Citation:	Schatroph v. Preston Chevrolet Oldsmobile Cadillac Ltd. 2003 BCSC 265	Date:	20030221
		Docket:	S024010
		Registry:	Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DOUG SCHATROPH

PLAINTIFF

AND:

PRESTON CHEVROLET OLDSMOBILE CADILLAC LTD.

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE STEWART

Counsel for the Plaintiff	T.H. Pettit
Counsel for the Defendant	M.C. Samuels J. Scott
Date and Place of Trial:	February 6 and 7, 2003 Vancouver, BC

[1] The plaintiff's action against the defendant falls into several parts.

[2] It begins with a claim against the defendant arising out of the theft of the plaintiff's tools from the defendant's premises, a car dealership, on November 6, 2001.

[3] The way in which counsel for the plaintiff structured his submission at the end of the case means that that claim for lost tools takes the court to the area of bailment and contract. [I note here that I am alive to the fact that a bailment is viewed by some academics as a contract, by others as - in some circumstances - a tort and, by the cautious, as *sui generis*.] Plaintiff's counsel proceeded as if a claim in bailment and a claim in contract were clear different things open to the plaintiff, in the alternative, in connection with the loss of his tools. In this context the "contract" referred to is the contract of employment and an alleged promise to provide "tool theft insurance" up to a certain amount (Exhibit 1 Tab 1 Page 14). It is my conclusion (*infra*) that the claim in bailment cannot be properly analyzed without turning to whether the contract of employment established anything relevant to a claim by the plaintiff against the defendant for a wrong committed not by a third party but by the defendant. The business of the defendant's allegedly promising to supply "tool theft insurance" would be of interest where what was at issue was only a wrong committed by a third party. Because of the findings I make in these reasons for judgment this case never reaches that point of departure.

[4] The plaintiff's case then turns to a claim for wrongful dismissal. This claim arises out of the fact that as of all relevant dates prior to December 20, 2001 the plaintiff was employed by the defendant but as of December 20 he was not. [I have deliberately phrased it in that elliptical way.]

[5] This latter claim for damages for breach of a contract of employment takes the court to the usual and ordinary in that connection - the assertion of a right to damages for wrongful

dismissal by way of compensation - and the not so usual and ordinary, i.e. a claim for one or more of: the additional or extended damages contemplated by the Supreme Court of Canada's judgment in ***Wallace v. United Grain Growers Ltd.***, [1977] 3 S.C.R. 701; punitive damages; aggravated damages.

[6] The plaintiff has a third claim for damages against the defendant. This claim sounds in the tort of conversion. The plaintiff took the position that if the plaintiff succeeds on this action the wrongful conduct thus found is also worthy of condemnation by way of punitive damages in addition to the usual and ordinary award of damages flowing from a finding of conversion.

[7] I turn to my findings of fact.

[8] I find that the plaintiff was employed by the defendant as a mechanic. He worked in the defendant dealership's "Service Shop" as it is designated on Exhibit 1 Tab 18, a diagram.

[9] The plaintiff was hired by the defendant in mid-2000. He was a full-time employee.

[10] The plaintiff and the other mechanics were paid on what amounts to a piecework basis.

[11] As projects that required a mechanic's attention became available they were assigned to one mechanic or another. The project would arrive with a set time attached to it. That was not the time within which the project was to be completed. It was the time for which the mechanic would be paid if the job was completed satisfactorily regardless of whether the mechanic took 10 minutes or 10 hours to complete a 2 hour job. The mechanic got paid for the 2 hours. Nothing more. And nothing less.

[12] The problems inherent in arriving at a sensible monthly figure for the plaintiff's gross income are obvious. Fortunately, and sensibly, counsel were able to hammer out an agreement and, in the result, tell me to proceed on the basis that the applicable figure is $2,500.00 per month.

[13] I turn to the plaintiff's tools.

[14] It was common ground that, as was usual and ordinary in the industry, the plaintiff brought his own tools with him when he commenced working for the defendant in mid-2000.

[15] On the evidence before me I draw the inference that it is to the economic advantage of the defendant to have a mechanic supply his own tools.

[16] The entire system is based on each mechanic having his own personal set of tools immediately to hand. At the core of each set of tools are essentially the same basic tools. Then each mechanic adds such additional tools as that mechanic sees fit. This of course becomes especially important in the case of a mechanic who has developed a specialty. As I understand it the plaintiff was not a mechanic who had developed a specialty. He had tools that were adequate for his purposes as what I will refer to as a basic mechanic.

[17] The economic advantage to the defendant of the plaintiff and the other mechanics providing the tools for the job is obvious. And I conclude on the evidence I heard that it is an advantage of enormous value.

[18] Thus each mechanic working in the defendant's shop has his own tools. The mechanics share their tools as they see fit. In addition tools that belong to the defendant are kept separate and apart from the mechanics' tools. As I understood it these are, at least in the main, tools that General Motors forces the defendant to purchase if the defendant wishes to retain its status as a General Motors dealership.

[19] Each mechanic keeps his tools in a toolbox of his own choice. He owns and provides the toolbox.

[20] Toolboxes can be anything. Sizes vary. The plaintiff's toolbox was not unusual. He had actually two boxes. The bottom box was on casters. That box contained very heavy tools. On top of that box was another box. That box had handles. That top box of the plaintiff's is the box of tools that eventually went missing in this case.

[21] In any event the plaintiff's top box contained tools. It was very heavy. But not nearly as heavy as the bottom box.

[22] The top box sat on top of the bottom box. The plaintiff's top and bottom boxes were not bolted together.

[23] It was the practice in the shop for each mechanic to keep his toolbox (two boxes one on top of the other in the plaintiff's case) at the end of the "bay" he had been assigned in which to do his work. As was usual and ordinary, the plaintiff would lock up his toolboxes at the end of his workday whenever on any given day he was about to leave the shop. The mechanics' boxes would

stay in the shop overnight, save and except if a mechanic either out of habit or for a particular occasion chose to take his tools with him when he left the shop for the day. The dominant practice was to leave the toolboxes within the defendant's shop overnight.

[24] The plaintiff took two weeks' paid holidays commencing October 6, 2001. With the permission of a supervisor at the defendant's dealership the plaintiff took what proved to be two additional unpaid weeks of leave immediately after his two weeks' holiday.

[25] Before starting his holidays the plaintiff did with his tools what was usual and ordinary for the dealership. He wheeled his toolbox into a room in the Service Shop designated the "Tool Room". That room opened onto the general service area of the Service Shop. And the entry to that room from that general area was always open.

[26] On November 6, 2001 the plaintiff was still absent from work, as above.

[27] On the evening of November 6 a thief, acting alone or - more likely - in concert with others made his or her way into the Service Shop, located the plaintiff's tools, wheeled the plaintiff's double layered toolbox out of the building and then made off with the top box.

[28] Nobody, other than the thief or thieves, knows the detail of the theft.

[29] This is a civil case not a criminal case.

[30] As the trier of fact I find that the plaintiff has established on a balance of probabilities that it is more likely than not that one or more thieves entered the Service Shop through one of the two unlocked doors at the north end of the Service Shop.

[31] Once inside the Service Shop the thief or thieves had access to all that was in the Service Shop including the plaintiff's eminently mobile toolbox. The portals that could be opened in order to wheel the plaintiff's toolbox out of the Service Shop were numerous. Obviously it was in fact wheeled out of the building. The bottom box - the one with wheels - was found sometime later just outside the south wall of the Service Shop. The fact that bottom box was found there does not mean that it was taken out through one of the three doors on the south wall. Any of a number of other doors - there are eight on the east wall of the Service Shop for example - may have been used. It matters not.

[32] As a matter of mixed fact and law was the defendant a bailee of the plaintiff's tools?

[33] I conclude that the defendant was.

[34] The decision is situation specific. Case law simply dealing with a different body of evidence can be a trap for an unwary judge. But here, taking into account the factual matrix in which the plaintiff's tools came to be in the defendant's premises and the economic benefit to the defendant of having the plaintiff provide the tools for the jobs assigned to him by the defendant, I find that my conclusion that this was a bailment for reward, is in accord with the decision of the New Brunswick Supreme Court, Appellate Division in ***MacDonald v. Whittaker Textiles (Marysville) Ltd.*** (1978), 64 D.L.R. (3d) 317.

[35] That case is, of course, of only persuasive effect. In addition, as I have noted, I am actually dealing with the application of settled law to different bodies of evidence and not with precedent as to law. But if one accepts that like cases ought to be decided alike, I say this case and the ***MacDonald v. Whittaker Textiles (Marysville) Ltd.*** case are in fact like cases. I say as to the balance of the authorities drawn to my attention that I found no other authority of any real assistance.

[36] In the result I conclude as a matter of mixed fact and law that the defendant was a bailee.

[37] As a matter of law a bailee in the defendant's position has the onus of establishing that it exercised that degree of care and diligence which a careful and vigilant man would exercise in the custody of his own chattel in similar circumstances.

[38] Thus the onus is on the defendant. And the standard of care is as stated.

[39] One has to push aside much that does not matter in this case lest it cloud the analysis.

[40] I am convinced that what matters here is that on the defendant's own evidence the defendant permitted a situation to exist in which any thief worthy of the name could make his or her way into the Service Shop on any work evening after 5:00 p.m. and before 9:00 p.m. with at least a sporting chance of finding no cleaner or janitor present for the moment and, within minutes, exit the building with some of the defendant's tools or a mechanic's tools.

[41] The defendant was grossly negligent considering the value of what was in that Service Shop - both the defendant's tools and the mechanics' tools - and the nature and configuration of the

building. That building lent itself to being entered by strangers - tire kickers - with an invitation to wander about that included heading down a hallway that led towards a public washroom. And led also towards an unlocked door to the Service Shop. The defendant's attempt to paint the arrangement as sensible because of the possibility that a receptionist or a car salesman to the north of - and out of sight of - the unlocked door to the Service Shop might intercept a trespasser was far from persuasive.

[42] The defendant made a business decision - to keep the two doors on the north end of the Service Shop unlocked between 5:00 p.m. and 9:00 p.m. The defendant wanted salespeople to be able, if necessary, to assist customers by going on occasion into that Service Shop after hours. I say as the trier of fact that had no mechanics' tools been in that Service Shop and only the defendant's own tools stored in that Service Shop a careful and prudent owner of the dealership would have recognized that a grossly unreasonable risk of great loss was being taken by the dealership. That none of the senior executives of the defendant recognized that fact adds nothing to the analysis. What matters is that the defendant's conduct fell below the standard of care that had application.

[43] In the result I find that the defendant is liable to the plaintiff in bailment.

[44] Later in these reasons for judgment I will assess (not calculate) the damages.

[45] But this is the time for me to state my conclusions as to how the contract of employment enters the analysis in connection with the claim for damages for loss of the plaintiff's tools.

[46] The short point is it doesn't.

[47] In my respectful view much of what came before me at this trial was misconceived.

[48] As between the plaintiff and the defendant - never mind as between the defendant and its insurance company - was there anything relevant to the plaintiff's action in bailment as against the defendant? That is the question.

[49] I say no.

[50] It would take very specific language to amount to a waiver by an employee in the plaintiff's position of damages above a given amount available at law because of the culpability not of a third party but of the defendant. (Neither counsel analyzed the case this way but I think I must).

[51] Here there is no such language anywhere. In fact nothing gets at anything more than the imposing on the defendant of an obligation to the plaintiff to "provide 'tool theft insurance' up to [a dollar amount]". (See Exhibit 1 Tab 1 page 14 and Exhibit 1 Tab 2).

[52] It is my conclusion that as between the plaintiff and the defendant - which is what is at issue in this trial - the existence of, nature of, extent of, and limits upon the above noted suggested contractual obligation on the defendant to provide "insurance" is utterly irrelevant to the claim in bailment. If established it is a term directed at protecting against losses resulting from wrongs committed by third parties. Here the plaintiff has established an actionable wrong committed by the defendant.

[53] So I turn to the assessment of damages for the loss of the plaintiff's tools.

[54] As determined above the case is one of a bailment for reward in which through its own negligence the defendant bailee deprived itself of the opportunity to return possession of the goods in question to the plaintiff.

[55] I have read the cases left with me by counsel. The net effect of those cases is that I am to assess the actual value of what was lost. Replacement cost is the obvious weapon where the chattel in question has been lost, not damaged. (Bailment, Palmer, 2d ed. p. 78). In other words, the cases supplied to me by counsel and other authorities that I have looked at, state the obvious.

[56] But what about the law's approach to the problem of proof in a case such as this? None of counsel's cases was of assistance. I have been unable to find any authority that is of any real assistance. Absent law to the contrary it seems to me that it is just common sense that where the bailee's act of negligence deprives the bailor of the opportunity to make sure and certain proof of its loss - as is the case here because the plaintiff's receipts for his tools went with the toolbox - the trier of fact must assume all against the bailee.

[57] There is no curtailment of the application of that common sense proposition in the case at bar because of anything that has the force of law as between the plaintiff and the defendant. Here I refer to much evidence about whether the defendant ever suggested, requested, or demanded - prior to November 6, 2001 - that an employee in the plaintiff's position deposit with the defendant an inventory (or the equivalent) establishing the cost of the tools in the employee's

toolbox.

[58] First I say as the trier of fact that prior to November 6, 2001 all that had been said or done amounted at most to a statement of the obvious: "It would be in the best interest of all parties if each employee would have a detailed list of his/her tools...". (Exhibit 1 Tab 2). Second I say that whatever was said or done in this connection - including the circulating of copies of the letter just referred to at Exhibit 1 Tab 2 - was said or done in connection with proof of loss in connection with an insurance claim and, as noted above, that has nothing to do with the plaintiff's claim against the defendant for its own wrongdoing as a bailee. The potential for use of the defendant's insurance in the case of the theft of an employee's tools was directed at a situation in which what was relevant was simply wrongdoing by a third party. And that is not this case.

[59] So I return to the assessment of the actual value of the chattel lost in the case at bar, i.e. the top toolbox and whatever tools there were in it.

[60] This is a case in which the plaintiff's receipts were lost as a result of the defendant's negligence. It is a case where if I look at the evidence of witnesses as to what the plaintiff had in his toolbox the evidence is conflicting. It is a case where it is a fact that the peculiar nature of the tools in question looms large. If one buys top-end tools one buys not a tool but a lifetime supply of that tool suitable for the purpose for which the tool was designed. One buys a stream of tools. Put aside the question of breakage or obvious damage, once the tool is not fit for its purpose a top end manufacturer will hand the mechanic a new tool. That is the effect of the evidence placed before me.

[61] Applying the law noted above to what is thrown up in this particular case I say: the evidence does not satisfy me that the plaintiff did not have top end tools in his toolbox. In getting at the actual value of the chattel lost I must therefore proceed on the basis that the plaintiff had top end tools. On the evidence before me that sets the actual value of the chattel lost - the toolbox itself and the tools within it - at $13,532.61, the amount claimed by the plaintiff. I award that sum under this head.

[62] I turn to the claim for wrongful dismissal.

[63] In light of the findings I have made thus far in these reasons for judgment much of what I heard about the events after November 6, 2001 is of no moment in law.

[64] I have found, as above, that the plaintiff was deprived of his tools by reason of the defendant's negligence.

[65] The plaintiff did not return to work after November 6, 2001 because - and this was common ground - absent his tools the plaintiff was in no position to return to work.

[66] I find that what the defendant points to as evidence that after November 6, 2001 and prior to December 20, 2001 (the date the defendant's agent telephoned the plaintiff and told him he was fired) the plaintiff had "abandoned" his employment is nothing more than evidence of the blowing off of steam by a frustrated worker. I note also that counsel for the defendant turned away from a submission that the contract of employment had been frustrated within the meaning of the law. Apart from all else the lack of an appropriate pleading was fatal.

[67] An amazing series of misunderstandings accounts for the plaintiff's frustration.

[68] Those misunderstandings are I say irrelevant in law.

[69] But those misunderstandings took up half the trial. And they certainly are interesting. So I'll pause to outline certain of those misunderstandings, briefly.

[70] First, nobody focused on the fact that the defendant's default was of interest. The assumption was that a claim "by" the plaintiff on the defendant's insurance was what mattered. Next there was the fact that the defendant's executives thought that the insurance policy in question contained an insurance company imposed limit of $12,000.00 on a claim arising out of loss of a mechanic's tools. It didn't. I know that from the evidence of the adjuster Rob Keeper. No such insurance company imposed limit existed.

[71] Next was a very odd thing. With all assuming that what mattered was a claim on the defendant's insurance policy "by" the plaintiff the claim went forward without Rob Keeper, the adjuster, understanding that tools of the kind in question are not the usual and ordinary chattels which start out new, depreciate quickly, and are soon worth half of their original value. As I have explained above a person in the plaintiff's position purchases a lifetime stream of tools with the purchase of the first tool from a top end manufacturer. In this case the insurance company's adjuster, Rob Keeper, proceeded on the basis that it was a case for making use of a third party and, in the result, discovering the cost of a mid-range set of tools, reducing that figure by 50% for depreciation, lowering the resulting figure by $1,500.00 for the defendant's deductible and sending the defendant a cheque or a draft for whatever figure dropped out.

[72] The last misunderstanding I will deal with is passing strange. The plaintiff did buy new tools. Here see Exhibit 1 Tab 4. But as he processed what all concerned thought was properly viewed as an insurance claim "by" the plaintiff Rob Keeper did not know that the plaintiff had purchased new tools. Rob Keeper told me that had he known that fact the entire basis of his evaluation of the claim would have shifted to adjusting the claim on a replacement cost basis (Exhibit 3 Tab 3 Page 32). In the result the net amount the insurance company would have been willing to pay would have been much higher than the $3,500.00 eventually settled upon by the insurance company through Rob Keeper.

[73] In any event I find that for the purposes of the law all that matters is that the plaintiff: was employed by the defendant; was deprived of his tools by the defendant's negligence; could not return to work without his tools; never repudiated his contract of employment; and was ultimately faced with a repudiation of its contractual obligations by the defendant on December 20 when the defendant fired the plaintiff by telephone. The letter of "termination" went out the next day. (Exhibit 1 Tab 8). In the result the plaintiff has accepted the defendant's repudiation of its contractual obligations, i.e. treated the contract as at an end and sued for damages for wrongful dismissal.

[74] In the eyes of the law the plaintiff is simply an employee who was dismissed without cause and without reasonable notice. He is entitled to damages in lieu of notice. The plaintiff's submission that damages be set at six weeks' wages in lieu of notice is reasonable and in accord with the applicable law. (***Bardal v. Globe & Mail Ltd.*** (1960), 24 D.L.R. (2d) 140 (Ont. H.C.)). I accept it. In the result compensatory damages for wrongful dismissal are set at $3,750.00. I note here that counsel for the defendant touched down lightly on a plea that the plaintiff failed to mitigate his loss. I will put it this way: The onus is on the defendant to establish the necessary. Here the defendant has simply failed to establish so much as a platform for a discussion of lack of mitigation.

[75] With respect there is nothing in this case to bottom a sensible discussion of any head of damages arising out of wrongful dismissal other than basic compensatory damages.

[76] There is in this case nothing approaching the bar set by the Supreme Court of Canada in ***Wallace v. United Grain Growers***, *supra,* for "an addition to the notice period" because of bad faith and lack of fair dealing during the dismissal.

[77] It is my conclusion that in the case at bar the defendant was candid, honest and forthright with the plaintiff as it and the plaintiff wrongly treated what was the defendant's problem because of the defendant's unrecognized negligence as the plaintiff's problem because of the malfeasance of a third party. There is nothing in that that leads to anything other than the adverse results for the defendant which have been visited upon the defendant earlier in these reasons for judgment.

[78] As for punitive damages, ***Vorvis v. ICBC***, [1989] 1 S.C.R. 1085 is still the leading authority. Punitive damages are divorced from the concept of compensation. Canadian law reserves an award of punitive damages for clear cases that demand punishment of the defendant. That Canadian law does so is obviously based on an understanding that once let slip punitive damages are inherently set and controlled by no inherent logic. It is my conclusion that there is nothing in the case at bar that engages the concept of punitive damages.

[79] As for aggravated damages the law is to the effect that aggravated damages are simply an augmentation of compensatory damages. Unless every case of wrongful dismissal is to result in an award of aggravated damages there is nothing here that demands an award of aggravated damages.

[80] Any fired employee is rocked by having been fired. Most fired employees are left with a financial desert before them. Many fired employees are in the throes of a matrimonial break-up. Many fired employees are part-time single parents facing an uncertain future. If Canadian law recognized as compensable the adverse secondary effects on any plaintiff who is wrongfully dismissed then the plaintiff in the case at bar would have a case. But Canadian law does not. That is inherent in the starting point for the Supreme Court of Canada's analysis in ***Wallace v. United Grain Growers***, *supra*.

[81] The last item I must deal with is the claim for damages for conversion. I will deal with this briefly. In my respectful view the claim is misconceived. The short point is that what was thought of as the plaintiff's claim on the defendant's insurance - all wrong - went forward and eventually, after many unhappy events I see no point in detailing, a draft dated April 5, 2002 in favour of the defendant in the amount of $3,500.00 was received by the defendant from the insurance company. The defendant refused to pass that sum along to the plaintiff absent a release of all claims by the plaintiff against the defendant. To this day the defendant retains the $3,500.00. It is that sequence of events that bottoms the plaintiff's claim for damages for conversion. The absence in law of any basis for a finding of conversion is manifest. Apart from all else, the plaintiff was not a person "entitled" to any relevant chattel within the meaning of the law. (***Driedger v. Schmidt***, [1931] 3 W.W.R. 514.) I choose to say no more.

[82] The net result of these reasons for judgment is that I grant judgment in favour of the plaintiff for a total of $17,282.51 (para. 61 plus para. 74). In addition, on the face of it

there should be an order for court order interest. The plaintiff will have his costs, scale 3. If necessary counsel can arrange to get back before me in connection with one or both of those items.

"A.M. Stewart, J."
The Honourable Mr. Justice A.M. Stewart