

CANADA / JUDGMENT

Champ's Mushrooms v. Guo

2018 BCSC 650

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 650 Champ's Mushrooms v. Guo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Champ's Mushrooms v. Guo,

2018 BCSC 650

Date: 20180424

Docket: S156379

Registry: New Westminster

Between:

Champ's Mushrooms Inc.

Plaintiff

And

Zhi Ping Guo, Yorkham Enterprises Ltd, Yorkham International Trading Company and Jian Hua Lu

Defendants

And

Tri Quach

Defendant

By Way of Counterclaim

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Plaintiff and the Defendant by Way of Counterclaim:

C. Taliunas

Appearing on his own behalf:

Z.P. Guo

Appearing on her own behalf:

J.H. Lu

Place and Dates of Trial:

New Westminster, B.C.

February 26-28 and

March 1-2, 2018

Place and Date of Judgment:

New Westminster, B.C.

April 24, 2018

Introduction

- [1] The plaintiff seeks damages from the defendants for the wrongful conversion (theft) of mushrooms - the property of the plaintiff - by the defendants in the months of August through November 2013. The mushrooms at issue are said to be worth \$45,522.10.
- [2] The defendant, Zhi Ping Guo, acknowledged at trial that he wrongfully removed mushrooms over a portion of the time frame noted in the notice of civil claim. However, he says such only occurred in the later part of October and early November of 2013. He disputes the plaintiff's loss as claimed, and notes he paid \$7,500 in restitution to the plaintiff as part of his sentence following his guilty plea in related 2014 criminal proceedings.
- [3] He has counterclaimed against both the plaintiff and its former manager, Tri Quach, seeking damages for defamation; Mr. Guo alleges the plaintiff and Mr. Quach spread word of the alleged theft to other suppliers. He also seeks damages for emotional distress caused by Mr. Quach's threat to have him charged criminally if Mr. Guo did not pay \$50,000 as compensation for the mushrooms.
- [4] At the conclusion of the evidence, the claim against the defendant Jian Hua Lu was dismissed by consent. She is Mr. Guo's wife and a part owner of the corporate defendant. The plaintiff did not present evidence supporting a conclusion that the conversion of the plaintiff's property resulted with the knowledge or instruction of Ms. Lu.

Issues

- [5] The issues to be determined in this case are as follows:
- a) Has the plaintiff proven on a balance of probabilities that the defendants, or any of them, wrongfully converted mushrooms from the plaintiff? If so, in what volume and amounting to what value?
 - b) Has the defendant proven the plaintiff, through any of its representatives, uttered defamatory words about the defendants, and in particular the defendant Mr. Guo?
 - c) Does the acknowledged threat of criminal proceedings against Mr. Guo - if compensation of \$50,000 was not paid to the plaintiff - entitle the defendant, Mr. Guo, to damages for emotional distress?

Background

- [6] The plaintiff is wholesale/retail outlet which sells mushrooms to, inter alia, restaurants, retail outlets such as Safeway or Costco, small retailers such as greengrocers and, in some cases, individuals.
- [7] The company occupies a sizeable warehouse facility in Langley, B.C.
- [8] The defendant Mr. Guo, doing business as Yorkham Enterprises Ltd., was a person who had an account with the plaintiff. The mushrooms that he selected were invoiced to Yorkham.
- [9] In the later part of 2013, Tri Quach, a managerial employee of the plaintiff, learned of inventory shortages the plaintiff was experiencing. Mr. Quach commenced an investigation into the cause.
- [10] Mr. Quach reviewed extensive video of the warehouse and cooler. He observed a person, later identified as Mr. Guo, who was removing significant amounts of product from the plaintiff's premises at odd hours very early in the morning before the warehouse shipping staff arrived. It is unclear when the investigation began or what video was available for Mr. Quach to review.
- [11] The video he reviewed depicted the defendant moving unescorted about the plaintiff's warehouse, helping himself to pallets of mushrooms, and then loading them into his van at the plaintiff's loading bay.
- [12] The video reviewed in court depicted significant amounts of product taken by Mr. Guo to the front of the loading area between approximately 2:00 a.m. and 3:15 a.m. on November 1, 2013. A shipping employee of the plaintiff, Mr. Friesen, arrived around 3:00 a.m. but paid little notice to Mr. Guo. Prior to leaving, Mr. Guo reported the volume of mushrooms selected to Mr. Friesen and a waybill was prepared. The amount on the waybill was significantly below that which Mr. Guo removed from the warehouse.

- [13] On November 6, 2013, Mr. Quach stayed late at the warehouse and caught the defendant Mr. Guo loading significant quantities of mushrooms into his van. The police were summoned to the warehouse and Mr. Guo was ordered by them not to return to the warehouse. The mushrooms were removed from his van.
- [14] I pause to note the arrival of police and the removal from the van of the mushrooms loaded by Mr. Guo took place prior to any advice by Mr. Guo to the shipper, again Mr. Friesen, as to the amount taken on this occasion.
- [15] Historically, Mr. Guo's orders were never more than 20 or so cases of mushrooms; the orders were mostly of the lowest quality, being "slice ends".
- [16] In the same early hours of November 6, 2013 and following the departure of police, Mr. Quach invited Mr. Guo back into the warehouse where he showed Mr. Guo some of the video depicting the thefts. It is not clear from the testimony of either as to how much video was reviewed.
- [17] Mr. Quach told Mr. Guo the missing inventory amounted to close to \$50,000 over the course of the approximately three-month period the inventory was going missing. He demanded Mr. Guo reimburse the plaintiff or criminal charges would follow.
- [18] According to Mr. Quach, Mr. Guo admitted the theft, expressed remorse, and offered to pay for what he had taken.
- [19] Despite a denial in the response to civil claim, Mr. Guo concedes he was stealing mushrooms. However, he denies the extent and duration over which the thefts took place.
- [20] The plaintiff only retained video from October 25, 2013 to November 6, 2013.
- [21] Following the discussions of November 6, 2013, Mr. Quach contacted Mr. Guo several times by email demanding payment - or at least partial payment - on account of the \$50,000 worth of mushrooms said to have been removed.
- [22] Mr. Guo deflected in his responding email by reminding Mr. Quach that he, Mr. Guo, had been prohibited by police from re-attending the plaintiff's warehouse. Mr. Guo then asked for particulars of the loss.
- [23] Mr. Quach responded via email as follows:

Hi Mr. Gua [sic], your letter does not explain anything regarding all the money you owe Champs for all the mushrooms you stole. We have you on video for 2 months filling your van full of our mushrooms that you did not pay for. I have already given all the evidence to the police and will be ready to press charges if you don't have the money for me. I gave you until Wednesday (today) to get me at least \$15000 but you did not get me even \$1. We have fired Mark because he helped you steal our mushrooms.

I also told you I would meet you anywhere you wanted to exchange the cheque but you made me call you instead of you calling me. You should do the right thing and give me back the money you stole. You know my family owns all the farms you keep contacting and I have told them not to sell mushrooms to you until you pay us back. Second Brothers, Apex, Newlands, King, Infinity, Harvest, C&T, and many more all know about what happened at Champs. I leave it up to you. I will call the police again Friday and tell them I want to press charges for theft.

[24] Mr. Guo's reply is disingenuous given his later guilty plea to charges of theft and his admission here of stealing mushrooms. He replied:

I don't think I stole your mushrooms, I was just doing business with your company. Every time, your representative give me the permission [sic] (waybill), after loading then I left. I also paid them monthly according to your waybill and invoices. (except Oct & Nov. 2013)

I don't think Mark help me to steal something also. I think he was just a representative of your company. I have no personal relationship or private contact with him.

If you think there are some mistakes during our business, you can give me the correct evidences and reasonable requirement, I also like to solve the problems with you.

[25] In response, Mr. Quach wrote, on November 21, 2013:

I will not discuss this any further with you. You should get a lawyer. I know you think you got away with this for now but I want to make sure I have enough evidence to put you away in jail for a very long time. I am sure that it won't be long before the police come to arrest you in front of all your family and neighbours. I don't even care about the money anymore. You are just pretending like you don't know what you did and that is upsetting me even more. You admitted to me and my associate that night that you were stealing and that you felt bad about it. We will both testify in court against you.

[26] Finally on December 10, along with a demand letter demanding payment of \$50,000 prepared by the plaintiff's counsel, Mr. Quach wrote:

I hope you have money for a lawyer because now I'm coming after everything you own, your house, your car, your van, anything you have. I will make your life miserable that your wife will leave you because you won't have a penny left in your name. I don't care if I can't get one penny now I know you will have to pay for a lawyer or you will end up in Jail for a very long time. You think you can steal from me and make me [indecipherable].

[27] A further demand followed in late December, and then these proceedings were commenced.

[28] Originally the claim in damages was for \$50,000, which was the same amount demanded by Mr. Quach. Later, the plaintiff amended the notice of civil claim to reflect the amount currently being sought - \$45,522.10 - based on Mr. Quach's review of inventory losses from the date of the commencement of what were described as "unexplained inventory losses".

- [29] Charges were laid against Mr. Guo and in July 2014, he pleaded guilty to a charge of theft over \$5,000. The indictment refers to the period between October 23, 2013 and November 4, 2013.
- [30] Mr. Guo received a conditional discharge and was ordered to make restitution of \$7,500 to the plaintiff. He has complied with the order for restitution.
- [31] The missing inventory analysis prepared by Mr. Quach references dates upon which Mr. Guo attended at the plaintiff's warehouse. Such dates commence on August 19, 2013, and run up to and including the last date upon which it was said he wrongfully took mushrooms - November 4, 2013. It should be recalled he was ordered to replace all of those which he clearly was intending to take on November 6, 2013.
- [32] Mr. Quach prepared the list with the assistance of the company's inventory system and pricing lists.
- [33] I am satisfied from the evidence that inventory is taken at least once a day, possibly twice. The primary purpose is apparently to let the salespeople know what mushrooms are on hand so they can assist their customers, not necessarily to alert management to shortages.
- [34] In any event, the dates of Mr. Guo's attendance are noted. The evidence discloses he attended the plaintiff's warehouse on Mondays, Wednesdays and Fridays. On a number of the days he attended following August 19, 2013, specifically August 19, 21 and 26, September 2, 11, 13, and 18, and October 2 and 9, no product was missing.
- [35] On other dates of his attendance, significant product was missing. On some dates, upwards of 300 cases of mushrooms were missing.
- [36] The assessment of what was missing was done through Mr. Quach's reliance upon the inventory system, which provides for a day's starting inventory, deducts all sales represented by the waybills issued to customers, and then adds back in all deliveries from suppliers.
- [37] Over the course of the almost three-and-a-half months described in the inventory list, a total of \$45,522.10 was said to be missing. Following examinations for discovery, Mr. Quach revised that list noting several modest mistakes. The total unexplained inventory loss was revised to \$45,304.60.
- [38] For his part, Mr. Guo testified that the thefts began after he became upset because he was not being supplied the promised slice ends; he began simply taking large amounts of various mushrooms and then reported to the shipper on duty - either Mr. Friesen or Mr. Ly - a small amount of slice ends and/or mature brown mushrooms. He would sign a waybill for that which he told the shipper he took, and then leaving with far more product than was reported.

- [39] It is clear that over the course of time, Mr. Guo was given free rein of the warehouse and loaded his van without assistance and/or oversight by either of the two shippers. Such, no doubt, emboldened him to commence the admitted theft from the plaintiff.
- [40] Mr. Guo attended three days per week: Mondays, Wednesdays, and Fridays. On Mondays and Fridays, prior to his dismissal in November 2013, the shipper was Mr. Friesen. On Wednesdays, it was Mr. Ly.
- [41] Mr. Friesen conceded that he paid little or no attention to Mr. Guo and relied on Mr. Guo's representations in preparing the waybill. Mr. Friesen did not arrive at work until 3:00 a.m., but Mr. Guo was able to access the warehouse at any time because there was staff there 24 hours a day - albeit not in shipping. The video reviewed detailed him walking about the cooler taking large amounts of mushrooms which then, according to the undisputed evidence of Mr. Quach, he loaded in his van.
- [42] The controversy is not whether the defendant wrongfully converted the plaintiff's product, but how much of the product was converted.
- [43] As to the alleged defamatory remarks, Mr. Guo pleaded no specifics as to the utterances complained of or the manner and scope of publication.

The Claim in Conversion

- [44] As discussed in *Ast v. Mikolas*, 2010 BCSC 127, at paras. 125-126:
- [125] The tort of conversion involves the wrongful interference with another person's chattels such as taking, using or destroying the goods in a way that is inconsistent with the owner's ownership of or title to the goods. See: *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727 at para. 31.
- [126] The elements that must be proven to establish the tort of conversion are:
- (a) a wrongful act by the defendant involving the goods of the plaintiff;
 - (b) the act must consist of handling, disposing, or destroying the goods; and
 - (c) the defendant's actions must have either the effect or intention of interfering with (or denying) the plaintiff's right or title to the goods.
- [45] I find that such has occurred here. The defendant conceded, despite the denial in his response to civil claim, that he stole mushrooms from the plaintiff, thus establishing - from a civil law standpoint - the tort of conversion. The issue is the quantity of mushrooms taken and the extent to which the plaintiff has proven the damages alleged.
- [46] Video provided by Mr. Guo demonstrated the capacity of the back of his van. I am satisfied that the back of the van holds something in the order of 199 10-pound cases of mushrooms and 27 five-pound cases. There is room in the cab for additional cases of mushrooms.

- [47] I am not satisfied the plaintiff has proven any nexus between Mr. Guo's wrongful taking of the plaintiff's mushrooms and the other two defendants. In the result, the plaintiff's claim as against Yorkham Enterprises Ltd. and Yorkham International Trading Company is dismissed.

Evidence of the Plaintiff

- [48] Mr. Quach noted his review of the video revealed that Mr. Guo placed cases of mushrooms in the front of the van as well as the rear. Despite this, it is unlikely, if not impossible, that the cab of the defendant's van held sufficient additional product to warrant the conclusion that Mr. Guo could have taken in excess of 300 cases of mushrooms on certain days as calculated by Mr. Quach.
- [49] Similarly, the assertion by Mr. Quach that the thefts only occurred on the shifts where Mr. Friesen was the shipper - not Mr. Ly - is untrue.
- [50] Mr. Ly was the shipper on Wednesdays. A review of a calendar and Mr. Ly's identification of certain waybills at trial clearly demonstrates he was present on days where significant losses occurred.
- [51] Mr. Ly testified that he was never informed of the investigation. Mr. Friesen learned of it some two to three weeks prior to his firing on November 6, 2013.
- [52] Tony Vuu, the plaintiff's present CEO, testified that a loss of the magnitude of that experienced by the plaintiff would become apparent within weeks of its commencement. He could not recall who instructed Mr. Quach on the need for an investigation into losses or when it commenced.
- [53] The inventory list as prepared by Mr. Quach was said to have been prepared after reviewing the inventory records for the days noted, as well as price lists for the inventory claimed to have been taken. No underlying records were presented save for Mr. Vuu's presentation of "a sampling of invoices" for the stolen product spanning a number of months prior to and following the thefts. That is to say, no source documents were presented as to the specific value of the mushrooms stolen, but rather documentation culled by Mr. Vuu from the plaintiffs' actual business records.
- [54] The plaintiff asks me to rely singularly on Mr. Quach's interpretation of the company's documentation and knowledge as to what shrinkage occurs normally as a result of spoilage. Such, the plaintiff submits, accounts for miscounting of inventory, mistakes in filling customer orders, or any other reasons why inventory might not be in accord with the morning count.
- [55] Mr. Quach allowed that his count might be inaccurate within a margin of two to five percent.

- [56] I also find Mr. Quach was careless in the extreme in pricing. The same mushrooms were priced at various different prices. Slice ends - which were normally sold to Mr. Guo for five dollars - were priced by Mr. Quach at as much as nine dollars. Mr. Quach noted that the plaintiff did not feel that they needed to give Mr. Guo "a deal on pricing" if he was stealing. Inferentially, it would appear that the prices "charged Mr. Guo" as damages were overstated. In one instance, he was charged in excess of \$43 a case for mushrooms that were charged elsewhere in the list of missing product at \$12 to \$14 per case.
- [57] Absent a pricing list or some more compelling evidence than was given by Mr. Vuu, I am not prepared to accept as 100% accurate either the volume of mushrooms taken or the price at which they are calculated as submitted by the plaintiff.

Evidence of the Defendant

- [58] As against the notion that Mr. Guo only began taking mushrooms in or about October 2013 is his typewritten statement made regarding the events at Champ's. In part he noted:

I am free to choose the quantity and the types of mushrooms according to my clients' possible requirements. Most of the time, as I get a pile of mushrooms to my van, Champ's representative is around, it should be clear to Champ's representative that the number of boxes I took were sometimes significantly more than what was written on the waybill (signed before I leave) Sometimes a smaller number than the actual number of boxes taken is written on the waybill. This could be due to quality of the mushrooms or maybe due to oversupply of the mushroom at that time, or maybe some other reasons unknown to me. This is a decision made by Champ's representative, and I agreed.

- [59] Nothing contained in the statement supports the contention that the volume he took was less than the \$50,000 originally claimed by Mr. Quach in their discussion following the departure of the police the morning of November 6, 2013.
- [60] When confronted by Mr. Quach the morning of November 6, 2013 with the statement that the plaintiff's losses were \$50,000, Mr. Guo did not suggest that figure was too high given the number of occasions he says that he stole from the plaintiff.
- [61] Mr. Guo also acknowledged promising Mr. Quach \$15,000 that morning on account of the total taken by him, but said he did so only because there was nobody around after the police had left, that it was dark outside, and that he was afraid.
- [62] In addition, there is the matter of Mr. Guo's pleadings as contrasted with his evidence at trial.
- [63] The response to civil claim avoids the specific claim as to the amount of the plaintiff's loss by a denial of the theft followed by an assertion that no invoices were presented for the amount claimed.

- [64] Mr. Guo acknowledged unpaid invoices for October and November 2013, but testified the reason they were not paid was that he was told by the police not to re-attend at the plaintiff's premises.
- [65] Finally, as to the assessment of Mr. Guo's credibility, there is the claim for damages he presented for the loss of mushroom suppliers following Mr. Quach's advice to Champs' suppliers of Mr. Guo's dishonesty.
- [66] Mr. Guo asserted a loss of \$5,827.50 premised on the hours he and Ms. Lu spent travelling to suppliers from November to December 2013 and then, for some inexplicable reason, seven days in September and October 2014.
- [67] The time was "billed" for him alone, or him and Ms. Lu, for up to nine hours daily at \$45 per hour.
- [68] The combined force of all of those factors leads me to disbelieve Mr. Guo as to the date of the commencement of the conversion, and the amount he acknowledges to have taken.

Analysis

- [69] I find that the thefts began well before the date admitted by Mr. Guo, but having said that, cannot accept the claim as calculated by the plaintiff as accurate for the reasons given above.
- [70] While I do not suggest Mr. Quach is lying about the duration of the plaintiff's losses, the manner in which proof is offered as against Mr. Guo as being solely responsible does not, in my view, discharge the plaintiff's onus of proving on a balance of probabilities the volume or value of the mushrooms taken as pleaded.
- [71] A combination of mispricing, overstatement of the inventory taken by Mr. Guo - specifically inventory in excess of that which would fit into his van - and errors as to the shipper overseeing Mr. Guo during his attendances upon dates alleged to have been when the losses occurred, all lead to my discounting the claim as presented.
- [72] As to the matter of the plaintiff's damages, I was referred to *Ast v. Mikolas*, 2010 BCSC 127, where at para. 166, Cullen J., as he then was, said the following:
- [166] In coming to my conclusion in quantifying the plaintiff's additional damages in the amount of \$70,000 in para. 165 above, I have had regard for the following passage from *Huff v. Price*, 76 D.L.R. (4th) 138 at 149, 51 B.C.L.R. (2d) 282 (C.A.), leave to appeal to S.C.C. ref'd [1991] 1 S.C.R. vii, as follows:

Once the fraud or breach of fiduciary duty is shown, then the court assessing damages will not be exacting in requiring proof of the precise loss in circumstances where all reasonable efforts have been made by the plaintiff to establish the amount of the loss and the cause of the loss. The burden of leading the evidence to disprove the amount of the loss and the cause of the loss will then fall on the defendant who has been found to have been fraudulent or in breach of fiduciary duty.

[73] Here, I find Mr. Guo has discharged that onus, in part, by reference to the aforementioned frailties in the evidence of Mr. Quach.

[74] In *Smith v. Reid* (1994), 91 B.C.L.R. (2d) 278, Saunders J., as she then was, discussed the resolution of a damage claim where the evidence of the value of goods taken was poor and said the following, at 290:

Although the evidence of the value of the goods is poor, I must assess the damages as best I can on this poor foundation. I have therefore assessed the value of the goods lost by considering the value of the goods auctioned (so far as I can determine which goods were sold by that method), by considering the plaintiff's estimate of the cost of replacement clothing and applying a discount of 20% (considering it is unlikely he could replace those items other than as new items and likely could purchase many of them on sale), and by applying a discount of 40% to the value he attributed to the household goods (considering that many of them should be able to be replaced either at sales of retail merchants or at garage sales).

[75] I take the essence of the decision to be that where the estimate of damages is poor, or for any reason overstated, I am at liberty to do the best I can on the evidence before me and try to achieve fairness to the plaintiff.

[76] Here, I do that by discounting the plaintiff's claim from that which is set out in the notice of civil claim by 20%. I arrive at an award of damages for conversion in the amount of \$36,417.68. From that must be deducted the \$7,500 already repaid by the defendant.

[77] No claim was advanced for the unpaid invoices for October and November 2013. I direct an amendment to the pleading seeking payment of same, and direct that the two unpaid invoices be added to the plaintiff's damages.

[78] The plaintiff is entitled court order interest at registrar's rates from the date the loss became known to it, November 6, 2013.

Defamation

[79] The counterclaim provides no particulars of what was said, to whom, or when.

[80] By inference, the alleged defamation is the plaintiff's employee Mr. Quach's advice to farms associated with Champ's that they not deal directly with Mr. Guo given his theft of product from Champ's.

- [81] The plaintiff, through Mr. Quach, acknowledged calling the farms in which the plaintiff had an interest and advising them not to deal with Mr. Guo owing to his refusal to repay Champ's for the amount Champ's claimed he had wrongfully taken from them.
- [82] The response to counterclaim notes the lack of particularity as to the alleged defamation, but also notes that any utterances, if containing allegations of dishonesty, were justified on the basis of them being true.
- [83] The counterclaim seeking damages for defamation is dismissed given: (1) the failure of the defendant Mr. Guo to establish the nature of the alleged defamatory remarks and the particulars of publication; and (2) given my conclusion the essence of the words complained of - Mr. Quach's advice to other distributors that Mr. Kuo had stolen from Champ's - were true.

Infliction of Emotional Harm

- [84] In the counterclaim, Mr. Guo alleges that the plaintiff, through its agent Tri Quach:

Threatened to put Guo in jail for a long time unless the defendants paid them \$50,000. Tri Quach and Champs Mushrooms Inc. threatened to make Guo's life miserable by ways of the jail and financial hardship. Such threats caused Guo to suffer emotional distress which result in loss of sleep, loss of memory ability and medical costs.

- [85] Determining, as best I can absent submissions from Mr. Guo on this point, that his claim is founded on the tort of intentional infliction of nervous shock/mental suffering, I conclude that he failed to establish the requisite elements of the tort such that the claim must be dismissed.
- [86] The essential ingredients for the tort arise from *Wilkinson v. Downton*, [1897] 2 QB 57 (Eng. Q.B.). In *Wilkinson*, the defendant told the plaintiff, as a practical joke, that her husband had been in an accident and broken both his legs. The plaintiff, in reliance upon the defendant's knowingly false statements, sent people to assist her husband and became seriously ill from the shock of the news.
- [87] In *Young v. Borzoni*, 2007 BCCA 16, the B.C. Court of Appeal heard a matter involving a claim by the plaintiffs for compensatory damages against all defendants for intent to inflict nervous shock causing severe psychological harm.
- [88] At para. 24, Thackray J.A. noted the following:
- [24] In *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (C.A.), Weiler J.A. wrote:
- [48] A review of the case-law and the commentators confirms the existence of the tort of the intentional infliction of mental suffering, the elements of which may be summarized as: (1) flagrant or outrageous conduct; (2) calculated to produce harm; and (3) resulting in a visible and provable illness.

The appellants agree with this and with Mr. Justice Bouck's finding that a pleading of intentional infliction of nervous shock must include an allegation of "an overt act of a flagrant and extreme nature done by Mr. Borzoni without legal justification."

At paras. 35 through 39, Thackray J.A. went on to say:

- [35] However, even if the facts are taken as pleaded to be true, I am of the opinion that the statement of claim still fails to plead the material facts necessary to complete the cause of action in the tort of intentional infliction of nervous shock. While intentional infliction of mental suffering may arise from a deliberate course of conduct over time (see *Clark v. Canada*, [1994] 3 F.C. 323 (T.D.)), the conduct must not only be flagrant, outrageous and extreme, but also of a type calculated to cause a recognizable psychiatric illness in the plaintiff.
- [36] The statement of claim alleges that Mr. Borzoni's conduct resulted in a visible and provable illness and that through his alleged malicious conduct he intended to inflict nervous shock, anguish, and extreme despair. In *Guay v. Sun Publishing Co.*, [1953] 2 S.C.R. 216 at 238, Estey J., in his majority concurring judgment, set out what must be proved on the latter element in order that damages may be recovered citing the following from Pollock on Torts, 15th ed. at p. 37:

A state of mind such as fear or acute grief is not in itself capable of assessment as measurable temporal damage. But visible and provable illness may be the natural consequence of violent emotion, and may furnish a ground of action against a person whose wrongful act or want of due care produced that emotion. In every case the question is whether the shock and the illness were in fact natural or direct consequences of the wrongful act or default; if they were, the illness, not the shock, furnishes the measurable damage, and there is no more difficulty in assessing it than in assessing damages for bodily injuries of any kind.

- [37] In my opinion the pleaded material facts do not support the proposition that the suggested injuries were caused by the alleged actions of Mr. Borzoni. Recognizable psychiatric illnesses, such as are defined in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) for example, amount to visible and provable illnesses for the purposes of the tort of the intentional infliction of mental suffering. However, emotional stress, mental anguish and despair, the emotional states pleaded by the appellants, are not generally accepted as amounting to "visible and provable illness" for the purposes of the tort of the intentional infliction of mental suffering. In *Mustapha v. Culligan of Canada Ltd.*, [2006] O.J. No. 4964 (Q.L.) (C.A.), the Ontario Court of Appeal reaffirmed its earlier position with respect to liability in cases of psychiatric harm:

In Canadian law, a plaintiff can recover for the negligent infliction of psychiatric damage if he or she establishes two propositions - first, that the psychiatric damage suffered was a foreseeable consequence of the negligent conduct; second, that the psychiatric damage was so serious that it resulted in a recognizable psychiatric illness: see *Linden*, *Canadian Tort Law*, *supra*, at pp. 389-92.

- [38] The principle that the psychiatric damage must be so serious that it results in a recognizable psychiatric illness is not novel: See for example: *Topgro Greenhouses Ltd. v. Houweling*, 2006 BCCA 183 at para. 62; Mackenzie J.A.'s minority concurring judgment in *Devji v. Burnaby (District)*, 1999 BCCA 599 at paras. 79-113; *Kalaman v. Singer Valve Co.* (1997), 93 B.C.A.C. 93 at para. 63.
- [39] The appellants have not, in my opinion, demonstrated any error on the part of Bouck J. in his conclusion that the "statement of claim fails to plead the necessary elements of the tort of intentional infliction of nervous shock."
- [89] I note here that, other than passing reference to nightmares, Mr. Guo failed to produce any medical evidence or corroborative evidence supporting the type of emotional stress, mental anguish or despair referenced in Young.
- [90] I agree Mr. Quach's statements to Mr. Guo that "he would be going to jail for a very long time" and that "his wife would leave him and his life would be miserable" are properly characterized as flagrant or outrageous conduct. However, I cannot conclude that they were calculated to produce harm, let alone that such resulted in a visible and provable illness.
- [91] Accordingly, the claim for damages for the intentional infliction of mental suffering is dismissed.

Costs

- [92] Unless there have been offers exchanged that impact costs, given the outcome of the litigation, the plaintiff is entitled to its costs at Scale B.

"Harvey J."

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