One sound attempt, which many learned judges have made to resolve the problem, was cited by McInerney J.:

> As Mahoney J.A. observed in *Kelly v. Sweeney*[15] . . ., it is not to be assumed that the balance of utility is all one way. And there is in Victoria, no less than in England, 'substantial force in the observations made in *Searle v. Wallbank* concerning the burden which would be placed upon landowners of rural property if a different principle were adopted'.[16]

Indeed, like other jurisdictions before it,[17] the Statute Law Revision Committee in Victoria is currently considering whether a different principle should be adopted. With this hindsight, it is worth considering the conclusion of McInerney J.: 'What social utility is to prevail is, it would seem, a matter for the legislature, not for the courts.'[18]

Having therefore decided that the principle in *Searle v. Wallbank* was part of the common law of Australia at some time, McInerney J. correctly determined that it had not been abrogated by legislation.[19] Also, following *Brock v. Richards*,[20] His Honour decided that neither the proximity of the defendant's land to the highway nor the proclivity of the steer towards straying constituted 'special circumstances' which would have imposed a duty of care on the defendant.[21]

Dunn J. agreed with the result and did not add any reasons.[22] The order *nisi* was, consequently, discharged with costs.[23]

JOHN M. ROGAN*

FALKO v. JAMES McEWAN & CO. PTY LTD

Breach of Contract — Aggravated Damages — Inconvenience, Mental Distress, Anxiety.

In actions for breach of contract the accepted dogma has been that aggravated damages are not awarded. In *Addis v. Gramophone Co. Ltd*[1] the House of Lords held that no 'exemplary'[2] damages could be awarded for loss of reputation or for hurt feelings or for difficulty in finding employment caused by wrongful dismissal under a contract of employment. More recently the Judicial Committee of the Privy Council in *British Guiana Credit Corporation v. Da Silva*[3] advised that damages for 'humiliation, embarrassment and loss of reputation' could not be claimed. Apparently, this was because such loss was not reasonably foreseeable as liable to result from breach of contract. Even the renowned West Indian test cricketer, Sir Learie Constantine,

15 [1975] 2 N.S.W.L.R. 720, 740.
16 [1978] V.R. 49, 65.
17 *E.g.* New South Wales, *Law Reform Commission Report* L.R.C. No. 8 (1970); The Law Reform Commission (U.K.) (1965) Law Com. No. 13; and 7th Report of the Law Reform Committee of South Australia to the Attorney-General, 'Law Relating to Animals' 1969.
18 [1978] V.R. 49, 65.
19 *Ibid.*
20 [1951] 1 K.B. 529.
21 [1978] V.R. 49, 65-6.
22 *Ibid.* 66.
23 *Ibid.*
* B.A. (Melb.).

1 [1909] A.C. 488. (see also *Perera v. Vandiyar* [1953] 1 W.L.R. 672 (C.A.).)
2 *Ibid.* 496 *per* Lord Atkinson, 497 *per* Lord Collins.
3 [1965] 1 W.L.R. 248, 259.

failed to obtain substantial damages in *Constantine v. Imperial Hotels Ltd*,[4] when he was refused accommodation at the hotel into which he was booked on account of his colour and thereby suffered 'much unjustifiable humiliation and distress'.[5]

The term 'aggravated damages' is not a well-defined one. In *Addis v. Gramophone Co. Ltd*[6] the House of Lords did not draw a distinction between 'aggravated' and 'exemplary' damages. The distinction has been drawn only recently in a number of tort cases. In *Uren v. John Fairfax & Sons Pty Ltd*[7] Taylor J. said:

> It is, perhaps desirable to point out that there has been a degree of confusion between 'aggravated' and 'exemplary' damages and sufficient attention has not, in the past, been given to the distinction between these two concepts. The former are, of course, given by way of compensation for injury to the plaintiff, though frequently intangible, resulting from the circumstances and manner of the defendant's wrongdoing. On the other hand exemplary damages are awarded, as Lord Devlin says in *Rookes v. Barnard*,[8] to 'punish and deter' the wrongdoer though, in many cases, the same set of circumstances might well justify either an award of exemplary or aggravated damages.

The contract rule has not been without criticism. Treitel suggests: 'The rule results from a failure to distinguish between exemplary damages (which are meant to be punitive) and damages from injured feelings (which are meant to compensate the plaintiff for a loss though it is not a pecuniary one).'[9] The courts have taken several routes to alleviate some of the inadequacies of the rule by awarding aggravated damages for certain non-pecuniary loss attributable to a breach of contract.

First, there is the old line of authority which is to be found in *Hobbs v. London and South Western Railway Co.*[10] which allows recovery on a breach of contract when there is personal, physical inconvenience, which is the natural consequence of the breach of contract. The plaintiff was allowed to recover £8 for the inconvenience of having been taken to the wrong station after midnight on a cold, wet night, so that he and his wife and two children had to walk two to three miles to their home. He was not allowed to recover £20 damages asked by reason of his wife getting a bad cold and being in ill health from exposure to the wet on that night with the consequent expense incurred in medical attendance upon her, as such loss was too remote,

[4] [1944] K.B. 693 *per* Birkett J.

[5] *Cf.* Race Relations Act 1976 (U.K.).

[6] [1909] A.C. 488.

[7] (1966) 117 C.L.R. 118, 129-30. In Australia in tort cases the courts have wider guidelines within which to allow awards of exemplary damages than the guidelines set for the courts in the United Kingdom. See *Australian Consolidated Press Ltd v. Uren* [1969] 1 A.C. 590 (P.C.); (1966) 117 C.L.R. 221 and *cf. Rookes v. Barnard* [1964] A.C. 1129 (H.L.). In Australian cases, therefore, the circumstances may justify an award of either exemplary or aggravated damages. Some tort cases have proceeded on the basis that there is no need to distinguish between the categories. See *Johnstone v. Stewart* [1968] S.A.S.R. 142; *Pearce v. Hallett* [1969] S.A.S.R. 423; *Pollack v. Volpato* [1973] 1 N.S.W.L.R. 653. In the decision of the Court of Appeal in *Pollack v. Volpato* [1973] 1 N.S.W.L.R. 653, 657, Hutley J.A. referred to the conceptual difference in setting limits for exemplary damages. He stated: 'Whereas compensatory damages have to be approached by looking at the situation of the plaintiff in consequence to the wrongful act to which he has been subjected, punitive damages have to be looked at from the side of the defendant. If he is to be punished, it is his proper punishment which provides the basis for the assessment of damages.' His Honour continued: 'Just as, in inflicting a fine, amongst the factors which have to be considered is the capacity to pay of the person ordered to pay it, in my view the means and resources of the defendant are an important consideration for the jury in inflicting punitive damages.' Conversely it may be important to a plaintiff to have his award classified under the compensatory heading of 'aggravated' so that the defendant's resources and ability to pay become irrelevant.

[8] [1964] A.C. 1129, 1221.

[9] Treitel, G. H., *The Law of Contract* (4th ed. 1975), 659.

[10] (1875) 10 Q.B. 111.

not being within the contemplation of the parties.[11] This distinction was followed by Barry J. in *Bailey v. Bullock*[12] where the plaintiff was allowed to recover for inconvenience and discomfort in the form of cramped and inadequate living conditions for himself and his family arising in an action in contract against his solicitor for professional negligence. He was not allowed to recover for annoyance or mental distress. Damages for inconvenience which was caused by the faulty installation of a central heating system, were allowed by the Court of Appeal in *Bolton v. Mahadeva.*[13] Likewise in *Burke v. Lunn,*[14] Menhennitt J. allowed a building owner to recover a sum including an amount for 'physical inconvenience and discomfort' in time spent in rectifying or arranging to rectify defects under a building contract.

It is interesting to compare the approach in *Burke v. Lunn*[14] with that of the Court in *D. Galambos & Son Pty Ltd v. McIntyre,*[15] where a sum was allowed under a building contract for loss of enjoyment of the premises. The owners were prevented from using the premises in the way in which they had intended because the contract had not been performed in accordance with the specifications. Although there was no diminution in the value of the house Woodward J. allowed recovery of damages for 'loss of enjoyment of premises from failure to comply with plans and specifications'.[16] He said: 'Even without the aid of authority I would be inclined to the view that a distinct diminution in the enjoyment of a home — amounting to more than a mere annoyance — could be compensated for in an action for breach of contract by the builder even though no pecuniary loss could be shown.'[17]

Second, there is a well established category which allows recovery for mental distress where the object of the contract is to prevent annoyance or molestation. In *Silberman v. Silberman*[18] a wife recovered damages for annoyance from her husband for the breach of a covenant not to molest, contained in a separation deed. Likewise, a solicitor may be sued for breach of contract if by his negligence he fails to stop the pesterings and molestations of an admirer, when the solicitor has been hired in order to bring them to an end.[19] However, this does not cover the case where the solicitor's negligence puts the plaintiff in a state of anxiety, leading to a breakdown in health, as this is too remote.[20] Bridge L.J. drew out the difference in *Heywood v. Wellers,*[21] where he said: 'There is, I think, a clear distinction to be drawn between mental distress which is an incidental consequence to the client of the misconduct of litigation by his solicitor, on the one hand, and mental distress on the other hand which is the direct and inevitable consequence of the solicitor's negligent failure to obtain the very relief which it was the sole purpose of the litigation to secure. The first does not sound in damages: the second does.'

Third, a more recent line of development has allowed a sum to be recovered for loss of enjoyment and the frustration, annoyance and disappointment suffered by the plaintiff where there is a breach of contract to provide entertainment or a holiday. In

[11] *Ibid.* 119 *per* Cockburn C.J., 121 *per* Blackburn J., 122 *per* Mellor J. and 124 *per* Archibald J. See also *Parker v. Cunningham* [1879] 5 V.L.R. (L.) 202, where damages were allowed for the plaintiff's inconvenience travelling from New South Wales to Melbourne as a result of the breach of contract as this was within the contemplation of the parties.

[12] [1950] 2 All E.R. 1167.

[13] [1972] 1 W.L.R. 1009, 1014.

[14] [1976] V.R. 268, 285-6.

[15] (1974) 5 A.C.T.R. 10.

[16] *Ibid.* 15.

[17] *Ibid.* 14.

[18] (1910) 10 S.R. (N.S.W.) 554.

[19] *Heywood v. Wellers* [1976] Q.B. 446 (C.A.).

[20] *Cook v. Swinfen* [1967] 1 W.L.R. 457, 461-2 (C.A.). *Cf. Heywood v. Wellers* [1976] Q.B. 446, 459 where Lord Denning M.R. suggests *Cook v. Swinfen, supra,* 'may have to be reconsidered'.

[21] [1976] Q.B. 446, 463-4.

Athens-MacDonald Travel Service Pty Ltd v. Kazis.[22] Zelling J. posed the problem in this way: 'The difficulty which I find in assessing what is physical discomfort and inconvenience in a case such as this is that all inconvenience has to include some mental element. 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.' The nettle of disappointment was firmly grasped by the Court of Appeal in *Jarvis v. Swans Tours Ltd*.[23] Lord Denning M.R. said: 'In a proper case damages for mental distress can be recovered in contract, just as damages for shock can be recovered in tort. One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset and frustration caused by the breach. I know that it is difficult to assess in terms of money, but it is no more difficult than the assessment which the courts have to make every day in personal injury cases for the loss of amenities.' The Court of Appeal extended such claims in *Jackson v. Horizon Holidays Ltd*,[24] where the plaintiff, who had made a contract for a family holiday, recovered damages for the discomfort, vexation and upset of all the other members of his family as well as for himself.

This approach was taken up and applied in *Cox v. Philips Industries Ltd*[25] by Lawson J. in a case of unfair dismissal. In applying *Addis v. Gramophone Co. Ltd*[26] the plaintiff was not allowed to recover damages for the dismissal when the compensation due under the contract of employment had been paid.[27] However, his Lordship stated: 'I can see no reason in principle why, if a situation arises which within the contemplation of the parties would have given rise to vexation, distress and general disappointment and frustration, the person who is injured by a contractual breach should not be compensated in damages for that breach. Doing the best I can, because money can never really make up for mental distress and vexation — this is a common problem of course in personal injury cases — I think the right sum to award the plaintiff under that head is the sum of £500.'[28] Despite the lip service paid to *Addis v. Gramophone Co. Ltd*,[29] the approach of Lawson J. contradicts the ruling of the House of Lords. Their Lordships excluded specifically the category of 'injured feelings' caused by wrongful dismissal, although describing as 'exemplary' this kind of damages payable in respect of non-pecuniary loss.[30] Some basis for Lawson J.'s approach, however, can be found in the dissenting judgment of Lord Collins,[31] who would have allowed recovery.[32]

[22] [1970] S.A.S.R. 264, 274.
[23] [1973] Q.B. 233, 237-8, 238-9 *per* Edmund Davies L.J., 240 *per* Stephenson L.J.
[24] [1975] 1 W.L.R. 1468.
[25] [1976] I.C.R. 138; [1976] 1 W.L.R. 638.
[26] [1909] A.C. 488.
[27] [1976] I.C.R. 138, 146; [1976] 1 W.L.R. 638, 643.
[28] *Ibid.* 644.
[29] [1909] A.C. 488.
[30] See *supra* n. 2.
[31] *Addis v. Gramophone Co. Ltd* [1909] A.C. 488.
[32] United Kingdom statutory provisions regulating unfair dismissal on the grounds of racial or sex discrimination allow a sum to be recovered for humiliation resulting from the particular discrimination. See Employment Protection Act 1975 (U.K.) ss. 71-80; Sex Discrimination Act 1975 (U.K.) ss. 65 and 66(4); Race Relations Act 1976 (U.K.). The third category approach was applied in *Buckley v. Lane Herdman & Co.* [1977] 10 C.L. 290 by Judge Faye, sitting as an Official Referee, who awarded damages for 'inconvenience, distress and anxiety' caused by solicitors, who negligently performed their contract on the sale of an old home and the purchase of a new one for their clients.

These above categories indicate the types of situations when non-pecuniary loss may be recovered within the principles of *Hadley v. Baxendale*[33] as being 'damages' such as may fairly and reasonably be 'considered as either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of breach of it'.

In the light of these categories the decision of Anderson J. in *Falko v. James McEwan & Co. Pty Ltd*[34] is interesting. The facts were that the complainant contracted with the defendant company for the installation of an oil heater in his home at the cost of $334 in June 1975. By the terms of the contract, the electrical installation required 'all existing wiring to be earthed. If not, an additional charge will be made'. In order to effect the electrical installation the defendant employed one Petides the Elder. He informed the complainant that an existing power point was not adequate and that a new power point was necessary at an extra charge of $5. This sum the complainant refused to pay so Petides the Elder refused to continue with the work. The complainant complained to the defendant on a number of occasions without success. Some months later he took a temporary lead from a power point in his kitchen so that the heater functioned. A proper installation could have been made at a cost of $11. When requested to pay the contract price, the complainant paid all but $80.39. The defendant issued a default summons for the outstanding amount. The complainant issued a special summons particularizing the damages claimed as follows:

1. Cost of repair: $56.00.
2. Inconvenience in being unable:
   (1) to use the said heater subsequent to its installation;
   (2) inconvenience of a temporary connexion having been made by the defendant for the purpose of making the said heater operative: $600.

In November 1976, two days before the hearing, Petides the Elder returned and in 20 minutes installed a new power point.

As a result of the Magistrates' Court hearing the defendant was given judgment on the default summons and the complainant on his special complaint was awarded $400 for 'inconvenience and mental distress'. In reviewing the Magistrates' Court's decision, Anderson J. held that the complainant was not entitled to recover damages for inconvenience or mental distress.

His Honour disallowed the claim for damages for inconvenience and mental distress for three reasons. First, the claim was disallowed because of a lack of evidence. Anderson J. said: 'There are no details of the so-called mental distress of the complainant other than that the sister [of the complainant] gave evidence that she observed that the complainant was upset in being unable to use the heater. One of the affidavits for the defendant stated that the sister had given evidence that the complainant's drinking had increased after July, 1975, but the complainant in his answering affidavit asserted that the sister had said no such thing. In such proceedings as these the customary practice is to accept the answering affidavit; and, accordingly, we may assume that the complainant's mental distress was not associated with his being driven to drink.'[35]

Second, the complainant had not taken all reasonable steps to mitigate the loss consequent on the breach in relation to the inconvenience. Some alternative method of heating could have been resorted to. The necessary electrical work could have been done cheaply and quickly as happened eventually.[36]

[33] (1854) 9 Exch. 341, 354 *per* Alderson B.
[34] [1977] V.R. 447.
[35] *Ibid.* 450.
[36] *Ibid.* 449.

Third, Anderson J. did not consider that the present case was a 'proper case' in which to recover damages for mental distress as well as for physical inconvenience. His Honour lumped together *Bailey v. Bullock*;[37] *Heywood v. Wellers*;[38] *Cox v. Philips Industries Ltd*;[39] *Burke v. Lunn*;[40] *Jarvis v. Swans Tours Ltd*;[41] *Jackson v. Horizon Holidays Ltd*;[42] and *Athens-MacDonald Travel Service Pty Ltd v. Kazis*[43] as 'travel agency and other cases'. This might give the impression that they were all cases concerning the provision of entertainment. He felt that the present case could not be distinguished from an 'ordinary commercial transaction'.[44] 'In essence, it is no different from sale and delivery of a multitude of other articles which may require installation or adjustment, *e.g.*, a television set where an aerial also had to be installed, a washing machine or cooking stove which required installation, a motor car which required charging.'[45]

One may agree that not every disappointed plaintiff should recover damages beyond monetary loss for breach of contract on account of his anxiety. This general rule may be appropriate in commercial transactions. Commercial men may reasonably assume that, as part of the business risk, they do not contemplate anxiety from non-performance of contractual obligations as falling within the ambit of loss. Is such a rule appropriate for a consumer transaction concerned with the consumer's personal, social or family interests? It may be assumed that, in such consumer transactions, where there is non-performance, it is reasonably within the contemplation of the parties that the consumer is likely to suffer mental distress or anxiety in the form of vexation and upset from non-performance and also in appropriate cases will be physically inconvenienced. Lord Denning M.R. in *Heywood v. Wellers*[46] gave this example: 'If you engage a driver to take you to the station to catch a train for a day trip to the sea, you pay him £2 — and then the car breaks down owing to his negligence, so that you miss your holiday. In that case you can recover not only your £2 back, but also damages for the disappointment, upset and mental distress which you suffered.'[47]

In the *Falko* case it is unfortunate that the complainant took such a petulant stand and failed to mitigate his loss and also that his evidence of inconvenience and mental distress was not adequate. In mitigation he could have had the work done for $11 and deducted that from the price as a liquidated sum. Presumably in similar circumstances, the reasonable consumer suffers inconvenience and anxiety in arranging mitigation and the physical inconvenience of having temporary heating or being without heating altogether for a short period. Is he not to be compensated for this non-pecuniary loss? In the *Falko* case the complainant was in the fortunate position of not having paid and with a little more sense could have made a deduction of $11 and an appropriate sum for the inconvenience and anxiety. In many consumer transactions the consumer will have paid and will accept a breach of contract with resignation. Often the consumer will shop elsewhere next time and advise friends to do so. It is unfortunate that Anderson J. instanced a number of situations where the

[37] [1950] 2 All E.R. 1167.
[38] [1976] Q.B. 446.
[39] [1976] I.C.R. 138; [1976] 1 W.L.R. 638.
[40] [1976] V.R. 268.
[41] [1973] Q.B. 233.
[42] [1975] 1 W.L.R. 1468.
[43] [1970] S.A.S.R. 264.
[44] [1977] V.R. 447, 452.
[45] *Ibid.* 452-3.
[46] [1976] Q.B. 446, 458.
[47] The approach of Lord Denning M.R. would make taxi driving a more hazardous occupation than it is already. The distinction drawn by Bridge L.J. in the same case provides a safer approach. See [1976] Q.B. 446, 463-4.

consumer is not likely to be making a similar purchase for some time and where he is going to be worried and put to inconvenience in remedying the breach.

Anderson J. seemed concerned that the complainant might receive more by way of damages than he had paid for the heater.[48] Indeed, the Magistrate's award of $400 was over-generous on any view of the circumstances, but it seems no reason for disallowing such a claim altogether. The authorities have allowed the plaintiff to recover more than the contract price even though by way of damages for disappointment, distress and upset.[49] Where the breach of contract has led to personal injuries[50] or caused death,[51] damages will often be well in excess of the contract price. Where a court has to quantify the loss suffered by way of mental distress or physical inconvenience, it must preserve a sense of proportion and exercise moderation. The Court of Appeal in *Bolton v. Mahadeva*[52] felt that the sum of £15 for inconvenience in failure to instal a heating system was too low. Nevertheless such difficulties are no reason for avoiding the issue altogether.

As Anderson J. said in the *Falko* case about damages for inconvenience and disappointment: 'There may be signs of some judicial thaw, but spring is yet to come.'[53] It is to be hoped that the courts are not thinking in terms of a spring flood after the thaw and closing the floodgates against damages for mental distress and inconvenience in cases where personal, social or family interests of a party to a contract are affected by its breach.

ROBERT EVANS*

[48] [1977] V.R. 447, 453.

[49] In *Jarvis v. Swans Tours Ltd* [1973] Q.B. 233, the Court of Appeal awarded nearly double the cost of a fortnight's holiday which the plaintiff had taken but not enjoyed. In a Scottish case, *Diesen v. Samson* 1971 S.L.T. (Sh. Ct.) 49, where it could have been argued that defender had saved the pursuer from financial expenditure by failing to turn up and take photographs of the pursuer's wedding, the court awarded £30 for the pursuer's distress.

[50] *E.g. Grant v. Australian Knitting Mills Ltd* [1936] A.C. 85 (P.C.).

[51] *Woolworths Ltd v. Crotty* (1942) 66 C.L.R. 603 (H.C.).

[52] [1972] 1 W.L.R. 1009, 1014-15 *per* Cairns L.J., 1015 *per* Buckley L.J., 1016 *per* Sachs L.J.

[53] [1977] V.R. 447, 452.

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