

**COURT FILE NO.:** 96-CU-108888SR

**DATE:** 2001/04/20

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

KEN LUCO

Plaintiff

**- and -**

JOHN BEVERIDGE and CREATIVE  
SOLUTIONS

Defendants

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**REASONS FOR JUDGMENT**

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Mr. Justice Denis J. Power

**Released:** April 20, 2001

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**BETWEEN:**

KEN LUCO

Plaintiff

**- and -**

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SOLUTIONS

Defendants

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 ) Martin P. Forget, for the Plaintiff  
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 ) John Beveridge, in person, for the  
 ) Defendants  
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 ) **HEARD:** April 5, 2001

**REASONS FOR JUDGMENT**

**Power J.**

**Preamble**

[1] This action was tried on Thursday, April 5<sup>th</sup>, 2001 as a Summary trial pursuant to Rule 76.

[2] The record contains affidavits of Ken Luco and William J. Bryant in support of the Plaintiff's case and John H. Beveridge, Wesley Garland, and Victoria McKinnon in support of the defendant's case. *[emphasis added]* The defendants were unable to produce Ms. McKinnon for cross-examination at trial and, therefore, during the course of the trial, I ruled that her affidavit would not constitute evidence. At trial, each party exercised his/their right to cross-examine the

remaining deponents.

[3] Following the completion of the evidence and argument I reserved my judgment. Having now had an opportunity to consider all of the evidence and the submissions made by the parties, I am satisfied that the Plaintiff should have judgment against the Defendants.

### **The Claim and the Facts**

[4] The Plaintiff seeks damages which he alleges he sustained to reproduce/recreate/or reformat computer data. The Plaintiff alleges that this data was destroyed as a result of the negligence of the Defendants. He sues in contract and in tort. The defendants deny the existence of a contract for professional services and, as well, they deny any negligence.

[5] The Plaintiff is a dentist. The defendant, John Beveridge, was a former patient and friend of the Plaintiff. He, Mr. Beveridge, has an impressive and extensive background in the design and development of computer systems. Mr. Beveridge's computer expertise became known to the Plaintiff which led to the Plaintiff and Mr. Beveridge working together in, among other things, the creation of a computer application to assist in the diagnosis and management of TMJ disorder which was one of Dr. Luco's specialties. Most of the assistance Mr. Beveridge provided to Dr. Luco in this area was provided without financial compensation to him. In cross-examination, Mr. Beveridge acknowledged that his computer knowledge was far more extensive than that of the Plaintiff. Creative Solutions is a proprietorship owned by Mr. Beveridge.

[6] Dr. Luco spent considerable time in the creation of computerized presentations that involved large graphics. Mr. Beveridge advised Dr. Luco to install in his computer a SYQUEST removable hard drive, the purpose of which was to create a backup for the data stored in the computer. While Dr. Luco did follow Mr. Beveridge's advice he, Dr. Luco, did not take steps to ensure that the data was stored offsite as well as in the computer itself.

[7]As aforesaid, the claim in this action is for the cost of reproduction: lost data. Mr. Beveridge argues that no loss would have been sustained had Dr. Luco stored data offsite. While this may be true, the Plaintiffs failure to store data offsite was not the proximate cause of the loss giving rise to the claim in this action. I find that Dr. Luco's failure to store or keep information offsite cannot be considered negligence on his behalf that contributed to the loss of which he now complains. The data was lost because of the Defendants' negligence.

[8] While Mr. Beveridge did not have a detailed knowledge of exactly what was stored in Dr. Luco's computer, he was aware that the data consisted of the aforementioned and, as well as individual patient information. I find as a fact that Mr. Beveridge was aware, at the relevant time, that the stored information was very valuable to Dr. Luco and that Dr. Luco had a genuine interest in making sure that the data was not lost to him --- i.e. that it be preserved.

[9] On June 14<sup>th</sup>, 1994, the Plaintiff began having problems accessing data. Put simply, his computer would not "boot" or "boot up". As he had only recently purchased the computer in question, he contacted the manufacturer but was advised by its representatives, during a telephone conversation, that the troubles Dr. Luco was apparently encountering were

attributable to software causes and, therefore, did not fall under the manufacturer's warranty. The manufacturer suggested to the Plaintiff that he send the computer to their offices for inspection; however, it was apparent that the process would take place over a considerable period of time --- between six to eight weeks. The Plaintiff decided against returning the computer since he needed frequent access to his patient data and because he had an upcoming TMJ presentation commitment.

[10] The Plaintiff then contacted Mr. Beveridge because of his understanding of the latter's computer expertise. The evidence regarding what transpired, at that time and over the next couple of days, is in dispute. I prefer the evidence led on behalf of the Plaintiff particularly in light of the fact that the Defendants' evidence is, in my opinion, contradicted by Mr. Beveridge's letter of June 22nd, 1994, about which I will have more to say later in these Reasons for Decision. Dr. Luco's evidence is that he contacted Mr. Beveridge because he "was the person I knew with the most computer knowledge".

[11] In fact, Mr. Beveridge was not an expert in the area of the particular problem that Dr. Luco was then confronting. In my opinion, Mr. Beveridge should have told Dr. Luco about his lack of expertise in data recovery at that time --- i.e. at the time of the initial contact on June 14<sup>th</sup>. At the very least, Mr. Beveridge should have advised the Plaintiff of the limit of his expertise after he had taken the computer to his home for study.

[12] Mr. Beveridge, because of his friendship and because of his past association with Dr. Luco went to Dr. Luco's office on June 14<sup>th</sup> in order to inspect the computer. He, also, was unable to cause the computer to boot or boot up. Therefore, none of the data stored in the computer could be accessed. Mr. Beveridge offered to take the relevant part of the computer to his home for further investigation. He did this.

[13] Within a short time thereafter, Mr. Beveridge called the Plaintiff to advise him that the computer had been infected by the "MONKEY VIRUS" and that "all of the data on the hard drive had been lost" and that, therefore, "the hard drive had to be reformatted and the software reinstalled".

[14] Dr. Luco, relying on this advice, asked Mr. Beveridge to proceed accordingly, the result being that the data, which I find had not then been destroyed, was, in fact, destroyed. At trial, Mr. Beveridge suggested that the destruction of the data may have resulted from various causes. I do not accept this theory. I find, on the basis of reasonable probability, that when Mr. Beveridge examined the computer, at Dr. Luco's office and later at his house, the data was still in existence.

[15] On June 22<sup>nd</sup>, 1994, in order to assist the Plaintiff with a claim he intended to file with his insurer, Mr. Beveridge wrote to Dr. Luco. The letter reads as follows;

Creative Solutions  
57 Point Saint Mark Drive  
Suite 101  
Kingston, Ontario  
K7K 6L7

Dr. Ken Luco  
Barnefield Centre  
Unit#2  
RR # 2 Kingston, Ontario  
June 22, 1994

Dear Dr. Luco:

Further to our telephone conversations regarding the crash of your computer system and the subsequent data loss I have prepared a summary of the damages and actions by my company to date and an estimate of the cost of recreating the data from your existing hard copies and your specifications on forms or data lost where there is no hard copy.

System Description:

IBM PS1 with 240 megabyte hard drive Serial # 1433058885  
12 megabytes of memory  
Syquest 105 Megabyte Removeable hard drive  
Combination 3.5" 5.25" floppy drives  
Super VGA monitor-Logitech Scanman Scanner  
Serial Mouse

Diagnosis:

The system was infected with the Monkey Virus. This virus had destroyed the file allocation tables on all drives and had also affected the CMOS a set of instructions for the system BIOS on the motherboard. All data was lost and no backup was available.

The system bios would no longer recognize the existence [sic] of the hard drives and had to be powered down and reset. The hard drives themselves were removed, a low level format done on them on another system, reformatted and the existing software reinstalled.

I have examined some of the samples you have provided of the documents lost and understand that there are some 500 such documents originally created in Microsoft Publisher and Word 6.0. These documents, including computer presentations to your TMJ study club are made up of uniquely formatted text together with specific scanned images.

In addition you have indicated that you lost numerous Word templates with built in

dialog boxes designed to produce patient pre-determinations and estimates etc. These documents and templates took you approximately six and one half months to create or about five hundred hours.

To create your data we will require the original images that you scanned into your documents, the hard copy that you do have and a brief summary of the elements and layout of those lost documents that have no hard copy.

I understand your need for prompt attention to this problem since the data is used on a day to day basis and we are prepared to devote three of our Desk Top Publishing experts to your project. You asked for an estimate of the number of hours required and a very board estimate would be between four hundred and five hundred man hours. Our base rate is \$45/hour and we can provide deliverables on a weekly basis. Please determine which documents are the most urgent and these will be completed first.

Please be advised that with a project of this size and the speed with which you wish the work done we must also bill weekly for work done.

Please advise if these arrangements meet with your approval and we will begin.

Charges to date

	Item	Time
1-	Virus removal from hard drive & removable hard drive	1.0 hours
2-	Scan existing software disks (50) for virus (monkey virus was found on 9 disks)	3.1 hours
3-	Reset system bios	
4-	Low level format hard drives and reformat	1 hour
5-	Re install existing software Windows, Word 2 Upgrade to Word 6,Publisher, Excel Power Album Scanman Software, Clipmaster etc.	3 hours
6-	Setup Automatic Virus Protection on system	.5 hours
	Total hours for initial restoration	9.6 hours
	1 Technician 9.6 hrs @\$50/hr	\$480.00
		GST \$33.60
		Total \$513.60

[16] I note, in particular, that Mr. Beveridge's diagnosis was that the Monkey Virus had destroyed the file allocation tables on all drives and had also affected the CMOS a set of instructions for the system BIOS on the motherboard and that "a data was lost and no backup was available".

[17] Mr. Beveridge's evidence was that this letter had to be read in the context of two separate

and distinct events. According to him, different advice was given on each of these events. He denied that, following the first event, he told Dr. Luco that the data was destroyed. I cannot accept this explanation. The letter, on its face, contradicts the explanation and, as well, the letter is consistent with Dr. Luco's recollection of the events which, as aforesaid, I prefer.

[18] Indeed, the uncontradicted evidence at trial is that the Monkey Virus does not destroy or obliterate data --- it simply moves it and makes it difficult to retrieve.

[19] The Defendants invoiced the Plaintiff \$513.60 for their services and this account was paid. Obviously, he, Mr. Beveridge, was not simply trying to gratuitously help out a friend. In my opinion, there was a contract between the parties for the performance of professional services and there was valuable consideration. Therefore, the Defendants were obligated to bring reasonable care, skill, and knowledge to the performance of the professional services which they undertook to carry out on behalf of the Plaintiff. They failed to meet the standard for reasons which will be hereafter explained. Mr. Beveridge, simply, should have declined the retainer. However, having accepted it, he was bound to carry it out without negligence. (See *Central Trust Co. v. Rafuse* (1986), 2 S.C.R. 147)

[20] In his cross-examination of Dr. Luco, Mr. Beveridge attempted to demonstrate that Dr. Luco was aware that there were options open to him other than a total reformatting of the data which process involved the destruction of any data that might have still been on the hard drive. Dr. Luco's evidence was that the option which he adopted, after speaking with the manufacturer, was to retain the professional services of Mr. Beveridge who he, Dr. Luco, reasonably thought possessed the required expertise. When pressed as to whether other options were pointed out to him by Mr. Beveridge, Dr. Luco said "you said that the data was destroyed and that the only option was that of reformatting the hardware" and that, as a result, Dr. Luco instructed Mr. Beveridge to proceed accordingly. Mr. Beveridge continued to press the issue of options on Dr. Luco. The Plaintiff testified that Mr. Beveridge did, indeed, point out that there was the option of sending the hard drive to the United States at a cost of \$5,000. However, Dr. Luco continued to insist that Mr. Beveridge had already told him that the data had been lost.

[21] The Defendants and Mr. Beveridge's daughter were retained by the Plaintiff to reformat/recreate the data. Exhibit 2 is an invoice on the letterhead of Creative Solutions in the amount of \$5,580 plus \$781.20 for a total of \$6,361.20 for one hundred and twenty-four (124) hours of work described as "restoration of online forms and compound image documents (2) two staff over two weeks". This work was carried out at an average hourly rate of \$45. This, however, did not put Dr. Luco back where he was prior to the discovery of the data recovery problems.

[22] On or about February 28<sup>th</sup>, 1995, Dr. Luco filed a Proof of Loss Claim with his insurer in the amount of \$28,460 rounded to \$25,000. In this document, he described the loss as "infection of computer data and backup with Monkey Virus". That was his understanding at the time.

[23] The claim in this action includes that the Defendants' initial account of \$513.60 (\$480 plus \$33.60 GST) but does not include the account for \$6,361.20 which account, in fact, was not paid. Mr. Beveridge argues that the amount of \$6,361.20 should be deducted from any judgment

that is awarded against him.

[24] At the time the Proof of Claim was submitted Dr. Luco had asked Mr. Beveridge for an estimate of what the problem had already cost him and requested an estimate of the costs to recreate the data. After some discussion, Mr. Beveridge quoted an hourly rate of \$45.

[25] Both parties rely on testimony from computer experts - William J. Bryant, for the Plaintiff and Wesley Garland, for the defendants. Mr. Bryant was retained by the Plaintiff's insurer to provide an opinion concerning the cause of the loss of data and to provide an estimate regarding the cost of recreating the lost data. I accept his evidence that the data could not have been destroyed by the Monkey Virus. I also accept his evidence that that an appropriate hourly rate to recreate the data, in 1994, was \$45 per hour. As well, I accept his estimate that the work would consume four hundred and sixteen (416) hours of work. There, he estimated data recreations fees of \$18,720. To this he added the \$480 from the aforementioned Creative Solution's invoice and came up with a damage estimate of \$19,200. *[emphasis added]*

[26] Mr. Bryant, when retained in 1994, discovered an anti-virus package or utility known as KillMonk which was freely available. This utility could have been used to discover and reformat the moved data. Mr. Beveridge, having accepted the retainer from the Plaintiff should have been aware of this utility and should have employed it notwithstanding that it was not available as a commercial product. *[emphasis added]*

[27] In cross-examination Mr. Bryant stated that Mr. Beveridge knew that the data was important and did not know how to find it himself. He said that Mr. Beveridge should have suggested to the Plaintiff that a specialized data recovery service be retained. I find that Mr. Beveridge did not make such a suggestion until after the data had been destroyed which, of course, happened as a result of early advice given to the Plaintiff by Mr. Beveridge. The cost of retaining a data recovery service would not have been substantial when measured against the potential loss. Mr. Bryant estimated the costs at somewhere between \$500 and \$2,500. *[emphasis added]*

[28] In cross-examination Mr. Beveridge said that, in fact, he had found a cocktail of problems during his inspection including the Monkey Virus. According to him, anyone of the components of the cocktail could have caused or contributed to the booting problem. These possibilities included some of the self-help efforts by Dr. Luco. This evidence, in my opinion, does not assist the Defendant. First of all, his aforesaid letter, which I have quoted in full, makes it clear that he, at the relevant time, attributed the problem to the Monkey Virus. Secondly, given the limits of his expertise, limits which he failed to clearly point out to Dr. Luco, he should have suggested to him the need to retain a data recovery expert.

[29] Even if Mr. Beveridge's evidence is accepted --- i.e. that he did not know that the problem was the Monkey Virus until what he refers to as the second occasion, he is faced with the problem that the Monkey Virus does not destroy data and with the further problem that he failed to recommend retaining an expert data retriever.

[30] Notwithstanding that Mr. Garland's computer expertise is very impressive, I do not find

his evidence to be very helpful. The fact that he is a close friend and business associate of the Defendant is significant, as is the fact that his report was based primarily on what he had been told by Mr. Beveridge. Mr. Beveridge did not have any notes or other documents to support his recollection other than the aforesaid accounts. **I also note that like Mr. Bryant, Mr. Garland was aware, at the relevant time, i.e. 1994, that the Monkey Virus did not destroy data; that the KillMonk anti-virus package was available; and that the problem could have been referred to a firm specializing in data recovery.** [*emphasis added*]

[31] As aforesaid, Dr. Luco filed a Proof of Claim with his insurer for \$25,000. **After reviewing the claim, and on the advice of Mr. Bryant, the insurer paid to the Plaintiff the sum of \$19,200 and it is this amount for which judgment is sought.** [*emphasis added*] Paragraph 20 of Mr. Beveridge's affidavit read as follows:

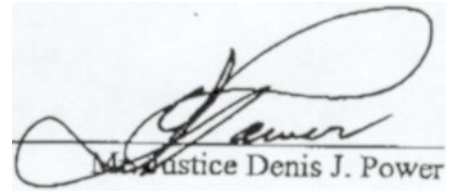
Some work was done for Mr. Luco in this area and billed under Creative Solutions, after some time Mr. Luco instructed me to cease as he was having trouble getting a firm commitment from his insurance company. Following his direction we stopped.

### **Damages**

[32] In my opinion, the Plaintiff must give some credit to the Defendants for the work done to recreate the data. The evidence as to just how much of this work actually benefited the Plaintiff is unsatisfactory. Indeed, the Plaintiff argues that there should be no credit at all. I disagree. I allow a credit of 50% of the account (Exhibit 2), or \$3,180.60. In addition, the problem which confronted Dr. Luco in June of 1994 was, initially, not caused by the Defendant. Therefore, at the very least, Dr. Luco would have had to retain the services of a data retrieval firm. I estimate, based on the evidence, such as it was, that this would have costs him at least \$1,500. Therefore, the total claim should be further reduced by \$1,500 leaving a net claim of \$14,519.40. I assess the Plaintiffs damages at this amount. The Plaintiff is entitled to Pre-Judgment Interest from the date of the commencement of these proceedings at the rate specified by the *Courts of Justice Act* for August 1996.

### **Costs**

[33] Costs are reserved. If the parties cannot agree on an appropriate disposition of costs, they may submit written argument to me. The Plaintiffs submissions should be served on the Defendants and delivered to me not later than May 11<sup>th</sup>, 2001. The Defendants' submissions should be delivered and filed with me not later than May 25<sup>th</sup>, 2001 and, if the Plaintiff wishes to reply to those submissions, he should do so prior to June 1<sup>st</sup>, 2001.



Mr. Justice Denis J. Power

**Released:** April 20, 2001