

GENERAL DAMAGES FOR MENTAL DISTRESS: COMING TO A CONTRACT BREACH NEAR YOU?

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Hickey's Building Supplies Limited was recently heard at the Newfoundland Court of Appeal.^[1] It suggests that Courts are becoming more willing to award damages for mental distress for breach of a contract.

As a rule, damages are not available for mental distress when a contract is breached. Mental suffering is typically not contemplated as part of the business risk of a transaction. However, the "peace of mind" exception was used in *Hickey's Building Supplies Limited* to award a husband and wife \$15,000 in general damages for mental distress and inconvenience arising from their contractors' conduct. The contractors also had to pay the costs to repair the home.

The facts of the case are simple. A married couple entered into a written contract to build a home for their retirement. The wife used a wheel chair and cane. The purpose of building the home was to create a comfortable space to accommodate her abilities. The couple was adamant that they had emphasized the desire to be obstacle-free to the builder and refused to make the final payment under the contract when they realized the transition between flooring was not perfectly even. The contractor registered a lien on the home for non-payment.

The contractors argued the uneven floor is acceptable because they complied with the National Building Code (NBC) minimum standards. They also argued that because there was a whole agreement clause stating that the entire agreement must be in writing, there was no agreement outside the written contract.

The Court sided with the homeowners. It held there was clear potential for conflict between the clients' needs and what the NBC permitted. The client's mental distress was said to be reasonably foreseeable. Even though the NBC allows some transitional height difference in flooring, the contractors should have considered that perfectly even flooring was needed in the circumstances. The Court went beyond interpreting the contract to adding a term: the contract was entered into not just to build a home, but to secure a *psychological* benefit.

The contractors had to compensate the homeowners for the mental distress resulting from the uneven floors. The Court did not allow the contractors to rely on the clause stating that the written contract is the entire agreement and that no other agreement exists regarding the work on the home. The reasons also state that it

is inherent in a home construction contract that the finished flooring will be hazard-free. Traditionally, contractors consider the "hazard-free" benchmark to be satisfied by following the NBC standards.

It is not enough just to have some mental distress, there must be enough mental distress to warrant payment by the contractor. In this case, the mental distress from the breach of the construction contract was said to be serious, prolonged and far from trifling. It is interesting to compare this conclusion to the Court's comments on other types of contracts. The Court agreed that mental distress damages generally are not available in the employment law context. It also discussed insurance contracts, where compared to employment it is easier to conclude the denial of insurance benefits will lead to mental distress. In awarding mental distress damages to the homeowners, the Court is aligning the purpose of construction contracts with the purpose of purchasing insurance, as opposed to making it's purpose akin to the professional choices made in an employment relationship.

The Court calling construction contracts "peace of mind contracts" signals new concerns in contract law. How far will foreseeability extend in construction disputes? Will the NBC address this issue? Will more and more consumer contracts generally be considered a peace of mind? What new considerations for medical evidence will arise?

Contract law in this area will continue to evolve. When contracting with individuals, ensure your business is protected by asking appropriate questions and including protective clauses. Be as prepared as possible to defend against alleged mental distress by connecting with one of McMillan's lawyers.

by Ron Petersen and Emily Dandy, Student-at-Law

1 *Hickey's Building Supplies Limited v Sheppard*, 2014 NLCA 43 (CanLII).[ps2id id="1" target="1"]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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