



# Mental Distress and Building Contracts

## When is a contractor liable for an owner's peace of mind?

**C**ontractors often deal with claims for deficiencies from owners. Most contractors do not realize that in certain circumstances they could be held responsible not only for the cost of remediating a deficiency, but also for damages for mental suffering caused by the inadequate construction.

Awards of "general damages" such as this are still part of a developing area of the law and are only granted in limited circumstances. One type of general damages – those for mental distress – are recoverable where such damages were in the reasonable contemplation of the parties at the time the contract was made, and an object of the contract was the "peace of mind" of one of the contracting parties. The degree of suffering must be enough to warrant compensation. Damages for mental distress arising from breach of contract are generally not awarded where both parties are sophisticated commercial entities.

Damages for mental suffering were recently awarded in a decision coming out of Newfoundland and Labrador. In *Hickey's Building Supplies Limited v. Sheppard, 2014 NLCA 43*, the Sheppards wanted to build a retirement home. To move around, Mrs. Sheppard relied on a cane, a wheelchair, or had to crawl on the floor. It was very important to the Sheppards to have a home that gave them pleasure in their retirement and also provided suitable accommodation for Mrs. Sheppard's needs.

Although the building contract did not explicitly require a level floor, the Court found that the Sheppards had contracted for one. The contractor was fully aware of Mrs. Sheppard's medical and disability issues and knew

that the Sheppards wanted floors that were level and continuous. This was reflected in the contractor's notes, discussions with the Sheppards, and the installation of special features to accommodate Mrs. Sheppard.

Instead of a level floor, there was a quarter-inch difference between the tile and hardwood flooring in the home. While the contractor conceded this difference existed, it argued that this was permitted under the National Building Code, which incorporates accessibility standards. By simply adding transition strips, the flooring was compliant with the Code and the written terms of the contract.

The Court found that the contract required level floors because the contractor knew of the Sheppards' requirements for floors that were level and consistent. Consequently, the Sheppards were awarded damages for the cost of remediating the floors.

A majority of the Court of Appeal also agreed that the uneven flooring warranted an award of general damages for mental distress. Mrs. Sheppard's circumstances made it foreseeable that failure to live up to the terms of the contract would cause distress. As conceded by counsel for the contractor, an object of the contract was peace of mind. The contractor understood the psychological benefit that the Sheppards had contracted for. While any construction project should result in a floor that is hazard-free, it was particularly foreseeable in this instance that mental distress would result from the deficiency.

Turning to whether the degree of mental distress warranted compensation, the majority noted that Mrs. Sheppard spent more time at home than most people and the inconsistent

flooring required her to go about her activities in a state of fear and anxiety associated with the risk of tripping. She was particularly vulnerable because of her compromised balance and fragility. Mr. Sheppard also suffered from the risk of tripping and bearing the worry and concern over his wife.

Concluding that an object of the contract was "peace of mind," the contract had been breached and the degree of distress warranted compensation, the majority of the Court of Appeal upheld the trial judge's award of \$15,000 to the Sheppards jointly.

It is clear from the Court's reasons that in rare circumstances, where a party has contracted for "peace of mind," failure to satisfy contractual obligations may lead to damages for mental distress. This decision is particularly applicable to contractors dealing with individuals rather than commercial entities. Contractors can mitigate the exposure that may be faced in "peace of mind" contracts by clearly drafting exclusion language. For owners, the decision underscores the importance of having their construction requirements set out in the contract. If the Sheppards had ensured that the level flooring specifications were stipulated clearly in the contract, the litigation could have potentially been avoided. □

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