

IN THE PROVINCIAL COURT OF ALBERTA

BETWEEN:

CANADA SAFEWAY LIMITED

- and -

MARIO JACQUES GUAY

JUDGMENT OF THE HONOURABLE JUDGE R. H. O'NEIL

COUNSEL:

Susan Remmer - Counsel for the Plaintiff

Joan Blumer/Ruth Reimer - Counsel for the Defendant

[1] This is a claim for damages for trespass to land and chattels. On two occasions, one on November 17, 2000 and the other, on October 21, 2001, the defendant entered premises of the plaintiff and was apprehended for shoplifting. On the first occasion, he was found with 20 CD's and DVD's and on the second occasion, he had 12 CD's, DVD's and movies. All of the merchandise was recovered. On each occasion, he was prosecuted in Criminal court and convicted and sentenced to serve time in jail and placed on probation. No order for compensation was sought in the criminal proceedings.

The plaintiff seeks:

- a) damages for trespass to chattels
- b) damages for trespass to Canada
- c) damages for loss prevention
- d) punitive and exemplary damages
- e) interest
- f) costs

[2] The plaintiff has kept careful accounts of its costs in surveillance, loss prevention and in apprehending and dealing with shoplifters and the plaintiff has statistics showing the magnitude of its losses attributable to shoplifting, as well as figures showing the number of shoplifters apprehended. The plaintiff also adduced evidence as to the direct cost involved in the two incidents involving the defendant.

- [3] The quantity and type of merchandise found in the defendant's possession satisfies me that he entered the plaintiff's stores for the purpose of shoplifting and as such, committed trespass to real property. It is established law that a person becomes a trespasser, when having authority to enter for one purpose, he enters for a different and unauthorized purpose - *Gross v. Wright* [1923] SCR 214. At the same time, the defendant committed trespass with respect to the plaintiff's goods in that he deprived, however briefly, the plaintiff of possession of them.
- [4] The plaintiff's claim for damages is not based on any alleged loss it suffered directly by the defendant having temporarily deprived it of its goods or by having damaged its real property. What the plaintiff seeks is damages that reflect what it argues is this defendant's share or contribution to its much greater problem of the shrinkage of its inventory caused by the shoplifting of the defendant and many others like him, some apprehended and the majority, unapprehended. The plaintiff argues that it is entitled to substantial compensatory damages. It also asks for punitive and exemplary damages.
- [5] The claim for compensatory damages relies on the rule that trespass is actionable per se, and, unlike other torts, it is not necessary to prove actual damage to constitute an actionable tort. Proof of the wrongful act, in itself, is sufficient. Where no actual damages are proved nominal or token damages are awarded. Damages for trespass, however, are not necessarily limited to nominal damages and a court, taking into account all relevant circumstances may reach an intuitive assessment of the damages it considers the plaintiff has suffered - *Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.* [1991] AJ 102 also, 83 Alta. L.R. (2d) 289.
- [6] The function of an award of compensatory damages in a tort action is to put the plaintiff in the same position he would have enjoyed if the tort had not taken place to the extent that a monetary reward is capable of doing so. The cause and effect equation necessarily plays a part in the reasoning. On this reasoning, it is difficult to find that anyone can be responsible for loss or expense incurred in anticipation that he or someone of similar propensities may or is likely to commit a tort. On the present facts, I would attribute to the defendant those costs directly associated with the apprehension and detention, including all costs involved in writing reports and attending criminal court but nothing with respect to its costs incurred for loss prevention.
- [7] Punitive damages have been claimed. The function of an award of punitive damages is briefly stated by Goodfellow, J. in *Leahy v. Day*, 1999 N.S.J. 214 to be as follows:

“An award of punitive damages is based on the defendant's conduct rather than the plaintiff's loss. These damages are awarded to:

- i) punish the wrongdoer;
- ii) deter the tortfeasor or others from committing a similar act; or
- iii) prevent the wrongdoer from acquiring an undue profit from his unlawful act.

The general principles for applying punitive damages are set out by La Forest, J. in *Hill v. Church of Scientology of Toronto and Manning* (1995) 2 SCR 1130.

“Punitive damages may be awarded in situations where the defendant’s misconduct is so malicious, oppressive and high-handed that it offends the court’s sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those cases where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.”

- [8] The defendant has been caught shoplifting at the plaintiff’s stores on two occasions. On the first occasion, he had stolen 25 CD’s and 1 DVD to a retail value of \$595.00. On the other occasion, he stole 5 CD’s, 3 DVD’s and 4 videos having a retail value of \$248.88. He was convicted each time and sentenced to a jail term and probation. The second sentence was greater than the first. The type and quantity of merchandise stolen indicates to me that the defendant’s purpose in stealing these items are not for his personal use; he intended to sell them.
- [9] Theft is reprehensible conduct and where it is repeated as it has been here, it shows a high handed disregard for the rights of the victim. There is no doubt that society expects thieves to be punished. Indeed, the defendant has been punished by imprisonment on two occasions, at least, for shoplifting at the plaintiff’s stores. That punishment is to be taken into consideration in any award of punitive damages.
- [10] The first jail sentence did not deter the defendant. Whether the second jail term will, is not established. It may be that he simply looks upon the occasional term in jail as an occupational hazard, or something in the nature of a license fee for being in business. Whether a money judgment will accomplish more than jail time, I do not know. It may be that a persistent debt collector armed with a judgment may make an impression where a jail sentence or a fine does not. On balance I am of the view that an award of punitive

damages in a moderate amount is justified.

- [11] The plaintiff has provided the court with evidence of specific costs associated with the defendant's shoplifting. These were costs that would not have been incurred but for the shoplifting. The amount proved in this connection is: 8 hours at \$12 per hour or \$96.00 for loss prevention agents plus an indeterminate amount for the time of regular store employees, which I estimate at \$50.00. I therefore award \$146.00 in compensatory damages. Taking into consideration the jail term the defendant has served, I am of the view that an award of \$1,000 in punitive damages is fitting.

Dated at the City of Calgary, in the Province of Alberta this, 5th day of March, 2003.

Judge R. H. O'Neil