

Special Report on Consumer Law



Legal Remedies for Spoiled Vacations

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The annual vacation is met with high expectation all year by harried adults. It promises a window of time to strengthen close relationships through exciting shared experience, to see new places and learn new things. The word “vacation” means to empty oneself of work and other toils, replacing them with leisure and refreshment.

One might vacate by staying around home to rest or engage in interests such as sewing, entertaining or golfing. For the purposes of this article, however, we will define and consider vacations in which one travels away from home and pays for services that comprise the vacation. This would include the components of air travel and accommodation (hotel or timeshare) or bought as a more “packaged” and organized vacation arrangement which might include tours and entertainment. It might even be “all-inclusive” of food, accommodation, drinks, transportation and tips.

When these vacations go bad, consumers have a compound loss — the unrecoverable waste of the annual pleasure period, the exasperation of long-laid plans gone awry, the helplessness that accompanies captivity away from home, and the financial loss. What was to be reinvigoration was instead stress and disappointment.

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If the ruined vacation is due to unforeseen circumstances, such as the outbreak of a civil war, a national railway on strike, unusually bad weather, or large crowds, there is

not much one can do. Other times, the travel agent or tour operator may be liable for breach of contract in promising (and charging for) something that was not delivered or, in tort law, for failing to provide good advice on such things as clothing to bring, inoculations to obtain and safety practices to follow.

No Contract Damages for Disappointment

Whether it is buying an airline ticket or an all-inclusive cruise, legal contracts are made between the vacationer and the service provider. If the service is not provided — where the vacation did not happen — one would only be entitled to recovery of the purchase price and consequential damages arising from the breach, such as the cost spent on a substitute hotel or meals that were promised but not supplied.

The applicable law will be that of the local country where the transaction is made, and rarely will one find effective and prompt legal recourse. These transactions will need to be based on the best available research and trust. Once money has been paid, one is largely vulnerable and subject to the integrity of the seller.

If the vacation is purchased from a Canadian seller, whether that is a travel agency or the end service provider, Canadian law has not traditionally been sympathetic to consumers suing to recover damages for merely suffering disappointment, mental anguish and sadness as a result of the vacation. While money might be refunded where the services were

not supplied at all, or to reimburse for substituted out of pocket costs, obtaining damages more generally for “loss of enjoyment” or

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disappointment has been uncertain. In *Addis v. Gramophone Company Ltd.*, a 1909 decision, the British House of Lords said damages were not available for “hurt feelings” when a contract was breached.

Enjoyment and fun are hard to quantify and guarantee. Generally, if the vacationer is not satisfied, there can be no legal protest. Disappointment and sadness in all breaches of contract are not compensated unless the breach was deliberate or if one suffers a palpable physical breakdown or illness as a result. If it were otherwise, everyone might come to court to complain and collect a few dollars for a shortfall of enjoyment on the trip. Despite the marketing chimera of fun and fantasy, vacation operators are not selling or guaranteeing enjoyment and happiness. They are contracting to supply the *services* associated with the vacation which vacationers convert to their personal version of fun.

Consumer Surplus

In all contracts, people believe and expect that they are getting more than what they are paying for. Otherwise, they would not make the contract. They feel that they are being made better off by the contract. If they pay \$2,500 for a vacation, they expect that they will enjoy perhaps about \$4,000 overall value from it. This “consumer

surplus,” also called “excess utility,” is the value that an individual consumer places on an item over and above its purchase price. It explains why one consumer will pay more for something, such as a seat on the airplane, than another consumer, and why auctions are popular.

When the contract is not performed as promised, courts may be inclined to consider compensating for this consumer surplus beyond the pure financial loss. Such compensation usually benefits consumers and not commercial parties. The judicial decisions carve out *ad hoc* categories, rather than following a principled approach as to when these damages are appropriate.

Jarvis v. Swan Tours

This general rule that one cannot collect damages for mere disappointment in a breach of contract was reconsidered by the English Court of Appeal in the 1973 decision of *Jarvis v. Swan Tours*. Jarvis bought a fortnight winter holiday in the Swiss Alps that he had hoped would be the time of his life. It did not measure up to his expectations or what had been promised in the brochure. In his view, it was a disaster. He did get the roundtrip air travel, lodging and meals, but his skis were short, the German house party poorly attended, the “miserable little dry nutcakes” were hockey puck hard, his ski boots ill-fitting, and the yodeller was locally authentic, but not inspiring.

The disappointed Jarvis, a lawyer, sued. He claimed damages for his disappointment, indeed mental distress, from this winter getaway. He had long planned for it and he had

wonderful expectations of a pleasant and meaningful cultural experience. To the rule that one cannot recover damages for disappointment

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in breach of contract, the English Court of Appeal found an exception for vacations. The Court said that, in vacations, the very *purpose* of the contract was enjoyment and pleasure. Frustration, annoyance and disappointment for a spoiled vacation were foreseeable if the operator breached the contract by not delivering what was promised. Therefore, for vacation contracts alone, if the travel agent or operator seriously messes up, one might recover damages for the ensuing mental distress. The judges gave Jarvis *twice* the difference between what he paid for and the value of what he received. His awarded damages were his lost consumer surplus.

Canadian Application of the Jarvis Doctrine

The *Jarvis* case, though British, has been adopted into Canadian law. In the Manitoba *Keks* case, a family booked a package holiday in Hawaii. Accommodations with accessible kitchen facilities and an adjoining room for the housekeeper were promised. When they arrived, the facility was not as promised. The housekeeper had no place to cook the meals, so the family had to eat out. In addition to recovering the

housekeeper's expenses and the cost of the restaurant meals, the family received money for the frustration and disappointment.

In *Elder v. Koppe*, a 1974 decision of the Supreme Court of Nova Scotia, a daughter booked a motorhome to take her visiting family through Nova Scotia. The motorhome was not available as promised and they could not find a substitute elsewhere. The daughter left her small apartment to stay with friends so her family could stay at her place and the holiday was limited to a few day trips. The Court awarded the daughter the cost of the substituted camping equipment and much more for the family's loss of enjoyment of the motorhome vacation.

Actually, this *Jarvis* principle has been adapted to more than vacation enjoyment. In *Newell v. Canadian Pacific Airlines Ltd.*, a 1976 decision of the Ontario County Court, the travellers' dog was killed and another injured after being put in the cargo hold on the airplane. In addition to the replacement cost of the dogs, the Newells were granted damages for "anguish, loss of enjoyment of life and sadness" resulting from the emotional loss of their dogs.

Mental anguish damages have also been awarded against a photographer for botched wedding photos (*Wilson v. Sooter Studios Ltd.*, 1989, BC Court of Appeal) and a disc jockey who failed to provide entertainment at a wedding (*Dunn v. Disc Jockey Unlimited Co. Ltd.*, 1978, Ontario District Court).

In 1995, the British House of Lords acknowledged consumer surplus in a significant decision on intangible losses of enjoyment in *Ruxley Electronics and Construction Ltd. v. Forsyth*. Forsyth contracted with Ruxley for the construction of a swimming pool in his backyard, to a depth of seven feet, six inches.

The completed pool had a maximum depth of only six feet. In the result, Forsyth sued for

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the cost of demolishing the swimming pool and rebuilding a second pool to conform to the original specifications. Lord Lloyd equated the loss of amenity, convenience and satisfaction with the loss of consumer surplus and the losses compensated in *Jarvis*. He characterized the contract for the pool as one for a "pleasurable amenity," suitable for compensation. A court will determine reasonableness by the consumer's subjective and idiosyncratic preferences, and will not impose its own ideas of what is reasonable. If the extra 18 inches of depth in the swimming pool was truly important to the consumer, the quantum of damages may be the cost to destroy the deficient pool and reconstruct the desired one. As recently as 2002, in the consumer insurance case of *Whiten v. Pilot Insurance*, the Supreme Court of Canada referred to the insurer's advertising. Parties selling to consumers will sometimes explicitly offer "peace of mind" which, when violated, will be a compensable loss. The same principles can be expected to be applied to lost enjoyment in vacations.

Conclusion

Services to facilitate vacations are often provided by commercial entities. These firms may deliberately convey an impression that they are selling fun and enjoyment. Accordingly, vacationers may expect to receive enjoyment beyond the mere provision of travel, lodging and food. This is known as consumer surplus. This subjectively-assessed enjoyment or utility is a hallmark of every consumer purchase. The *Jarvis*-type loss of “entertainment and enjoyment,” which started as a spoiled vacation, is today broadly interpreted as loss of *amenity* in any other consumer scenario. This loss of consumer surplus, in bad vacations as well as other breaches of consumer contracts, may be compensated where it is a reasonable expectation and foreseeable consequence within the contemplation of the parties.

As the leisure industry grows, travel agencies and tour operators should be careful to ensure that they can deliver on the promises they make in their marketing. Increasingly, consumers, individually and through class actions, are being outfitted with legal remedies and judicial empathies to hold the vacation industry in Canada accountable for their enjoyment.

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