Stress Injury Claims

Maximize Available Remedies

Stress injury, meaning emotional concerns such as anxiety, annoyance, disappointment, distress, fear, frustration, loss of peace of mind, upset, among other things, are genuine sufferings despite the difficulty of precise measurement. Additionally troublesome in measuring stress injury is that susceptibility to stress injury can vary. There are people with 'thin skin' who may be more emotionally affected by wrongdoing than other people.

Traditionally, judges were hesitant to provide awards for stress injury arising from tortious conduct or breach of contract, especially where medical evidence in the form of a psychological diagnosis was lacking. This hestitation further upset litigants already upset by the issues that brought the litigation about. Litigants who were wronged often feel twice shorted - first by the wrongful conduct that caused the litigation and then by the justice system for failing to appreciate and acknowledge (and compensate) the stress injury resulting from the wrongful conduct.

Especially in Small Claims Court matters, it appears that judges prefer to provide awards strictly for actual damages as precisely measurable sums and to avoid wading into the guessing game of how severe was the stress and how much is compensation for that stress worth. Small Claims Court judges are often unwilling to permit advocates, whether lawyers or paralegals, with the opportunity to argue for general damages due to stress injury. The exception it seems is where Small Claims Court judges are willing to provide awards in matters of intentional wrongdoing, especially those wrongs where the Defendant intended to cause upset; however, for unintentional matters of negligence, especially negligent contractual performance, rarely - or at least inconsistently, are arguments regarding general damages permitted - even in cases where a core aspect of the contract was to fulfill an emotional purpose and therefore part of the initial bargain was to obtain, what became an undelivered, emotional benefit.

The Law, tort

Recently, the Supreme Court addressed the issues of stress injury by clarifying that general damages for mental distress do not need medical support via psychiatric evidence and that general damages for mental distress are appropriate where the distress is, "serious and prolonged" and rises above "the ordinary annoyances, anxieties and fears that people living in society routinely" experience. The following paragraphs from the two cited cases when referenced together should demonstrate that where stress occurs as a result of tortious conduct, and where the stress is beyond that which is regular and routine to ordinary life, the lower courts are bound to consider awards for general damages:

> ***Saadati v. Moorhead***, [2017] 1 S.C.R. 543
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> [2] This Court has, however, never required claimants to show a recognizable psychiatric illness as a precondition to recovery for mental injury. Nor, in my view, would it be desirable for it to do so now. Just as recovery for physical injury is not, as a matter of law, conditioned upon a claimant adducing expert diagnostic evidence in support, recovery for mental injury does not require proof of a recognizable psychiatric illness. This and other mechanisms by which some courts have historically sought to control recovery for mental injury are, in my respectful view, premised upon dubious perceptions of psychiatry and of mental illness in general, which Canadian tort law should repudiate. Further, the elements of the cause of action of negligence, together with the threshold stated by this Court in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 (CanLII), [2008] 2 S.C.R. 114, at para. 9, for proving mental injury, furnish a sufficiently robust array of protections against unworthy claims. I therefore conclude that a finding of legally compensable mental injury need not rest, in whole or in part, on the claimant proving a recognized psychiatric illness. ...
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> ***Mustapha v. Culligan of Canada Ltd.***, [2008] 2 S.C.R. 114

> [9] This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness: see *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.), at p. 42; *Page v. Smith*, at p. 189; Linden and Feldthusen, at pp. 425-27. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co. of Canada (1999)*, 1999 CanLII 2863 (ON CA), 48 O.R. (3d) 228 (C.A.): "Life goes on" (para. 60). Quite simply, minor and transient upsets do not constitute personal injury, and hence do not amount to damage.

The Law, contracts

The issue of general damages resulting from stress injury occurring from a breach of contract was also addressed by the Supreme Court and it was deemed that, in following the *Hadley v. Baxendale* principle, where the contract bargain contained an emotional benefit element, which was reasonably contemplated by the parties to the contract at the time of contract formation, the loss of the emotional benefit should result in compensation as a general damage.

> ***Fidler v. Sun Life Assurance Co. of Canada***, [2006] 2 S.C.R. 3

[44] We conclude that damages for mental distress for breach of contract may, in appropriate cases, be awarded as an application of the principle in *Hadley v. Baxendale*: see *Vorvis*. The court should ask "what did the contract promise?" and provide compensation for those promises. The aim of compensatory damages is to restore the wronged party to the position he or she would have been in had the contract not been broken. As the Privy Council stated in *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301, at p. 307: "the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed". The measure of these damages is, of course, subject to remoteness principles. There is no reason why this should not include damages for mental distress, where such damages were in the reasonable contemplation of the parties at the time the contract was made. This conclusion follows from the basic principle of compensatory contractual damages: that the parties are to be restored to the position they contracted for, whether tangible or intangible. The law's task is simply to provide the benefits contracted for, whatever their nature, if they were in the reasonable contemplation of the parties.

[45] It does not follow, however, that all mental distress associated with a breach of contract is compensable. In normal commercial contracts, the likelihood of a breach of contract causing mental distress is not ordinarily within the reasonable contemplation of the parties. It is not unusual that a breach of contract will leave the wronged party feeling frustrated or angry. The law does not award damages for such incidental frustration. The matter is otherwise, however, when the parties enter into a contract, an object of which is to secure a particular psychological benefit. In such a case, damages arising from such mental distress should in principle be recoverable where they are established on the evidence and shown to have been within the reasonable contemplation of the parties at the time the contract was made. The basic principles of contract damages do not cease to operate merely because what is promised is an intangible, like mental security.

Where general damages for stress injury, among other things, are appropriate, the difficulty in determining an award is an improper reason to avoid attempt to provide an award. In such cases where calculation becomes impossible or difficult, such as the reasonable compensation as a 'value for stress', courts will often simply need to guess.

> ***TMS Lighting Ltd. v. KJS Transport Inc.***, 2014 ONCA 1

> [64] The quantification of damages occasioned by a proven loss is often a difficult task. In many cases, while loss is established, the evidence affords little support for a precise or reliable assessment of damages arising from the loss. For this reason, as Finlayson J.A. noted in *Goldfarb*, at para. 75, a trial judge confronted with a meagre evidentiary record on damages may be required to resort to educated "*guess work*".

> ***Wood v. Grand Valley Railway Co.***, 51 S.C.R. 283, 1915 CanLII 4 (S.C.C.)

> It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned judges that such an impossibility cannot "*relieve the wrongdoer of the necessity of paying damages for his breach of contract*" and that on the other hand the tribunal to estimate them whether jury or judge must under such circumstances do "*the best it can*" and its conclusion will not be set aside even if the amount of the verdict is a matter of guess work.

Cause of Action

With the above stated it is important to bear in mind that, depending on the cause of action involved, stronger proof of stress injury may be required and form of such 'proof' may require the strength of medical evidence. For example, in cases of wrongful dismissal where allegations of an intent to cause distress are alleged.

Prinzo v. Baycrest Centre for Geriatric Care, 2002 CanLII 45005 (ON CA):

[45] With respect to the requirement that the conduct be calculated to produce harm, McLachlin J. found at para. 55 that this requirement was met on the basis that "[i]t was clearly foreseeable that the accusations of theft which the defendant made against the plaintiff would cause her profound distress." It appears that the requirement that the conduct be calculated to produce harm is met where the actor desires to produce the consequences that follow from the act, or if the consequences are known to be substantially certain to follow: Linden, Canadian Tort Law, 7th ed. (Markham, Ont.: Butterworths, 2001) at p. 34; Klar, supra, at p. 29; Fridman, The Law of Torts in Canada (Toronto: Carswell, 1989) at p. 53.

[46] Concerning the requirement of a "visible and provable illness" it appears that the absence of a medical expert will not necessarily be fatal. In *Rahemtulla*, supra, McLachlin J. wrote at para. 56: "Notwithstanding the absence of expert medical evidence, I am satisfied that the plaintiff suffered depression accompanied by symptoms of physical illness as a result of Mr. Flack's [her employer's] accusations."

For cases involving another cause of action, formal medical evidence as the 'proof' of stress injury are less likely as stress injury is presumed. Logically, this arises most where the cause of action, such as 'nuisance by neighbour' involves an intent to cause stress whereas it is hardly arguable that a victim of actions intended to cause stress failed to cause stress.

Deumo v. Fitzpatrick, 2008 O.J. No. 3015 at paragraph 19:

I find that they both suffered physically from the smoke. You do not have to be a doctor to draw that conclusion but without medical evidence in both cases I cannot say to what extent. I really think in any event that the pain and suffering was part of the annoyance and loss of use and enjoyment of the property and any relief on account of that should be subsumed in that head. The symptoms were not of the most serious, although they were certainly long lasting and annoying and disconcerting. They would not add much money to the claim but they are part of the loss of use and enjoyment of the property. There may well be long term risks from second hand smoke but the plaintiff was not in a position to prove that.

Rathmann v. Rudka, 2001 CarswellOnt 1206 at paragraph 34:

The defendant's conduct was unbelievable and outrageous. Both Ms. Rathmann and Mr. Mark testified how Ms. Rudka's conduct worried and upset them to the point that they were wary of going outside concerned about what they might find or what might happen. They were concerned that further damage may have been caused to their property or their vehicles. They were concerned about the safety of their dogs. Stress developed in their relationship. No medical evidence was called to corroborate the claimed psychological effects of the defendant's misconduct on them. Such evidence was not necessary.

Summary Comment

With the above principles establishing guidance for the lower courts, it is hoped that general damage awards for stress injury will occur more regularly so to provide wronged litigants with a judicial result that duly attempts to 'make victims truly whole'.