

Citation: Klaus and Klaus v. Taylhardat
2007 BCPC 0021

Date: 20070202
File No: C6096
Registry: Chilliwack

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

RONALD LORNE KLAUS and LIZA KLAUS

CLAIMANTS

AND:

CARLOS TAYLHARDAT (doing on business as VIDAPHOTO PHOTOGRAPHY)

DEFENDANT

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE K. D. SKILNICK**

Appearing on their own behalf:

Ronald Lorne Klaus and Liza Klaus

Appearing for the Defendant:

No one appearing

Place of Hearing:

Chilliwack, B.C.

Date of Hearing:

February 2, 2007

Date of Judgment:

February 2, 2007

Background

[1] The Claimants have brought an application for a default judgement against the Defendant for the return of money paid by them to the Defendant, as well as a claim for punitive damages and emotional stress. They ask for judgement in the amount of \$25,000 plus their filing and service fees. The Defendant did not file a reply. On February 2, 2007 the Claimants appeared in Small Claims Court in Chilliwack, B.C. asking for their default order. A brief hearing was held at which the Claimant Ronald Klaus gave some evidence. The evidence heard satisfies me that the Claimants are entitled to a judgement against the Defendant, but I reserved judgement in order to determine an appropriate quantum of damages.

[2] The Claimants signed a contract with the Defendant in which the Defendant agreed to provide services as a photographer at the Claimants' wedding. The Claimants gave the Defendant \$2073 and the Defendant attended at the wedding and took photographs. The Defendant promised delivery of the photographs within six weeks, but the Claimants have never received them.

[3] It appears that the Defendant gave the Claimants the run around for a significant period of time. At first the Claimants tried to discuss the matter with the Defendant by phone, but they found that the Defendant was extremely difficult to reach. On those occasions when they were able to speak with him, the Defendant maintained his promise to provide the wedding pictures and made several promises to deliver them. The Claimants, who live in Merritt, B.C., drove to Vancouver on three separate occasions to pick up the pictures. This is a round trip distance of approximately 460 kilometres.

[4] Finally, on December 21, 2006, the Defendant notified the Claimants, by email, that the pictures had been destroyed. The Claimants were devastated by the news. Mrs. Klaus stated that she had waited a long time to get married and that this will be her only marriage. Mr. Klaus pointed out in his Claim that a great deal of preparation went into the wedding. The couple hired a helicopter so that the photographer could take aerial pictures of the reception and of the community in which it was held. For them the failure of the photographer to deliver what he had been contracted to do was bad enough, but the manner in which he evaded them and falsely led them to believe that they would be receiving the wedding pictures for so long added considerable insult to their injury.

Emotional Stress and Punitive Damages

[5] Emotional stress and punitive damages are different concepts. In the former case, damages are awarded when a defendant owes a duty of care to a claimant, the duty of care is breached, and the claimant suffers an emotional trauma which manifests itself in a physical disorder or illness. This is referred to as "nervous shock." Damages for emotional distress can also be awarded in contract if an important part of the contract is to give pleasure, relaxation or peace of mind and the substance of the contract is not provided or if the contrary result occurs. Punitive damages are intended to punish a wrongdoer for egregious conduct and provide additional deterrence.

(a) Emotional Stress

[6] The law regarding when a court can compensate someone for emotional stress or nervous shock as a tort is summarized by the author Philip Osborne in "The Law of Torts" 2000, Irwin Law Publishing, at page 75 as follows:

"Nervous shock is defined as a severe emotional trauma that manifests itself in a physical disorder or in a recognized psychiatric illness such as clinical depression or post-traumatic

stress disorder. It does not include emotional upset, mental distress, grief, sorrow, anxiety, worry, or other transient and more minor psychiatric injury.”

[7] This description does not cover what has occurred here. However the law also permits recovery of damages for emotional distress resulting from the breach of a contract in limited circumstances. In *Wharton v. Tom Harris Chevrolet Oldsmobile Cadillac Ltd.* [2002] B.C.J. No. 233 (B.C.C.A.), the court set out these principles concerning when a court can award damages for mental distress resulting from the breach of a contract:

- (a) A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension, or aggravation which the breach of contract may cause to the innocent party.
- (b) The rule is not absolute. Where a major or important part of the contract is to give pleasure, relaxation or peace of mind, damages will be awarded if the fruit of the contract is not provided or if the contrary result is instead procured.
- (c) In cases not falling within the "peace of mind" category, damages are recoverable for inconvenience and discomfort caused by the breach and the mental suffering directly related to that inconvenience and discomfort. However, the cause of the inconvenience or discomfort must be a sensory experience as opposed to mere disappointment that the contract has been broken. If those effects are foreseeably suffered during a period when defects are repaired, they sound in damages even though the cost of repairs is not recoverable as such.

(b) Punitive Damages

[8] Punitive damages do not compensate for a specific injury. They are designed to punish a party for egregious conduct. In *Vorvis v. ICBC* [1989] 1 S.C.R. 1085, the Supreme Court of Canada held (at para. 27) that “punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature.” In *Voss v. Crooks et. al.* [2002] BCPC 0003, the Honourable Judge M. J. Brecknell of this court summarized the tests used in determining when punitive damages are appropriate. These include:

- (a) whether Defendants' conduct was malicious or high-handed;
- (b) the degree of the Defendants' culpability;
- (c) nominal damages would be an invitation to violate property rights and amount to a license fee, and as such, a substantial amount for punitive damages should be considered.

Application of the law to these facts

[9] I am satisfied that the Claimants have brought their claim within the limited scope in which a court can compensate them for emotional distress resulting from the Defendant's breach of contract. In *Wharton, supra*, the Court of Appeal of this province held that such damages may be awarded “where a major or important part of the contract is to give pleasure, relaxation or peace of mind.” The court held that in these circumstances “damages will be awarded if the fruit of the contract is not provided or if the contrary result is instead procured” and in my view this is precisely the situation in this case. A photographic recording of the Claimants' wedding day was very important to them and was intended to provide them with continuing fond memories. In breaching his contract with the Claimants, the Defendant has provided a contrary result, depriving the Claimants of peace

of mind, and the Claimants are entitled to recover damages as a result.

[10] I am also satisfied that the Claimants are entitled to recover punitive damages from the Defendant because of the dishonest and insensitive manner in which the Claimants were treated. Instead of honestly admitting his error, the Defendant continued on a course which falsely led the Claimants to believe that they would be receiving their wedding photos. He caused them needless inconvenience in wasted trips to Vancouver and conducted himself in a very high-handed manner. Although the Defendant may not have acted maliciously in causing the loss of the pictures, and although such may have occurred accidentally, the Defendant compounded the problem in persisting in the lie that the Claimants would be receiving their photos and in stringing them along for over a year before finally being truthful with them.

Quantum of Damages

[11] Having found that the Claimants can succeed in their claim for mental distress and for punitive damages, what is an appropriate amount of compensation? In deciding this question, I must be guided by decisions of our courts in similar situations. I have considered the following reported decisions:

- (a) *Wilson v. Sooter Studios* [1988] B.C.J. No. 2531 (B.C.C.A.): In this case, the defendant agreed to take wedding photos for the plaintiffs at a cost of \$399. Only 10 clear photos turned out and there were a number of other deficiencies in the services provided. The plaintiffs were awarded \$1000 by the trial judge and this was upheld at appeal. I would make the observations that this case involved a smaller contract, the plaintiffs actually received some photographs, and the parties were able to reassemble the wedding party to have new photographs taken. The plaintiffs did not make as elaborate arrangements, such as renting a helicopter, as the Claimants did in this case. Also, unlike the present case, the court commented that "this case has no elements of... rude conduct which would aggravate the damages." I also consider the effect of inflation and find that \$1000 is insufficient compensation for the Claimants in this case.
- (b) *Kressin v. Memorial Gardens (B.C.) Ltd.* 2004 BCPC 0413: The defendants failed to videotape a funeral service. There were also other deficiencies in the service. Damages were awarded in the sum of \$10,000.
- (c) *Warrington v. Great-West Life Assurance Company* [1996] B.C.J. No. 1944 (B.C.C.A.): The British Columbia Court of Appeal upheld the trial judge's award of \$10,000 for aggravated and non-pecuniary damages for a plaintiff who experienced distress and humiliation over financial problems which resulted from the defendant's wrongful withholding of disability benefits.
- (d) *Wharton v. Tom Harris Chevrolet Oldsmobile Ltd., supra*: The British Columbia Court of Appeal upheld non-pecuniary damages in the sum of \$5000 for the defendant's failure, for two and a half years, to repair a buzzing noise in a luxury automobile.

[12] These cases illustrate the wide range of awards for this type of loss, spanning from nominal damages of a few hundred dollars upwards to \$10,000. I am mindful that, in *Wilson v. Sooter Studios, supra*, and in *Warrington v. Great West Life, supra*, our Court of Appeal has set out the principle that courts should exercise caution in the awarding of damages for mental distress.

[13] The degree of mental distress that can reasonably be expected will vary with every situation. For example, the mental distress which comes with the loss of a pet can not reasonably be said to approach that which accompanies the loss of a child. This situation falls within those two extremes. The Claimants in this case are greatly distressed by the loss of the record of this special day in their lives. Such distress is understandable and

reasonable. While no amount of money can replace what the Claimants have lost, a court-ordered award of damages for this distress must attempt to place that loss appropriately along the spectrum of damages for which a court is empowered to order.

[14] Taking into account all of these considerations, I am of the view that an appropriate measure of damages in this case is \$7,500 for non-pecuniary damages for mental distress and a further \$2,500 for punitive damages.

Order

[15] For the foregoing reasons, the Claimants shall have judgement against the Defendant for the sum of \$12,259, calculated as follows:

- (a) Refund of money paid to Defendants: \$2,073
- (b) Non-pecuniary damages for mental distress: \$7,500
- (c) Punitive damages: \$2,500
- (d) Filing fees: \$156
- (e) Service fees: \$30

Dated at the City of Chilliwack, in the Province of British Columbia this 2nd day of February, 2007.

K. D. SKILNICK, P.C.J.