Damages for Injured Feelings in Contract: Recent Developments in English and Canadian Laws.

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This article will examine the circumstances at common law in which a plaintiff can recover damages for breach of contract in respect of mental suffering, disappointment, or distressed feelings caused by the defendant's breach. In particular, can damages be recovered where injured feelings are foreseeable under the principles expounded in *Hadley* v. *Baxendale*[1] or is there a more restrictive general rule which would confine the application of *Hadley* v. *Baxendale* to more tangible consequences of a breach? The article has been prompted by a number of recent English and Canadian decisions of some considerable significance in this field. Those decisions will be subjected to analysis but first the earlier background must be considered.

The Early Cases

At one time it was generally thought that, apart from a few special categories, the courts were reluctant to countenance claims for injured feelings in contract. Rather the approach was that the primary function of damages in contract was to compensate for the loss of tangible commercial benefits or other benefits capable of specific pecuniary assessment which would have been obtained by the plaintiff had the defendant properly performed his contractual obligations. Aggrieved feelings of the plaintiff caused by the failure to perform were regarded as being so intangible and incapable of economic evaluation as to be inappropriate as matters of concern to the law of contract. This restrictive approach is aptly demonstrated by the following dicta of two leading English judges of the Nineteenth Century. In *Hamlin* v. *Great Northern Railway Co.*,[2] Pollock C.B. said:

> "In actions for breach of contract the damages must be such as are capable of being appreciated or estimated . . . it may be laid down as a rule, that generally in actions upon contracts no damages can be given which cannot 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."[3]

Later, in *Hobbs* v. *London & South Western Railway Co.*,[4] Mellor J., in a passage much quoted in more recent cases, put it as follows:

> ". . . . for the mere inconvenience, such as annoyance and loss of temper, or vexation, or for being disappointed in a particular thing

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1. (1854) 9 Ex. 341; 156 E.R. 145.
2. (1856) I H. & N. 408; 156 E.R. 1261.
3. (1856) 1 H. & N. 408 at p. 411.
4. (1875) L.R. 10 Q.B. 111.

> which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages. That is purely sentimental, and not a case where the word inconvenience, as I here use it, would apply."[5]

That was a case in which the plaintiffs in an action for breach of a contract of carriage with the defendant railway company were held entitled to damages for inconvenience suffered as a result of being obliged to walk five miles home late at night when their train had deposited them at the wrong destination. As the quotation from the judgment of Mellor J. illustrates the Court drew an apparent distinction between physical inconvenience within the reasonable contemplation of the defendant and what can be described as sentimental inconvenience or vexation. The former was recoverable, the latter not.

Then in *Addis* v. *Gramophone Co. Ltd.*[6] the House of Lords seemed to have confirmed and fortified this approach. In this case the plaintiff, a business manager paid partly by salary and partly by commission, brought an action for wrongful dismissal against the defendants who had dismissed him from his post in Calcutta without giving six months notice as required by his contract of employment. A successor manager had been appointed in the plaintiff's place to immediately assume his duties. The circumstances surrounding these events were humiliating to the plaintiff demonstrating, on the defendants' part, "undeniably a sharp and oppressive proceeding".[7] As well as injuring the plaintiff's feelings the manner of his dismissal would, as was also pointed out, very likely make it more difficult for him to obtain other employment. Notwithstanding these circumstances it was held that in such a contract action damages could not be awarded in respect of the plaintiff's injured feelings or his possibly increased difficulties in obtaining new employment. He could be compensated for the loss of salary in respect of the period of notice to which he was entitled, for the loss of commission which could have been reasonably anticipated during that period, and for the time which might reasonably elapse before he could obtain new employment, but not for the other more intangible items. The compensation properly awardable could be neither aggravated nor diminished by reference to the manner in which the breach occurred. A few exceptions to this general rule of no damages for injured feelings were recognized by Lord Atkinson,[8] but these were not readily to be augmented for fear of "uncertainty and confusion in commercial affairs."[9]

5. (1875) L.R. 10 Q.B. 111 at p. 122.
6. [1909] A.C. 488.
7. Ibid., at p. 504 per Lord Shaw of Dunfermline.
8. Ibid., at p. 495.
   Two such exceptions were mentioned: actions against a banker for refusing to pay a customer's cheque when he has funds of the customer's to meet it and actions for breach of promise to marry. It is probable that the first applies only to a trader whose cheque is so dishonoured: see *Gibbons* v. *Westminster Bank, Ltd. [1939] 2 K.B. 882.* The second has now been abolished in English law: see the Law Reform (Miscellaneous Provisions) Act, 1970, s. 1(i).
9. [1909] A.C. 488 at p. 495.

In tort actions it was and is different. It has long been the case that in respect of torts such as trespass to the person, defamation and malicious prosecution damages can be recovered for injury to the feelings of the plaintiff frequently far exceeding any financial or physical loss which has been suffered.[10] As was emphasised in *Addis* v. *Gramophone Co. Ltd.* had the plaintiff's injured feelings in that case resulted from some such tort accompanying his dismissal he might successfully have sought compensation in respect thereof in a separate tort action.[11] One of the interests which torts such as mentioned is particularly intended to protect is that of the feelings, dignity or reputation of a person, frequently compensated in the form of aggravated damages or, exceptionally, marked by an award of exemplary damages where the defendant's conduct is particularly outrageous.[12] Where such claims are brought the courts naturally have to give careful consideration to the manner and circumstances of the defendant's conduct. If the tort is committed in circumstances aggravating the injury to the plaintiff's feelings or reputation, or in a particularly high handed or outrageous manner, correspondingly inflated awards of aggravated or exemplary damages can be made. Conversely the nature of the plaintiff's own conduct, for example if it has been provocative, might remove or mitigate any award of such damages.[13] This was the very sort of judicial exercise which the House of Lords in *Addis* v. *Gramophone Co. Ltd.* wished courts to avoid in contract claims as being inappropriate and productive of undesirable uncertainty in a commercial context.

The combined effect of judicial dicta such as those quoted and the decision in *Addis* v. *Gramophone Co. Ltd.* has been seen by several commentators as having established a principle of general application to the assessment of damages in contract. For example, G.H. Treitel in one of the leading English textbooks on the law of contract so treats it. He writes:

> "Such damages [in respect of injured feelings and reputation] cannot generally be recovered in a contractual action".[14]

However, if such a restrictive general principle does exist it is one increasingly subject to modification by recent decisions. The exceptions mentioned by Lord Atkinson[15] have been augmented by others.

10. As, for example, in *Loudon* v. *Ryder* [1953] 2 Q.B. 202., in which, in an action for assault and battery, the plaintiff was awarded by a jury £5500 damages, £3000 of which was categorised as exemplary damages, despite the fact that the defendant's trespass had caused her no bodily injury. The plaintiff had been wrongfully evicted by the defendant from her flat in a particularly outrageous and humiliating manner.
11. [1909] A.C. 488 at p. 503, per Lord Shaw of Dunfermline.
12. In English law, since *Rookes* v. *Barnard* [1964] A.C. 1129 (confirmed in *Cassell & Co. Ltd.* v. *Broome* [1972] A.C. 1027), exemplary damages can now be awarded only in the exceptional categories mentioned in Lord Devlin's speech in that case. Australian courts have refused to follow the *Rookes* v. *Barnard* limitations: see *Uren* v. *John Fairfax & Sons Pty. Ltd.* (1966) 117 C.L.R. 118, and *Australian Consolidated Press Ltd.* v. *Uren* (1966) 117 C.L.R. 185, [1969] 1 A.C. 590.
13. See e.g. *Lane* v. *Holloway* [1968] 1 Q.B. 379.
14. See G.H. Treitel, *The Law of Contract,* 4th ed., 659.
15. Supra, n.9.

Indeed it will now be submitted that an examination of recent case law demonstrates that in reality there is today no such principle of general application. Instead damages for injured feelings can be recovered under the long standing rule in *Hadley* v. *Baxendale.*[16] In other words if the nature, type and circumstances of the contract point to such a consequence having been within the reasonable contemplation of the parties at the date of their contract then it is one which is redressible in a contractual action. There are some contracts the nature of which will more readily give rise to such reasonable contemplation than others. By way of an initial example take the case of an action for breach of promise of marriage, one of the allegedly exceptional categories mentioned in *Addis* v. *Gramophone Co. Ltd,* and incidentally, now a defunct action in English law.[17] The plaintiff in such an action can or could (as the case may be) recover damages for injured feelings not, as is submitted here, because of some exception to a restrictive general principle but because, under the normal principles of remoteness of damage in contract, injured feelings constitute a consequence which can be readily contemplated as a result of breach of such a contract. Similar is the case of breach of a covenant not to molest contained in a separation deed between a husband and wife. As was held in the New South Wales case, *Silberman* v. *Silberman*[18] damages can be recovered in respect of the plaintiff's sense of annoyance because such is "the very thing the covenant intended to guard against . . . . a thing that both parties to the deed contemplated."[19] We turn now to an analysis of the recent decisions which support the submission being made in this article.

The Recent Cases

Several of the recent English and Canadian cases in this area have involved breach of a contract to provide the plaintiff with a holiday sometimes and conveniently referred to as the "spoiled holiday" cases.[20] The first and most significant was the decision of the English Court of Appeal in *Jarvis* v. *Swans Tours Ltd.*[21] However, even before this case there had been others which were indicative of a more liberal judicial attitude than hitherto, cases in which the courts demonstrated, in "spoiled holiday" cases, a willingness to award damages in respect of appreciable inconvenience and discomfort suffered by the plaintiff as a result of the defendant's breach. Such was the South Australian case, *Athens — MacDonald Travel Service Pty. Ltd.* v. *Kaxis,*[22] in which Zelling J., after a very careful review of the authorities, concluded that the plaintiff was entitled to damages

16. (1854) 9 Ex. 341.
17. Supra, n.9.
18. (1910) 10 S.R. (N.S.W.) 544. See also the earlier English case, *Fearon* v. *Earl of Aylesford,* (1884) 12 Q.B.D. 539.
19. (1910) 10 S.R. (N.S.W.) 554 at pp.559-560.
20. The expression used in the latest of such cases, the Canadian decision, *Newell* v. *Canadian Pacific Airlines Ltd.* (1977) 74 D.L.R. (3d) 574 at p. 589. This case is analysed below.
21. [1973] 1 Q.B. 233.
22. [1970] S.A.S.R. 264.

for inconvenience and discomfort which he had suffered as a result of breach by a travel agency of a contract to provide him with a three months holiday in Cyprus. As His Honour recognized, such an award must of necessity have a mental element in it even though, as he thought the law stood in 1970, damages could not be awarded for "disappointment, regret or other feelings of the mind simpliciter".[23] This was a matter in which he considered that the law of contract was "lagging badly behind other fields in the law of damages".[24] The approach of the court in this case is remniscent of the similar distinction, already adverted to, drawn by Mellor J. in *Hobbs* v. *London & South Western Railway Co. Ltd.*[25] between physical inconvenience and mere injured feelings.

The importance of *Jarvis* v. *Swans Tours Ltd.* lies not only in the fact that the Court of Appeal allowed recovery for injured feelings simpliciter but also because of remarks of a more general nature made by the Court and, not least, because of the formative influence which the decision has exerted. It involved a claim for breach of contract brought by a disappointed holiday maker. The plaintiff had booked a skiing holiday in Switzerland in reliance upon representations made in a brochure issued by the defendant tour operator. In this the holiday was described in the most glowing terms. Not only was the prospective holiday maker promised skiing facilities but also he was assured of highly delectable apres-ski activities as a member of a convivial houseparty with a genial English speaking resident host. All in all the plaintiff was assured of "a great time". Unfortunately the great expectations aroused in the plaintiff by the enticing descriptions in the brochure were almost completely dashed by his experience of the facilities actually offered. For instance there were very few fellow guests during the first week of his fortnight's holiday and none during the second week. The entertainment provided was spasmodic and of a low standard. The ski runs were neither very local nor very convenient, and, since the resident host did not speak English, during the second week there was no one to whom the plaintiff could talk. His disappointment and exasperated feelings can be well imagined. His valuable annual holiday so eagerly anticipated had proved to be a disaster.

Clearly there had been a breach of contract by the defendants. The only issue before the Court of Appeal was as to the damages payable for that breach. In this respect it was held that compensation could be properly awarded in respect of the plaintiff's disappointed feelings in addition to any pecuniary loss and physical discomfort and inconvenience suffered. This was because the defendants had not merely undertaken to provide the plaintiff with air travel, hotel accommodation, meals of a certain standard and other such tangible items but, in addition, had undertaken, in the words of Edmund Davies L.J.:

> " . . . to provide a holiday of a certain quality, with 'Gemutlichkeit' (that is to say, geniality, comfort and cosiness) as its overall characteristics,

23. Ibid., at p. 274.
24. Ibid., at p. 274.
25. Supra, n.4.

> and 'a great time', the enjoyable outcome of which would surely result to all but the most determined misanthrope".[26]

Given such circumstances the parties to the contract must surely have contemplated that upon breach there might be such injured feelings as suffered by the plaintiff. It followed that such a consequence was within the normal principles of remoteness of damage in contract. Although it might be difficult to precisely evaluate injured feelings in pecuniary terms this was no reason for denying its compensation altogether. Judicial dicta denying any recovery for outraged feelings contained in cases such as *Hamlin* v. *Great Northern Railway Co.*[27] and *Hobbs* v. *London & South Western Railway Co.*[28] were treated by the court as being out of date and inconsistent with more recent trends. Just as the law of torts permitted recovery for mental distress so also, in a proper case, does the law of contract.[29] Unfortunately the House of Lords decision in *Addis* v *Gramophone Co. Ltd.*[30] was not even mentioned let alone analysised or distinguished.

The next English case in point, also a decision of the Court of Appeal, was another spoiled holiday case, *Jackson* v. *Horizon Holidays Ltd.*[31] Its facts were similar to those in *Jarvis* v. *Swans Tours Ltd.* The defendants had contracted to supply the plaintiff and his family with a holiday in Sri Lanka. When the accommodation and food provided proved to be well below the standard specified in the contract the family were caused mental distress. Because such distress was foreseeable in the circumstances the Court followed its earlier decision in *Jarvis* and awarded damages in respect thereof.

Overseas, the decision in *Jarvis* was approved and followed in two Canadian cases, *Keks* v. *Esquire Pleasure Tours Ltd.*[32] and *Elder* v. *Koppe.*[33] The first was a "spoiled holiday" case similar to *Jarvis* and the second involved a somewhat analagous situation of breach of a contract to supply a motor home known to be intended for holiday purposes. In both damages were awarded in respect of foreseeable injured feelings.

Thus far the modern decisions in which damages for injured feelings had been awarded had all fallen within the rubric of spoiled holiday cases. Despite the wider dicta contained in some of them, in particular *Jarvis,* it remained to be seen whether the effect of these cases would merely serve to add one further category as an exception to a restrictive general principle, or whether they were of greater significance as being symptomatic of a move towards a new principle under which such damages would be treated as falling within the normal rules of remoteness of damage in contract.

The most recent cases have demonstrated that the latter is the case. Of these, perhaps the most significant was *Heywood* v.

26. [1973] 1 Q.B. 233 at p. 239.
27. Supra, n.2.
28. Supra, n.4.
29. [1973] 1 Q.B. 233 at pp.237-238.
30. Supra, n.6.
31. [1975] 1 W.L.R. 1468.
32. [1974] 3 W.W.R. 406.
33. (1974) 53 D.L.R. (3d) 705.

Wellers,[34] yet another decision of the English Court of Appeal. The action was for breach of a contract for professional services between a solicitor and client. The plaintiff had instructed the defendants, a firm of solicitors, to take action by means of application for an injunction to protect her from molestation by a man who had been pestering her. An interim injunction to this end was obtained. Despite this the molestation continued causing the plaintiff mental distress. Such continued molestation would probably have been avoided had the defendants not negligently failed to take steps to enforce the injunction, a negligent omission constituting a breach of their contract with the plaintiff. It was held that the plaintiff was entitled to recover damages in respect of her distress. At the time of the contract it should have been within the reasonable contemplation of the defendants that if they negligently failed to act to enforce a remedy obtained to stop molestation it was likely to continue with consequent distress to the plaintiff. Thus the damage she had suffered fell within the rule in *Hadley* v. *Baxendale,* a rule which, in the opinion of the Court, is now sufficiently wide to encompass foreseeable mental distress. As it was expressed by James L.J.:

> "It is also the law that where, at the time of making a contract, it is within the contemplation of the contracting parties that a foreseeable result of a breach of the contract will be to cause vexation, frustration or distress, then if a breach occurs which does bring about that results, damages are recoverable under that heading (*Jarvis* v. *Swans Tours Ltd.*)".[35]

The earlier decision of the same Court in *Cook* v. *Swinfen,*[36] in which a client had been denied recovery for nervous shock in a contractual action against her solicitor, was distinguished as being a case where such a consequence was not reasonably foreseeable. It is, however, interesting to note that in that case Lord Denning had apparently espoused the more restrictive approach to injured feelings when he said, referring to the solicitor-client relationship:

> "It can be foreseen [if the solicitor is negligent] that there will be injured feelings, mental distress, anger, and annoyance. But for none of these can damages be recovered. It was so held in *Groom* v. *Crocker*[37] on the same lines as *Addis* v. *Gramophone Co. Ltd.*[38] . . . .".[39]

Since *Jarvis,* in which decision Lord Denning was of course a formative participant, one must surely agree with him when he said in *Heywood* v. *Wellers* that such dicta "may have to be reconsidered".[40]

Another English case which supports the emergence of a new more liberal principle was *Cox* v. *Philips Industries Ltd.*[41] decided shortly before *Heywood* v. *Wellers.* It was an action for breach of a

34. [1976] 1 Q.B. 446.
35. Ibid., at p. 461.
36. [1967] 1 W.L.R. 457.
37. [1939] 1 K.B. 194.
38. [1909] A.C. 488.
39. [1967] 1 W.L.R. 457 at p. 461.
40. [1976] 1 Q.B. 446 at p. 469.
41. [1976] 1 W.L.R. 638.

contract of employment brought by an employee who had been relegated by his employers to a position of lesser responsibility in breach of an undertaking given to him. Although he had suffered no dimunition of salary the effect of his demotion was to cause the plaintiff acute depression and anxiety necessitating medical treatment. Again, because such a consequence was held by Lawson J. to have been within the contemplation of the defendants at the time when the contract was made, the plaintiff was awarded damages for his injured feelings. Here also *Jarvis* was approved and applied. One brief reference was made by Lawson J. to *Addis* v. *Gramophone Co. Ltd.* from which it appears that, had the action been for wrongful dismissal, His Lordship would have regarded himself as being bound by that decision to award the plaintif no such damages.[42] If this is indicative of a desire by English Courts to restrictively interpret the views of the House of Lords in *Addis* v. *Gramophone Co. Ltd.* as being applicable only to actions for wrongful dismissal it would be understandable in view of the imperative dictates of judicial precedent, but it would be productive of an anomaly. Injured feelings are no less foreseeable a result of a wrongful dismissal than of any other breach of an employment contract. If anything the contrary is surely the case.

It thus appears that since *Jarvis* v. *Swans Tours Ltd.* English courts have successfully jettisoned the view that would deny recovery in contract for injured feelings and that, in so far as such a view survives, it is perhaps now restricted to actions for wrongful dismissal analagous to the fact situation of *Addis* v. *Gramophone Co. Ltd.* Otherwise injured feelings of the plaintiff where, because of the nature and circumstances of the contract, foreseeable under the rule in *Hadley* v. *Baxendale,* are properly redressible in damages. Before we leave the English cases one last reference to the topic by Lord Denning deserves mention. In *McCall* v. *Abelesz,*[43] involving an action by a tenant against his landlord for breach of a statutory duty not to harass the tenant with intent to cause him to vacate his tenancy, His Lordship said, obiter:

> "It is now settled that the court can give damages for the mental upset and distress caused by the defendant's conduct in breach of contract."[44]

Courts in Canada have travelled a similar path. We have already referred to two recent Canadian cases[45] in which *Jarvis* was cited and followed. It remains now to consider the most recent reported Canadian decision, *Newell* v. *Canadian Pacific Airlines Ltd.,*[46] a decision of a county Court in Ontario yet of considerable significance and interest in this context. At the end of his judgment containing a comprehensive analysis of the authorities, both English and Cana-

42. Ibid., at p. 643.
43. [1976] 2 W.L.R. 151.
44. Ibid., at p. 156.
45. Supra, n.32 and n.33.
46. (1977) 74 D.L.R. (3d) 574.

* For a similar conclusion see P.H. Clarke, *Damages in Contract for Mental Distress* (1978) 52 A.L.J. 626 , an article published after the present article had been submitted for publication.

dian, Borins, Co. Ct.J. concluded that there was no difference, in the field of contractual damages for injured feelings, between English law and the law of Ontario. Both jurisdictions now permitted recovery under the rule in *Hadley* v. *Baxendale.*

The action was for breach of a contract of carriage under which the defendants had agreed to transport two dogs belonging to the plaintiffs in the cargo compartment of their aircraft on a journey between Toronto and Mexico City. Both plaintiffs, who were a husband and his wife, were in poor health and were also travelling to Mexico City for recuperation purposes. They wanted to take the dogs with them in the passenger section of the aircraft. So solicitous were they for the safety of their pets that they even offered to purchase the entire first class section of the aircraft for this purpose. Although the defendants could not comply with this request they assured the plaintiffs that their dogs would be quite safe in the cargo compartment and would arrive at their destination in "first class condition". Unhappily this assurance and prediction proved to be unfounded. In Mexico City it was found that one dog had died and the other had suffered serious injury. This had been caused by carbon monoxide poisoining from the thawing out of a quantity of dry ice in close proximity to which the dogs had been regrettably placed.

The defendants admitted breach of a contractual duty to carry the dogs safely. They further admitted liability for the death and illness of the dogs. However, they disputed a claim for general damages in respect of the distressed feelings of the plaintiffs resulting from the breach. Nevertheless the claim was successful and the plaintiffs were awarded such damages. The circumstances in which the contract of carriage was made demonstrated to the defendants the plaintiffs' attachment to and concern for their dogs. These circumstances should have made clear to the defendants that should any harm befall the dogs this would likely cause the plaintiffs distress and vexation. Consequently such distress was a reasonably foreseeable consequence of the breach of contract for which, under the rule in *Hadley* v. *Baxendale,* the plaintiffs were entitled to recover damages. In reaching this conclusion the Court relied to a considerable extent upon four of the recent English decisions already considered, namely the *Jarvis, Jackson, Heywood,* and *Cox* cases. The principle applied in those cases, demonstrating that the rule in *Hadley* v. *Baxendale* was wide enough to permit recovery for foreseeable injured feelings, was also appliable to the Canadian laws of contract.

Conclusion

It is submitted that the recent cases analysised in this article have firmly established that the common law of contract does now permit recovery of damages for injured feelings, and that it does so under the rule relating to remoteness of damage classically formulated in *Hadley* v. *Baxendale.* In other words where such a consequence is within the reasonable contemplation of the parties at the time of making the contract it is a consequence for which damages can be properly awarded.

There are of course two limbs to the rule in *Hadley* v. *Baxendale.*

Some claims for injured feelings will fall within the first. Even in the absence of special circumstances known or brought home to the defendant it is a natural consequence, within the presumed contemplation of the parties, that, for breach of a contract, the foundation of which is the procurement of some sentimental benefit for the plaintiff, the plaintiff will suffer injured feelings where the breach results in the denial of the promised benefit. That was the situation with several of the contracts in issue in the cases discussed, such as an agreement to supply a holiday, to marry, or to protect the plaintiff against molestation. Other claims may fall within the second limb where special circumstances brought home to the defendant at the time of the contract cause the injured feelings to be within the reasonable contemplation of the parties and so recovarable. Such a case was *Newell* v. *Canadian Pacific Airlines Ltd.*[47] where the special circumstance of the plaintiff's great concern for the safety and welfare of their pet dogs had been clearly made known to the defendants at the inception of the contract of carriage.

There is only one remaining source of hesitation in asserting this conclusion, namely the decision in *Addis* v. *Gramophone Co. Ltd.*[48] As it is a decision of the House of Lords it can only be overruled, in English law, by that court itself or by contrary legislation. However, such is the force of the recent cases that, at the least, it would seem safe to predict that that decision will be so restrictively interpreted as to be applicable only in circumstances directly analgous to its facts i.e. to an action for wrongful dismissal in breach of a contract of employment. As already mentioned this seems to have been the approach taken in *Cox* v. *Philips Industries Ltd.*[49] and, as also noted, it would be productive of an anomaly defensible neither in principle nor logic. Courts in Australia and other non English jurisdictions are of course free to disregard *Addis,* and to apply the principle of the recent cases without any anomolous qualification, unless there be any contrary binding authority within their own jurisdictions. In Australia there would appear to be no such obstacle and, consequently, no good reason for, as Zelling J. put in *Athens — MacDonald Travel Service Pty. Ltd.* v. *Kazis,* [50] the law of contract to the "lagging badly behind other fields in the law of damages".

One last point emanating from this survey of the recent widening of the field of damages in contract is the interesting comparison with analagous developments in the law of torts with relation to recovery of damages for nervous shock. Just as nineteenth century English courts were reluctant to countenance claims for injured feelings in contract cases, so these courts were equally reluctant to allow claims for nervous shock in tort.[51] There appears to have been a reluctance at that time to permit recovery for such intangible consequences of commission of a tort or a breach of contract, borne perhaps of a fear of opening a "wide field for imaginary claims".[52] Since the door to

47. (1977) 74 D.L.R. (3d) 574.
48. [1909] A.C. 488.
49. Supra, n.42.
50. [1970] S.A.S.R. 264 at p. 274.
51. *Victorian Railway Commissioners* v. *Coultas* (1888) 13 App. Cas. 222 (P.C.)
52. Ibid., at p. 226.

claims for nervous shock was first opened[53] such fear has proved groundless. Now that the scope for awarding damages for injured feelings in contract has been extended it is submitted that, in so far as that same apprehension might have been a ground for the previous narrow view, it will prove to be equally groundless. It could be said that nearly every breach of contract causes foreseeable disappointment and consequent injured feelings to the innocent party because of his losing a bargain and the frustration of the expectations based upon it. However, in itself, that will not be enough to permit recovery. There is a considerable difference between the concept of foreseeability in that sense and the concept of reasonable contemplation as used in *Hadley* v. *Baxendale*. As emphasised by the House of Lords in *Koufos* v. *C. Czarnikow Ltd.*[54] the latter is a narrower concept than the former, and the cases analysised in this article demonstrate that it is only where the purpose of the contract itself is to confer some benefit upon the plaintiff, the loss of which will by its very nature cause injured feelings, that such consequence can be said to be within the reasonable contemplation of the parties. The normal sense of disappointment at losing a bargain, without more, is something the occurrence of which the contracting parties must themselves bear the risk. It is a risk concomitant upon entry into any contract.

53. In *Wilkinson* v. *Downton* [1897] 2 Q.B. 57 (in respect of intentional conduct), and *Dulieu* v. *White & Sons* [1901] 2 K.B. 669 (in respect of negligence).
54. [1969] 1 A.C. 350.