ATHENS - McDONALD v. KAZIS

CONTRACT — DAMAGES — MENTAL INJURY

The recent case of *Athens-Macdonald* v. *Kazis*[1] decided by Zelling J. in the South Australian Supreme Court may be a significant development in the law relating to the award of damages for mental injury, such as anxiety, suffering and torment caused by a breach of contract. Before examining this case, the existing law will be briefly reviewed.

In *Robinson* v. *Harman*[2] Baron Parke said:

> "The rule of the Common Law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

Unfortunately such a statement is deceptively broad. Although apparently governing every situation, on examination of the cases it is found that such a "principle" can only be applied after other conditions required by precedent, have been satisfied. So it is that the damage sustained is usually required to be of a pecuniary nature. Thus in *Hamlin* v. *Great Northern Railway Company*[3] Pollock C.B. said:

> "In actions for breaches of contract the damages must be such as are capable of being appreciated or estimated . . . The plaintiff is entitled to nominal damages, at all events, and such other damages of a pecuniary kind as he may have really sustained as a direct consequence of the breach of contract . . . it may be laid down as a rule that generally in actions upon contracts no damages can be given which can not be stated specifically, and that the plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but not damages for the disappointment of mind occasioned by the breach of contract."

Ease of assessment of damages, uniformity in the law, and certainty in commercial affairs are sometimes advanced as reasons for such a rule. For example in *Addis* v. *Gramophone Company*[4] Lord Atkinson took the view that exceptions should be "checked rather than stimulated; inasmuch as to apply in their entirety the principles on which damages are measured in tort to cases of damages for breaches of contract would lead to confusion and uncertainty in commercial affairs, while to apply them only in part and in particular cases would create anomalies, lead occasionally to injustice, and make the law a still more 'lawless science' than it is said to be".

Thus in *Foaminol Ltd.* v. *British Plastics*[5] although pecuniary loss had undoubtedly been suffered, through a loss of good will, Hallet J. refused to estimate the amount involved:

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1. [1970] S.A.S.R. 264.
2. [1848] 1 Ex. 850, at 855. For a similar general statement, see *Hadley* v. *Baxendale* [1854] 9 Ex. 341 at p.354 per Baron Alderson.
3. 156 E.R. 1261 at 1262.
4. [1909] A.C. 488.
5. [1941] 2 All E.R. 393, at 401.

> "All that (viz loss of good will) is perfectly true, but all that seems to me to be very general, and, although quite real, very vague . . . I can best perhaps put my position by saying that, whatever figure I take . . . I am wholly unable to say with any confidence that it is not too much. I feel I am completely in the dark and I have no basis for fixing a figure at all . . . There may be cases in which the quantifying of pecuniary loss is extremely difficult, and yet the Judge has to do the best he can. Here, however, I think that I have no material which enables me to put any figure at all upon that pecuniary loss which the plaintiffs have suffered . . ."

However, although, as in *Foaminol*[5], the difficulties are sometimes insuperable it is well settled that the courts will strive to quantify an established pecuniary loss. It has been held that financial loss need not be stated specifically by a plaintiff but may be claimed as "general damages", the plaintiff proving that a pecuniary loss has occurred and the Court assessing that loss[6]. Furthermore, in cases such as *Chaplin* v. *Hicks*[7], *Simpson v. London and North Western Railway Co.*[8] and *Howe* v. *Teefy*[9] it has been laid down that although a loss of chance to make a profit is involved and hence the amount of the pecuniary loss is extremely speculative, this will be no bar to the recovery of damages which must be assessed by the Court.

But perhaps the best evidence that difficulty of computation does not bar recovery of damages is the fact that the courts will compute damages for such intangible injuries as pain and suffering, loss of amenity and loss of expectation of life. For a valuble discussion of the principles of assessment of damages for this type of loss see the House of Lords decision, *West & Son Ltd.* v. *Shephard*[10]. Although some niceties of assessment may be slightly uncertain the important point is that damages *will* be assessed and given for non-pecuniary loss of this nature[11].

A further important line of cases has emerged establishing that damages can be recovered for physical discomfort caused by a breach of contract even though no pecuniary loss is involved. Such damages were allowed in the early cases of *Burton* v. *Pinkerton*[12] and *Hobbs and Wife* v. *London South Western Railway Co.*[13], but it was contended in *Bailey* v. *Bullock*[14] that pecuniary loss must be involved. Barry J. rejected this contention, ruling that damages could be recovered. His decision was followed in *Feldman* v. *Allways Travel*

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6. e.g. *Aerial Advertising Co.* v. *Batchelors Peas Ltd.* [1938] 2 All E.R. 788 at 795; *Last Harris* v. *Thompson Bros. Ltd.* [1956] N.Z.L.R. 995 per Archer J. at 999.
7. [1911] 2 K.B. 786.
8. [1876] 1 Q.B.D. 274.
9. (1927) 27 S.R. (N.S.W.) 301.
10. [1964] A.C. 326.
11. See also *Phillips* v. *London and South Western Railway Co.* [1879] 5 Q.B.D. 78 at p.80 per Field J., whose direction was approved by the Court of Appeal; *Godley* v. *Perry* [1960] 1 W.L.R. 9.
12. [1867] L.R. 2 Ex. 340.
13. [1875] L.R. 10 Q.B. 111.
14. [1950] 2 All E.R. 1167.

Service[15], and by the English Court of Appeal in *Stedman* v. *Swan's Tours*[16]. In that case Singleton L.J. made the point that:

> "Damages could be recovered for appreciable inconvenience and discomfort caused by breach of contract. It might be difficult to assess the amount to be awarded, but it was no more difficult than to assess the amount to be given for pain and suffering in a case of personal injuries."

It seems likely that this line of cases will be followed in Australia, though there is little authority on the point. Of course, as will be seen later, Zelling J. accepted these cases as good law, and in the High Court decision of *Fink* v. *Fink*[17] the tenor of the judgements suggest that recovery will not be rigorously limited to pecuniary loss. Thus Dixon J. (as he then was) and McTiernan J. said:

> "Where there has been an actual loss of some sort, the common law does not permit difficulties of estimating the loss in money to defeat the only remedy it provided for breach of contract, an award of damages"[18].

However, statements of principle as to just what type of loss will be made the subject of an award of damages are extremely hard to find, and the position seems to be that there is in fact no one rule. Undoubtedly the ideal situation is a specified sum of money being lost due to the breach of contract, but upon this ideal have been grafted a number of categories such as physical discomfort, loss of expectation of life, etc. If a plaintiff can bring himself within such a category he will be awarded damages.

There are also "negative" categories, certain fact situations the courts have specified in which damages will not be recoverable. Thus in *Addis* v. *Gramaphone Company*[19] an employee was dismissed in a harsh and humiliating fashion and claimed damages for, *inter alia*, injury to feelings and reputation. Lord Gorrel stated:

> "If it (the contract) had been performed, he would have had certain salary and commission. He loses that and must be compensated for it. But I am unable to find either authority or principle for the contention that he is entitled to have damages for the manner in which his discharge took place"[20].

In *Cook* v. *Swinfen*[21] Lord Denning M.R. (with whom Dankwerts L.J. and Winn L.J. concurred) said:

> "It can be foreseen that there will be injured feelings; mental distress; anger; and annoyance; but for none of these can damages be

15. [1957] C.L.Y. 934.
16. (1951) 95 Sol. Jo. 727.
17. (1946) 74 C.L.R. 127.
18. *Id.*, 143.
19. [1909] A.C. 488.
20. *Id.*, 501.
21. [1967] 1 W.L.R. 457 at 461.

recovered. It was so held in *Groom* v. *Crocker*[22] on the same lines as *Addis* v. *Gramophone Co.*"[23].

In such a state of the law there are bound to be inconsistencies and illogicalities, caused in the main by a desire to do justice in a case which can not be conveniently categorised, or falls within a category which seems unjust or out of step with the development of the law. *Athens-Macdonald* v. *Kazis* seems just such a case.

The plaintiff, Mr. Kazis, contracted with the defendant, a travel agency, to provide travel facilities for himself and his family for a three month holiday in Cyprus. Before leaving, Mr. Kazis learnt that the bookings which had been made would mean that the tour would be cut short by three weeks and, being greatly concerned, made equiries and was eventually told that everything was being remedied in Athens. Zelling J. found that in fact nothing was done, Mr. Kazis and his family being forced to return home three weeks early, having been deliberately deceived by the defendant.

As a consequence of the defendant's breach of contract, Mr. Kazis was forced to spend part of his holidays making enquiries as to the departure date, the actual time spent in such activities over the period being equivalent to four and one half days. The Magistrate in the Local Court awarded damages under several heads, but this note is concerned solely with the sum of $650 awarded for "discomfort and inconvenience", one of the awards challenged before Zelling J.

Mr. Kazis's complaint was summed up by Zelling J.:

> "The whole of the seventy day trip was overshadowed by the fact that he was not having the sort of holiday that he had set out to get and he was not able to have it without distraction caused by the matters to which I have already adverted (the time spent making enquiries, etc.). In addition:
>
> (a) he was unable to go to Beirut or to Famagusta as he had planned,
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> (b) he was unable to attend a special Saint's festival day in Cyprus,
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> (c) he lost the opportunity to live with relations board free,
>
> (d) he was not able to go to holiday places where other tourists go, which he wanted to see"[24].

The defendant, however, submitted that damages were only payable for the four and one half days spent in making enquiries, etc., the amount to be computed by expressing this as a fraction of the whole period. The question therefore arose, how should damages for inconvenience be computed?

After noting that damages can be recovered for *physical* discomfort, Zelling J. was forced to accede to cases such as *Addis* v. *Gramophone Co.*[25],

22. [1939] 1 K.B. 194.
23. [1909] A.C. 488.
24. [1970] S.A.S.R. 264 at 269.
25. [1909] A.C. 488.

Cook v. *Swinfen*[26], *West & Son Ltd.* v. *Shephard*[27] and *Groom* v.*Crocker*[28] which stand for the proposition that even though it is foreseeable that a breach will lead to mental discomfort, disappointment suffering or loss of reputation (other than trade reputation) only nominal damages are recoverable:

> "I agree immediately that as to mere disappointment, regret or other feelings of the mind *simpliciter* the law has not progressed so far yet that I can say, sitting as a single Judge of this Court, that damages can be awarded under this head, although I think that the law on this topic is in fact lagging badly behind other fields in the law of damages in this respect"[29].

The problem is largely circumvented, however, when it is realised that physical discomfort can not be gauged objectively but nearly always has a large subjective mental element. For example, if Donald, a duck hunter, contracts with Gastro the guide to guide him to a hunting location, and the ducks fail to appear after they have waited there for a period of time, Donald cannot sue Gastro for the physical discomfort involved in waiting in a cold and wet duck-blind, the discomforts of duck-blinds being well known and accepted by hunters.

However, if Donald books a first class seat on Gastro's bus tour and in breach of contract Gastro takes a different route, becomes lost, and forces the passengers to wait for hours in discomfort, then Donald could claim damages for the discomfort. What is discomfort in one situation or to one person is not necessarily discomfort to another person in another situation, the difference being due to different circumstances and different mental elements.

Before this concept can be applied it would seem necessary to have some sort of physical discomfort which could be aggravated or mitigated by the surrounding circumstances. Thus the logical applications of the concept to this case would seem to be to inflate the damages awarded for the period of four and one half days spent in letter writing and making tiresome enquiries—the discomfort of these activities would be aggravated by their setting, an intended blissful holiday from the long hours of Mr. Kazis's fish and chip shop. This would not be a significant deviation from the decided cases, and the Judge would be free to award virtually any sum he liked for the four and one half days physical inconvenience, rejecting the defendant's fractional method and instead looking to aggravation due to Mr. Kazis's mental element, though still scrupulously awarding damages for physical discomfort alone.

However, Zelling J. adopted a more direct approach, which may be divided into two parts. First he said:

> "What is inconvenience and discomfort to one person is not to another, and what is inconvenience and discomfort in one contractual situation

26. [1967] 1 W.L.R. 457.
27. [1964] A.C. 326.
28. [1939] 1 K.B. 194.
29. *Supra* n.1, 274.

> is not in another. This was a contract by a travel agency to provide a tour of a certain kind and the type of inconvenience and discomfort which is proper to be considered in relation to such a contract is in my opinion the inconvenience and discomfort of the type which I have detailed above, [i.e. letter writing, enquiries] and which must of necessity have a mental element in it"[30].

Thus Zelling J. establishes that the four and one half days of enquiries, letter writing, etc., may in these circumstances be classed as physical discomfort, for which damages are recoverable. Furthermore the discomfort and hence the damages, are aggravated by the mental element present. In the second part of his reasoning, however, Zelling J. looks to Mr. Kazis's complaints about his inability to undertake certain activities on his holiday as outlined above, and it is here that we seem to find a conflict with precedent:

> "In addition, it is in my opinion a fallacy to say that "physical inconvenience" includes only what one is compelled to do and not what one is compelled not to do, because a number of things complained of . . . were of the second kind, but in a contract of this type the second is just as much a physical inconvenience if one has to subsume it under the old labels as the first, and the respondent is equally entitled to be compensated for it. It is just as much discomfort and inconvenience on a tour to spend a day doing nothing, staying in a hotel or seeing something for the second time when one has planned something new and different for that day—when one has only a limited number of days at one's disposal—as to be forced to do something actively to try and retrive a situation brought about by the contract being broken"[31].

It is submitted that such a view of what is meant by physical inconvenience and discomfort goes beyond the situations such as walking home in the rain[32] or being provided with inferior lodgings[33] which have been dealt with in the decided cases. In fact, to say that inactivity or visiting the same place twice is transformed into physical discomfort by the mental element present, is really equivalent to awarding damages for this mental element *simpliciter*.

Nevertheless the result of the case was that Mr. Kazis recovered substantial damages for his inconvenience, though the sum of $650 was considered by Zelling J. to be excessive and was reduced to $400.

It is interesting to note that a similar result would in all probability have been reached in the United States. As the Court in *Kaufman* v. *Western Union Telegraph Co.*[34] observed:

> "No doubt the law as to liability for mental anguish alone is in a stage of development . . . There is a definite trend today in the United States to give an increasing amount of protection to the interest in freedom from emotional distress."

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30. *Ibid.*
31. *Ibid.*
32. *Hobbs and Wife* v. *South Western Railway Co.* [1875] L.R. 10 Q.B. 111.
33. *Setdman* v. *Swan's Tours* (1951) 95 Sol. Jo. 727.
34. 224 F2d. 723 (C.A.S.), cert. den. 350 U.S. 947; 100 L. ed. 825.

For numerous U.S. cases where damages were awarded for mental suffering see Williston on Contracts (third edition) s.1341.

But although the award of such damages is eminently just, their quantification may be very difficult. In a case of physical discomfort such as walking home in the rain[35] the cost of mitigating the discomfort (viz. the hire of a coach) may be taken as a guide. If a coach *is available* and the plaintiff was carrying the necessary money to hire it but instead preferred to undergo the physical discomfort of walking, it would seem that the hire of the coach would be the *maximum* amount recoverable unless, perhaps, the plaintiff had a good reason for not wishing to expend this money. However, if a coach is *unavailable* is would seem that the usual cost of hiring a coach could be taken as a *minimum* level of recovery, additional damages being given according to the circumstances.

Awards for damage such as pain and suffering or that dealt with in *Athens* v. *Macdonald* are not susceptible to such a simple guideline. It is true that like amounts can be awarded in like cases, but this does not overcome the original problem of estimation in a new situation. And of course the number of new situations requiring a new quantification is infinite. The solution usually adopted seems to be to award a round sum, which is consonant with community values and the judge's view of justice in the particular case, at the same time taking care that his award will not be misinterpreted. Thus in *Aerial Advertising Co.* v. *Batchelors Peas*[36] the amount of damages was deliberately set too low so that the actual award itself could not be complained of:

> "Taking it all in all, I think that, if I give £300 damages altogether, I am certainly not giving them too much. I am confident of that. However, I want to err very much on the low side, for fear it should be thought that I am doing what Sir Wilfred Greene, M.R. said that I must not do—namely, give damages for loss of reputation"[37].

But as submitted above, difficulties of computation should not be allowed to stand in the way of substantive justice and it may well be that Australian and English law will tend to follow the U.S. example in this area[38]. Whatever the eventual solution, *Athens-Macdonald* v. *Kazis* represents a significant development and, some may think, a departure from the decided cases.

D. H. Peek*

35. *Hobbs and Wife* v. *South Western Railway Co.* [1875] L.R. 10 Q.B. 111.
36. [1938] 2 All E.R. 788.
37. *Id.*, 796.
38. See also Mayne, *Treatise on Damages* (12th ed. by McGregor).

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EDWARDS V. NOBLE

FUNCTION OF APPELLATE COURT — INFERENCES OF FACT AND EVALUATION OF CONDUCT

Edwards v. *Noble*[1] presented to the High Court an opportunity to express its views with some finality on the role of an appellate Court when hearing appeals on questions of fact. The decision is the third in a trilogy of cases in the High Court which represent, at most, a significant departure from settled principle, and, at least, a warning to Supreme Courts that in all but the most exceptional cases, the judgement of the trial judge in "running down" cases should be regarded as final.

The action was commenced in the S.A. Supreme Court before Chamberlain J., who found the following primary facts: The plaintiff, Noble, was driving his motor-bike with a pillion passenger, Mannix, along the Main North Road between Warnertown and Port Pirie. It was 6.30 p.m. on an evening in August, 1969, and dark. The travellers decided to have a cigarette. The plaintiff stopped his bike on the edge of the bitumen surface, although there was a trafficable verge of over nine feet onto which he could have driven. Both plaintiff and passenger alighted and the bike was put onto its stand, but with the engine still running. If the lights were on, it is likely that Mannix was standing behind the motor cycle, so obscuring its rear light to following traffic. As Noble reached for his cigarettes, a car, driven by the defendant, crashed into the back of his motor cycle, killing Mannix and seriously injuring the plaintiff.

The defendant, Edwards, had been driving home to Port Pirie in his Morris Minor with a passenger, one Bickley. He was travelling three feet in from the bitumen at about 45-50 m.p.h., with his head lights on low beam, due, it would seem, to the frequency of oncoming traffic. Bickley had suddenly become aware of a man (presumably Mannix) about forty feet directly ahead on the bitumen, and yelled a warning to Edwards. Edwards had not seen the man until alerted by his passenger and he did not see the motor cycle until nine to ten feet away from it. Although he swerved immediately it was too late.

With those findings of fact, Chamberlain J. was unable to say that any negligence had been proved against Edwards and he dismissed the action. The plaintiff appealed. In the S.A. Full Court, it was held unanimously that on the facts the defendant had been negligent (for varying reasons), although the plaintiff had been largely to blame. The trial Judge's decision was reversed and by a majority (Bray C.J., Mitchell J.) the plaintiff was awarded 1/3 of his damages. Wells J. would have awarded 1/5.

The position, therefore, before the appeal was brought by Edwards to the High Court may be summarized thus:

1. The trial Judge had found certain primary facts.
2. Bickley, the defendant's passenger, was regarded as a reliable witness by Chamberlain J., and his evidence accepted.

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1. (1971) 45 A.L.J.R. 682.