DAMAGES FOR MENTAL DISTRESS IN CONTRACT

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A long established principle under common law is that damages are not recoverable for mental distress or disappointment arising from a breach of contract. Over the years however, a number of exceptions to that general rule have evolved. The High Court in it's recent judgement in the case of *Baltic Shipping Company v. Dillon*[1] has provided necessary clarification on the nature of these exceptions and the circumstances under which the Court will allow recovery of such damages.

Facts of the Case

This case arose from the sinking of a cruise vessel, the 'Mikhail Lermontov' on 16 February 1986 off the South Island of New Zealand. The vessel was in the course of a fourteen day pleasure cruise which had commenced in Sydney on 7 February. The Respondent, a Mrs. Dillon, was a passenger on board the vessel at the time. As a result of the catastrophe, she lost items of personal property and suffered physical injury and emotional trauma. She subsequently brought an action against the Appellant (the owner/operator of the vessel) in the Admiralty Division of the Supreme Court of New South Wales for breach of contract. The appellant, who had refunded the unused portion of the fare advanced by Dillon, made certain admissions of negligence and had therefore breached their contractual duty to take reasonable care.

The trial judge concluded that the obligation of Baltic Shipping to provide a fourteen day pleasure cruise was an entire and indivisible obligation and that because of the sinking on the tenth day, there had been a total failure of consideration. Mrs. Dillon was awarded damages which totalled over $45,000. This included amounts for the loss of valuables, damages for personal injury, an amount for restitution of the balance of the fare and compensation for disappointment and distress of $5,000.

An appeal by Baltic Shipping to the Court of Appeal was dismissed by majority. The appellant then appealed to the High Court.

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1. (1993) Aust Contract Reports 90-022.

High Court Decision

The two issues before the Court were whether Mrs. Dillon was entitled to a refund of the entire fare and whether she was entitled to claim damages for disappointment and distress.

(1) Restitution of the Fare

The High Court was unanimous in holding that Mrs. Dillon was not entitled to a return of the fare. It was held that restitution of the entire fare was not available unless there had been a total failure of consideration. The Court disagreed with the trial judge's conclusion that the failure of consideration had been complete as a result of the tragedy which occurred on the tenth day of the voyage. Due to the fact that Mrs. Dillon had accepted and enjoyed eight full days of the cruise before the sinking and thus obtained a substantial part of the benefit expected under the contract, it could not be said that there had been a total failure of consideration. Additionally, the contract could not be categorised as one where the obligation to pay (or the entitlement to retain advance payment) was made conditional upon complete performance of the appellant's obligations.

The Court also upheld the submission of the appellant that Mrs. Dillon was not entitled to receive restitution of the consideration paid pursuant to the contract and at the same time receive damages for breach of that contract. If this were allowed Mrs. Dillon would, ' ... in effect, take the benefit of the contract without an obligation to give consideration for it.'[2]

(2) Damages for distress and disappointment

On this issue, the Court was also unanimous in concluding that Mrs. Dillon was entitled to damages for mental distress and disappointment arising from the breach of contract.

The general rule as enunciated in *Hamlin v. Great Northern Railway Company*[3] and later confirmed in *Addis v. Gramophone Ltd*[4] that such damages are not recoverable and the justifications for that rule were identified and explained, particularly in the judgements of Mason CJ. and McHugh J. However it was also recognised that over time, the general rule has been eroded by the development of a number of exceptions although the precise nature and extent of those exceptions is subject to some uncertainty.

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2. Id at p. 89,544 per Gaudron J.
3. [1856] 1 H & N 408.
4. [1909] AC 488.

Mason CJ., with whom Toohey and Gaudron JJ. concurred, was of the view that the basis of recent English decisions in relation to the recoverability of damages for mental distress arising from a breach of contract is the rule in *Hadley v. Baxendale.*[5] He also highlighted the major advantage of this approach being that it puts these damages '... on precisely the same footing as other heads of damage in cases of breach of contract.'[6] However his Honour also recognised the emphasis that is placed in the cases on the limited circumstances in which such damages will be recoverable. Rather than classifying contracts into either commercial or non-commercial contracts his honour adopted the test that '... damages for disappointment and distress are not recoverable unless they proceed from physical inconvenience caused by the breach or unless the contract is one the object of which is to provide enjoyment, relaxation or freedom from molestation.'[7] In such cases the damages flow directly from the breach of contract. This test is in line with that applied by the English Court of Appeal in the recent case of *Watts v. Morrow*[8]. The object of the contract between Mrs. Dillon and Baltic Shipping was to provide an enjoyable and relaxing, fourteen day pleasure cruise. Therefore she was entitled to an award for damages for distress and disappointment.

Brennan J (who was also in agreement with the position adopted in *Watts v. Morrow*) expressed the view that in cases where a contract contains a promise ... 'express or implied that the promisor will not cause the promisee, or will protect the promisee from disappointment of mind, it cannot be said that disappointment of mind resulting from breach of the promise is too remote.'[9] Such a promise is express or implied in many contracts the object of which is to provide peace of mind. This was such a case. 'The plaintiff was promised a holiday cruise, an interlude to relax the mind and refresh the spirits.'[10] The disappointment and distress was such an inevitable and direct result of the breach of contract that it may be regarded as flowing naturally from the breach.

Deane and Dawson JJ. said the general rule regarding damages for mental distress should not be abolished. Although their Honours recognised that the rule is subject to a number of exceptions, they refrained from formulating any general proposition but merely stated that disappointment and distress sustained by breach of a contract to provide a pleasant and relaxing holiday experience comes within a range of exceptions to the general rule. In such cases it was held that an

5. (1854) 9 Exch. 341.
6. See fn. 1 at p. 89,533 per Mason CJ.
7. Ibid.
8. [1991] 1 WLR 1421.
9. See fn. 1 at p. 89,536 per Brennan J.
10. Ibid.

assumption that the disappointment and distress would not have been within the contemplation of the parties is unjustifiable.

McHugh J. examined the judgements of earlier cases such as *Jarvis v. Swan Tours Ltd*[11] and *Cox v. Philips Industries Ltd*[12] where damages for mental distress were allowed and noted that the rationale for granting such damages in these cases was the contemplation of the parties that the breach might give rise to distress. However, His Honour's conclusion, based on examination of recent English authorities such as *Bliss v. South East Thames Regional Health Authority*[13] and *Hayes v. James & Charles Dodd*[14] is that the English Court of Appeal has rejected the view that the contemplation of the parties is the basis upon which damages for disappointment and distress are awarded and limited their availability to cases involving breach of a contract to provide peace of mind or freedom from distress. His Honour referred to the judgement of Staughton LJ in *Hayes's* case where at p. 824 it was stated:

> I am not convinced that it is enough to ask whether mental distress was reasonably foreseeable as a consequence, or even whether it should reasonably have been contemplated as not unlikely to result from a breach of contract.

This approach appears to disregard the second limb of the rule in *Hadley v. Baxendale* when considering damages for mental distress. McHugh J. contrasted this position with recent developments in Canada and New Zealand where the general rule from *Addis* has been rejected, with the application of more general principles of reasonable foresight and contemplation of the parties.

In fact, His Honour recognised that in some cases, it is unreasonable that a party in breach of contract should escape liability, even though at the time of entering the contract he or she was aware that a breach might result in the other party suffering disappointment. However McHugh J. formulated the applicable rule in similar terms to Mason CJ. by concluding that '... damages are not recoverable for distress or disappointment arising from a breach of contract unless the distress or disappointment arises from breach of an express or implied term that the promisor will provide the promisee with pleasure, enjoyment or personal protection or unless the distress or disappointment is consequent upon the suffering of physical injury or physical inconvenience.'[15] Since the contract in question contained an implied promise to provide a pleasurable and enjoyable fourteen day cruise, it's breach gave rise to an obligation to pay damages to Mrs. Dillon.

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11. [1973] QB 233.
12. [1976] 1 WLR 638.
13. [1987] ICR 700.
14. [1990] 2 All ER 815.
15. See fn. 1 at p. 89,548 per McHugh J.

The quantum of damages for disappointment and distress was maintained at $5,000 notwithstanding that Mrs. Dillon was not entitled to restitution of the unrefunded balance of the fare.

Conclusion

The High Court, in this case has not expressly rejected the general rule set down in *Hamlin* nor has the Court returned exclusively to the application of the general test for recoverability of damages established in *Hadley v. Baxendale* so as to bring damages for disappointment and distress completely in line with other heads of damages. It has however provided clarification on the exceptions to the general rule. What is certain is that damages for disappointment and distress arising from breach of contract will be recoverable where the object of the contract is to provide pleasure, enjoyment, peace of mind or freedom from distress. In such cases the damage can be said to flow directly or arise naturally from the breach as there is a failure to provide promised benefits.