

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

FRANCIS CARLISLE

Plaintiff

- and -

JANET MacDONALD

Defendant

**MEMORANDUM OF THE PLAINTIFF
(Costs)**

1. The plaintiff submits this factum with respect to the issue of what costs should be awarded in relation to the trial. The trial judge, Justice Smith, awarded the Plaintiff \$35,248.42 with respect to damages for the defendant's breach of contract, and an extra \$500 punitive damages.
2. With respect to the matter of costs, it is trite that a discretion has been given to the court to award an amount in regards to costs that seems fair and just at the conclusion of a trial. This discretion is found in Rule 57 of the Rules of Procedure in Ontario.
3. In this case, the Plaintiff received damages for breach of contract because the defendant promised, upon receipt of money from the plaintiff to deliver a luxury car to the plaintiff and the defendant failed to convey the car to the plaintiff within three months as promised. And the trial judge, in rendering judgment from the Bench, said (see transcript, vol. 8, page 3,457-3,459:

Because you failed to deliver the car on time and never intended to deliver it on time in the first place, the plaintiff shall receive \$500 in punitive damages. The delay in delivery caused the plaintiff much harm. He needed it for his job, and he told you that. Without the timely delivery of the car, he lost his job.

You are going to compensate the plaintiff for the damage he suffered in losing his job. His salary was \$75,000 per year, and he was out of work for just under one half year. Luckily for you, he found a new job that paid him more. In law, we call that mitigation. So, on the basis of the mathematics, you need to pay him 35,248.42 to compensate him for his loss.

Punitive damages are awarded to punish behaviour that is not acceptable in a well ordered society. Punitive damages are designed to address the purposes of retribution, deterrence and denunciation. That is needed here.

As the Supreme Court said in *Fidler v. Sun Life Assurance Co.*, 2006 SCC 30; 271 D.L.R. (4th) 1:

By their nature, contract breaches will sometimes give rise to censure. But to attract punitive damages, the impugned conduct must depart markedly from ordinary standards of decency — the exceptional case that can be described as malicious, oppressive or high-handed and that offends the court's sense of decency: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196; *Whiten*, at para. 36. The misconduct must be of a nature as to take it beyond the usual opprobrium that surrounds breaking a contract. As stated in *Whiten*, at para. 36, “punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment)”. Criminal law and quasi-criminal regulatory schemes are recognized as the primary vehicles for punishment. It is important that punitive damages be resorted to only in exceptional cases, and with restraint.

4. Generally speaking, Rule 57 provides that the result in the proceeding and any offer to settle or to contribute made in writing, the principle of indemnity, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer, the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed, the amount claimed and the amount recovered in the proceeding, the apportionment of liability, the complexity of the proceeding, the importance of the issues, the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding, and so on, and any other matter that is relevant to the issue of costs should be taken into account. It is fair and just that the plaintiff receive substantial indemnity costs.

5. The case of *Smith v. Loblaw's Grocery Inc.* (1999), 54 D.L.R. (4th) 345, (1999), 42 O.R. (3d) 321 (Ont. C.A.) is on all fours with this case. In *Smith*, a farmer grew apples on his farm, near Peterborough. He contracted with the Loblaw's grocery chain to sell his apples. Mr. Gherson, a contractor for Loblaw's, promised that he would pick up the apples three days later. The judge found that this was a contractual obligation. The apples were not picked up in time. Rather, Gherson came by a week and a half later, but by then it was too late. The apples were rotten. The Court of Appeal awarded Mr. Smith damages for his apples – it said that it was compensating Mr. Smith for the delay in the pick up of his apples. It relied upon the following factor that it was entitled to take into account under Rule 57: “any other matter that is relevant to the issue of costs.” Under Rule 57, conduct deserving of condemnation attracts an award of substantial indemnity

costs, as I explain below – not partial indemnity costs, which is the lower award that applies in normal cases.

6. A similar case is *Pederson v. Grander Juice Co.* (2003), 54 O.R. (3d) 595 (S.C.J.). There, it was said by the Court, after ruling in the plaintiff's favour in a negligence case, that costs normally go to the winner of the litigation, and the costs should be partial indemnity costs, unless a particularly special circumstance founded on one of the factors in Rule 57 exists, meaning that the winner will get roughly 25% of the legal fees he paid and 100% of its disbursements. In that case, the plaintiff got her costs and was given substantial indemnity costs, i.e. 100% of her legal fees and disbursements, because the nature of the negligence was very egregious and beyond the pale and fell within the phrase in Rule 57: “any other matter that is relevant to the issue of costs.” As in *Davison v. Schlutz* (2002), 52 O.R. (3d) 436 (S.C.J.), the conduct was deserving of condemnation by the Court, so the innocent party who was grievously damaged by the other party when that party committed a grave breach of tortious duty received substantial indemnity costs.

6. Substantial indemnity costs are equal to roughly 100% of the actual legal fees paid by a party and all of the disbursements incurred by the lawyer. Partial indemnity costs are equal to roughly 25% of the actual legal fees paid by a party and all of the disbursements incurred by the lawyer. The plaintiff won, so he should get costs. And because of the defendant's conduct in wilfully delaying the delivery of the car, the plaintiff should get substantial indemnity costs.

7. In this case, some of the testimony of the defendant Ms MacDonald was as follows (see transcript, vol 6, page 2,546-2,537):

Q.: So why didn't you deliver the car to the plaintiff until three months after you promised?

A.: Because it was, um, all buyer beware. He was the buyer, and I was the seller. He was just dumb not to put anything in writing or ask for a receipt.

Q.: That's pretty callous, no?

A.: It's all in the eye of the beholder, isn't it? I wouldn't say callous. You might say tricky. You might say shrewd. You might say he was as dumb as a bag of hammers and as naïve as a two year old. Ripe for the picking. But callous? Isn't that something you find on your feet?

Q.: You'd agree with me that consumers ought to be protected against unscrupulous sellers?

A.: No. They should be able to take care of themselves. If they go into the market, they have to be prepared for the market. Buyer beware, that's

what everyone knows and if this guy in this case didn't know that, he deserved to be hurt. I made a great deal. And so what? He got his car. A little late. No biggie. No harm done.

8. The total amount of fees charged to the plaintiff is \$8,354.00 and disbursements in the amount of \$235.00, for a total of \$8,589.00. On January 13, 2012, counsel for the defendant wrote counsel for the plaintiff and the parties made an agreement that if substantial indemnity costs are awarded by this Court, an amount in the sum of \$8,589.00 should be awarded to the plaintiff.

9. It is respectfully submitted that it is important to note that the plaintiff's conduct in the car deal was really heinous conduct. It is obviously deserving, when all factors under Rule 57 are taken into account, of the very highest sanction of this Court. Therefore, a decision should be made by this Court that costs on a substantial indemnity basis should be granted.

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