of when the duct work was installed or last repaired.

C. The Read-Ins from the Examination of Gregory Silver

[24] Gregory Silver was examined as a representative of Power Vac. At the conclusion of Garden Park Estates' case, several parts of Mr. Silver's examination were read in with the following aspects of the examination highlighted in particular.

[25] Mr. Silver explained that, from his perspective, Power Vac was not hired to clean out all aspects of the dryers. Power Vac's main goal was to clear any blockages in the ducts. Mr. Silver explained that clearing included from the dryer drum, through the lint trap, through the fan, the piping to the exterior and the venting to the outside of the building.

[26] Mr. Silver reviewed several photos during his examination. When looking at photos of some ducts from other suites at the property, he said:

225 Q And in your experience, is this considered to be a lot of lint that's accumulated?

A It's a fair bit of lint, yes. I mean, looking in the one photo here, this looks like it -- it's loose, so --

...

THE WITNESS: Yeah, it's in the flex hose. It looks -- I mean, to me it looks like a piece of lint that's just loose, sitting in there. But, yes, there's a build-up of lint in there.

[27] In looking at photos from two other suites, Mr. Silver agreed that there was more accumulated lint than should have been in the ducts just two weeks after they were cleaned.

IV. THE DEFENDANT'S CASE

A. The Evidence of Gregory Silver

[28] Mr. Silver had consistently worked for Power Vac since 1992, except for a period between 2000 and 2003. At the time of this incident, he was the production supervisor and commercial estimator for the company.

[29] Power Vac is a ventilation-cleaning contractor. Mr. Silver explained that Power Vac cleans anything that moves air. He estimated that Power Vac would clean 10,000 to 12,000 dryer vents in a year in Winnipeg. That was the majority of the workload. Power Vac would duct clean at some properties that have just one dryer vent and at others that have hundreds of dryer vents.

[30] At the time of this incident, Power Vac employed fewer than thirteen employees. These employees had between a year and a half and twenty-seven years of experience in the industry. An employee would start out as a helper while completing on-the-job training under the supervision of a more experienced employee. Generally, an employee would remain as a helper for at least six months before being put on a job by himself. At six months, if Mr. Silver determined that the employee was ready, that employee would be sent to smaller commercial jobs (defined as one to two dryer vents at a property) and then be reassessed before being sent to larger commercial jobs.

[31] There are no licences or certifications to be qualified to clean dryer vents. A regulatory body does not govern duct cleaning services.

[32] In early January 2015, Mr. Silver called Ms. Rempel to discuss duct cleaning at the property. Power Vac's general recommendation was that ducts be cleaned once a year. Mr. Silver sent Ms. Rempel a quote dated January 5, 2015, which was filed as part of the Statement of Agreed Documents. The quote indicated a cost for the job, a notation that the property's ducts were last cleaned in August 2013, and that Power Vac could schedule the work at the property for the week of January 12 to 16, 2015. No other documentation regarding the work was provided at the trial.

[33] It is clear to me that Ms. Rempel accepted the quote given that Power Vac started work at the property on January 12, 2015, as suggested.

[34] Mr. Silver testified that it is best to clean dryer vents in warmer months because the technicians would not have to contend with frozen lint on the screens and in the ducts. However, he could not recall whether he discussed this preference with Ms. Rempel when speaking to her about the job.

[35] Mr. Silver explained that, from his perspective, Power Vac was being hired to remove blockages within the dryer ducts to ensure that air could flow properly from the dryer within a suite, through the ducts, and ultimately to the outdoors. Blockages could include a bird's nest, an outside screen with frozen lint, and anything else that would impede airflow through the ducts.

[36] Mr. Silver explained the standard practice that he would expect the employees of Power Vac to follow on a job such as the one at Garden Park Estates.

The employees would attend and walk around the property. They would clean the vent for the suite by starting at the top level of the property and working their way down. They would work around the exterior of the property, removing any screen or flap at the exterior end of the vent, and cleaning that screen or flap. They would then use a skipper line (a long hose with a ball on the end of it that would expel compressed air into the duct) in the duct by feeding the ball on the end of the line through the duct all the way to the dryer at the interior end of the duct. They would not be able to see within the duct so they would depend on feel and sound to make sure that the skipper line made it all the way to the interior of the dryer.

[37] Several photos of the ducts from other suites at the property were included at tab D to the Statement of Agreed Documents. These photos were taken February 23, 2015. While reviewing these photos, Mr. Silver clarified some answers he provided at his examination. He explained that none of the photos at tab D showed what he would define as blockages in the ducts. He defined blockages as something that would not allow air to flow through the ducts at all. Although lint could be seen in the photos, he described what was depicted in the photos as fresh, fluffy lint or loose lint in the ducts. He would not define these as blockages because air could still flow through the ducts; airflow was not cut off.

[38] Mr. Silver said that, in his experience, the lint seen in the photos at tab D could accumulate in the few weeks after Power Vac completed the work at the property. Factors that could affect the accumulation of lint include the age of the

dryer, the physical condition and set-up of the dryer ducts, how often a resident uses the dryer, what kind of fabric being dried, and whether the resident regularly removed or cleaned the lint trap.

V. ANALYSIS

A. Negligence

[39] In *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, the Supreme Court of Canada stated:

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

1. Duty of Care

[40] There is little dispute that Power Vac owed Garden Park Estates a duty of care. Power Vac was hired to clean the dryer ducts at the property in a good and workmanlike manner. It also had a duty to exercise reasonable care and skill that no damage to the property or premises would result from its actions with respect to cleaning the ducts. (*Knock v. Dumontier et al.*, 2006 MBCA 99 (CanLII) at para. 25)

2. Standard of Care

[41] The main question at trial was whether Garden Park Estates established, on a balance of probabilities, that Power Vac breached the standard of care required.

[42] Conduct is negligent if it creates an objectively unreasonable risk of harm. A person must exercise the standard of care that would be expected of a reasonable and prudent person in the same circumstances. Each case is to be measured on its own facts, including the likelihood of harm, the gravity of that harm, and the burden that would be incurred to prevent the injury. One may look to factors, such as custom, industry practice, and statutory or regulatory standards, to assess what is reasonable conduct. (***Ryan v. Victoria (City)***, [1999] 1 S.C.R. 201 at para. 28)

[43] I must be cautious to not ask whether Power Vac was at fault in failing to clean the dryer ducts properly. I must instead ask whether Power Vac acted according to the professional standards of a professional duct cleaning company. In other words, the correct inquiry to ask is whether Power Vac behaved as would a reasonably prudent and diligent professional in the same circumstances. To assess the question otherwise runs the risk of focusing on the bad result rather than on the actions of Power Vac. (***St-Jean v. Mercier***, 2002 SCC 15, [2002] 1 S.C.R. 491 at paras. 52–53)

[44] The goal cannot be to avoid the injury or damage; if it were, then a finding of negligence would happen every time there was an injury or damage. (***Armstrong v. Royal Victoria Hospital***, 2019 ONCA 963 (CanLII) at paras. 33–40)

[45] I must be able to articulate the standard of care to which Power Vac was to be held. I must be careful to not impose a standard of perfection, as opposed to a duty of *reasonable* care. (*Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132 at para. 80)

B. Expert Evidence

[46] Power Vac argued that an expert regarding the customs and practices of a duct cleaning company was required for Garden Park Estates to discharge the burden upon it. It says that an expert was required to establish what a reasonably diligent and prudent duct cleaning company would have done in the circumstances.

[47] Garden Park Estates argued that an expert was not required because this was a non-technical matter that is within the knowledge of an ordinary person. It says that there are some issues where ordinary experience of a trier of fact is sufficient to enable him or her to make a decision on the question of whether conduct constituted negligence. (*Anderson v. Chasney*, 1949 CanLII 236 (MB CA), (1949), 57 Man. R. 343)

[48] Garden Park Estates points to the medical negligence case of *Anderson*, where the court determined that expert testimony is not necessary for proof of negligence in non-technical matters. "While the method in which the operation was performed may be purely a matter of technical evidence, the fact that a sponge was left in a position where it was or was not dangerous is one which the

ordinary man is competent to consider in arriving at a decision as to whether or not there was negligence” (at p. 352). Counting the number of sponges a surgeon put into the patient and ensuring that the same number of sponges were out of the patient at the end of the surgery is a common sense, simple method to avoid danger. When simple methods to avoid danger have been devised and are readily understood by an ordinary person, it is within the competence of the trier of fact to deal with the issue. An expert is not required to say what the surgeon should have done to avoid the danger.

[49] In this case, however, how can I say what Power Vac should have done? What would be the ordinary, common sense, simple method to make sure that the dryer vents were cleaned properly? External indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards, may inform the standard. Where a debate arises as to how a reasonable person would have conducted himself or herself, recourse should generally be made to expert evidence. (*Krawchuk v. Scherbak*, 2011 ONCA 352 (CanLII) at paras. 124–25)

[50] Garden Park Estates suggested that a camera could have been used on the skipper line so that the technician could see inside the dryer duct rather than relying on feel and sound. I have no evidence that a camera is something that a reasonable and responsible duct cleaning company uses. The evidence from Mr. Silver included that, in his experience, there are questions about the reliability of a camera on a skipper line. On the evidence before me, I cannot say that a camera is a simple, common sense tool in this trade.

[51] While Mr. Swan's expert reports regarding the cause and origin of the fire were in evidence, Mr. Swan's evidence was clearly not as an expert in the custom and industry practice of a professional duct cleaning company.

[52] Even if Garden Park Estates demonstrated that it is more likely than not that the conduct of Power Vac was a substantial factor in the result, Power Vac has submitted evidence that is consistent with no negligence on its part. In ***Knock***, the Manitoba Court of Appeal stated:

[44] If the defendant submits a reasonable explanation that is as consistent with no negligence as with negligence, then this will effectively neutralize the inference of negligence and the plaintiff's case must fail. . . .

[45] Specifically in fire cases, the defendant is not required to prove the cause of the fire or demonstrate how the fire occurred without negligence on its part. However, where it fails to produce an explanation equally consistent with no negligence as with negligence, it may be held liable for the damage suffered. . . .

[46] In circumstances where the plaintiff has done nothing or permitted nothing to be done which might cause the damage, and where effective control is in the hands of the defendant, an inference of negligence on the part of the defendant can be raised. . . .

[53] Power Vac has provided several reasonable explanations that are as consistent with no negligence as with negligence on its part. Mr. Oman agreed that the property was built in the early 1970s. He had no knowledge of when or if any of the dryers in the suites had been replaced. Similarly, he had no knowledge of when the ducts had been installed or replaced.

[54] Mr. Silver pointed to several scenarios that would lead to an accumulation of lint within the duct. The way in which a resident used the dryer, including how

often it was used, what types of fabric were dried, and whether the lint trap was properly used, could all contribute to an accumulation of lint.

[55] The set-up of the dryer duct also could have an impact. The age of the flex hose from the dryer to the duct and the number of elbows within the duct could contribute to an accumulation of lint.

[56] Garden Park Estates did not provide any evidence from the resident of the suite to speak to how the dryer was used. In addition, it did not provide any evidence from anyone to speak to the condition of the dryer in the suite or whether the flex hose or duct was ever replaced or repaired.

[57] Mr. Swan concluded that the fire would not have occurred if the accumulation of lint was not in the duct. However, he could not say that it was a failure on Power Vac's part to meet its standard of care as a professional duct cleaning company that caused the accumulation of lint to occur.

[58] Garden Park Estates has not demonstrated, on a balance of probabilities, that Power Vac acted against or below the standard expected of a reasonably prudent and diligent professional duct cleaning company in the same circumstances.

1. Res ipsa loquitur

[59] In ***Hunt v. Burgess***, 1993 CanLII 14723 (MB CA), [1993] 4 W.W.R. 1, the Manitoba Court of Appeal stated:

[22] . . . [T]he doctrine of *res ipsa loquitur* is available to a plaintiff to prove negligence by inference where damage occurs and the only reasonable explanation is negligence on the part of the defendant. The elements which must be proved by the plaintiff for the application of the maxim are: 1. the thing which caused the loss must be under the sole management and control of the defendant or someone for whom he is responsible; 2. the accident or damage would not have occurred without negligence; 3. there is no evidence of how the accident or event took place. When those elements are established negligence which might not otherwise be provable may be inferred because the facts giving rise to the accident are within the sole knowledge of the defendant.

[60] As noted above, there are several alternatives, outside of Power Vac's control, that could have caused the damage, including the age of the dryer, the age and condition of the duct, and the use of the dryer by the tenant. As such, *res ipsa loquitur* fails on the first step in this case.

2. **Causation**

[61] Given my findings regarding standard of care, I will not address causation at length.

[62] Garden Park Estates has not shown that Power Vac did anything, or failed to do anything, to cause the fire at the property.

C. **Breach of Contract**

[63] In addition to negligence, Garden Park Estates also based its claim on a breach of contract.

[64] I am satisfied that there was a contract between Power Vac and Winpark Dorchester. Power Vac knew that Winpark Dorchester was the property management company on behalf of Garden Park Estates. Winpark Dorchester

clearly entered the contract for duct cleaning at the property on behalf of Garden Park Estates. There is really no dispute that Garden Park Estates paid Power Vac for the services performed. As Mr. Oman explained, rent payments from tenants would go into a trust account for Garden Park Estates and payments for services, such as duct cleaning, would be paid out of that account.

[65] For the reasons as articulated regarding standard of care above, Garden Park Estates has not demonstrated, on a balance of probabilities, that Power Vac breached the contract for duct cleaning.

[66] Other than Mr. Silver's letter of January 5, 2015, to the property manager, I do not have any evidence of explicit terms of the contract. The letter indicates that Power Vac will provide all labour, materials, equipment and insurance to clean the dryer vents at the property. I agree with Garden Park Estates that, given the lack of specificity, I can imply a term to the contract that the work would be done properly and to professional standards.

[67] As detailed above, however, I do not have evidence of whether or how Power Vac did not live up to professional standards expected in the industry. Therefore, I cannot find that it breached its contract with Garden Park Estates.

VI. DECISION

[68] Based on the evidence before me, and the applicable legal principles, I cannot find that Power Vac acted negligently and breached the standard of care owed to Garden Park Estates. I also cannot find that Power Vac breached the

contract it had with Garden Park Estates. As such, Garden Park Estates' claim must be dismissed.

[69] Power Vac is entitled to costs in an amount to be agreed by the parties, or failing agreement, as ordered by me.

VII. MOTION FOR NON-SUIT

[70] At the close of Garden Park Estates' case, Power Vac brought a motion for non-suit. I gave reasons for dismissing the motion at the time; however, I indicated that I would provide more thorough reasons within my reasons on the substantive matter.

[71] The usual practice on a motion for non-suit requires an election from the defendant. In other words, before ruling on a motion for non-suit, the defendant must commit that it will not be calling any evidence.

[72] Practices vary somewhat from jurisdiction to jurisdiction in Canada—some with codified rules and some based on common law.

[73] In Ontario, the trial judge must put defence counsel to his or her election as to whether the defendant wishes to call evidence (*Prudential Securities Credit Corp., LLC v. Cobrand Foods Ltd.*, [2007] O.J. No. 2297 (QL) (C.A.)). If defence counsel elects to call no evidence, the trial judge must then determine if there is any evidence to satisfy a reasonable person of the plaintiff's case (*McKenzie et al. v. Bergin et al.*, [1937] O.J. No. 117 (QL) (C.A.)).

[74] In most Maritime jurisdictions, no election is required (Prince Edward Island, *Rules of Civil Procedure*, r. 52.11; Newfoundland and Labrador, *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, r. 42.08; *Nova Scotia Civil Procedure Rules*, N.S., r. 51.06(2)).

[75] In Alberta and Saskatchewan, the defendant is not required to elect (*Rules of Court*, Alta. Reg. 124/2010, r. 8.20; *Saskatchewan Queen's Bench Rules*, effective July 1, 2013, r. 9-26).

[76] In British Columbia, the *Supreme Court Civil Rules* state that the defendant can apply to have an action dismissed on the ground there is "no evidence" without being put to an election; however, if the basis of the defendant's motion is "insufficient evidence", an election is required (B.C. Reg. 168/2009, r. 12-5(4)-(7)).

[77] As I note from the relative dearth of jurisprudence on the issue, this is not a motion that is often brought, especially in a judge alone trial. It would seem to be far more applicable in a trial with a jury. It strikes me as odd that the requirement of an election depends on whether the defendant brings the motion based on no evidence or insufficient evidence. However, based on the Manitoba Court of Appeal decision in ***Laufer v. Bucklaschuk***, [1999] M.J. No. 553 (QL) (C.A.), and the cases considered within it, the law in Manitoba is that if the motion for non-suit is based on no evidence, counsel should normally not be put to his or her election.

[78] In the circumstances of this case, I was prepared to decide the motion for non-suit without requiring Power Vac to elect.

[79] Several matters were not in dispute at the close of Garden Park Estates' case:

- There was no dispute as to the quantum of damages.
- There was no dispute as to what caused the fire. As outlined in Mr. Swan's reports, the fire was caused by fabric lint from the interior of the dryer being ignited by the dryer's electrical heating element and then being forced through the ducting system until it encountered an accumulation of lint in the dryer duct.
- There was no dispute that Mr. Swan, as the plaintiff's expert, could not provide expert evidence regarding any agreement between this plaintiff and defendant regarding the work to be done at the property. Also, Mr. Swan's evidence was not as an expert in the custom and industry practice of a professional duct cleaning company.
- There was no dispute that Power Vac was hired to clean the dryer ducts at the property and that the work was completed approximately two weeks before the fire.

[80] Power Vac's main argument on this motion was that Garden Park Estates had not provided any evidence regarding a duty of care owed or the standard of

care required. At the close of Garden Park Estates' case, I could not agree that there was no evidence.

[81] As to duty of care, there was evidence that Power Vac was hired to professionally clean dryer ducts at the property.

[82] As to standard of care, there was some evidence from the read-ins from the examination of Mr. Silver that there was more lint left in the ducts than there should have been. Questions were put to Mr. Silver while looking at photos of the property, to which he answered on several occasions that there was more lint than there should have been after they were cleaned.

[83] I agreed with counsel for Garden Park Estates that, at the point of the close of their case, this was not *obviously* a matter where an expert was required.

[84] On a motion for non-suit, I was to draw all reasonable inferences in favour of Garden Park Estates. The reasonable inference in its favour based on the evidence I heard before the close of its case was that there was more lint left in the ducts than there should have been because the cleaning was not done to the standard of care required.

[85] At the close of Garden Park Estates' case, I could not say that there was no evidence; therefore, Power Vac's motion was dismissed.

_____J.