

## NEW DEVELOPMENTS IN WRONGFUL DISMISSAL LITIGATION

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### I. *Historical Context.*

There is a tendency to think of the law of contracts as a legal category distinct from any other. We differentiate between obligations that are agreed upon by the parties and obligations that are imposed by law. For example, the law of negligence is based upon duties imposed by law rather than by agreement. Yet, if we examine the origin of modern contract law, we learn that at an earlier stage in its legal development, the distinction between contract and tort was not so sharply drawn, and that indeed, paradoxically, the law of contracts finds its origin in the law of torts.

From the middle of the fourteenth century onward, it was a requirement of the King's Court that if a plaintiff was to bring an action in contract, he was obliged to produce a deed sealed by the defendant witnessing the promise. In the absence of that deed, the plaintiff would have no standing to sue in the royal courts. In order to provide plaintiffs, who had not seen fit to attend to the formalities of contract making, with a remedy in the event that their contract was broken, lawyers began to argue that their actions were properly founded in tort. Actions that we would consider to be contractual in nature were dressed up as torts by using the writ of trespass. The argument was made that the defendant had breached an undertaking and had thereby deceived the plaintiff. This act of deception was held to fall within the writ of trespass.

The first known case of this type was that of *The Humber Ferryman's Case*,<sup>1</sup> decided in 1348. In that case, the defendant was a ferry operator who had agreed to take the plaintiff's horse across the Humber River. The plaintiff alleged that the defendant had overloaded his boat with the result that it overturned, and the horse drowned. The defendant's lawyer argued that the action was in contract. The agreement that had been reached between the plaintiff and the defendant was oral and accordingly, if the judge found that the

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<sup>1</sup> (1348), Lib. Ass. 22 Edw. III, f. 94, p. 41.

action sounded in contract, the plaintiff would be without a remedy. The judge found that in overloading the ferry, the defendant had committed a trespass and accordingly held in favour of the plaintiff. The case serves as an example of how by characterizing the claim against the defendant as one of deceit, the courts drew disputes involving the adjudication of contracts into the law of torts.

It is useful, then, to keep in mind, that in its origins the law of contract was very closely aligned with the law of torts. Fourteenth century lawyers performed a legal sleight of hand by placing their clients' complaints into a legal category that would provide them with a remedy. In order to accomplish this, medieval lawyers thought about the law in a way which is common to all lawyers who are confronted with rules of law which preclude their clients from obtaining relief. The device used was the legal fiction. By characterizing a breach of contract as a deceit perpetrated on the plaintiff, medieval lawyers were able to circumvent the formal prerequisites necessary to bring a contract action.

#### *Development of the Modern Idea of Contract.*

For centuries following *The Humber Ferryman's Case*, the demarcation between contract and tort remained ill-defined. It was not until the early part of the nineteenth century that the law of contract emerged as a truly distinct and comprehensive system of rules. With the development of a commercial society the need arose for the structuring of clear rules in order to govern complex commercial transactions. Given that these rules for the adjudication of contract disputes arose because of the needs of a highly industrialized society, it is not surprising that the rules that were developed reflected the economic assumptions of that society. Just as there was a free market for the exchange of goods without intervention by any authority, so too there was a law of contracts that allowed the parties to freely make their own bargains as they saw fit. It was the court's task merely to provide ground rules to facilitate commercial transactions.

Contract law, as it developed, concerned itself with the contractual intention of the parties, not the fairness of the bargain. It is in this context that we see the development of sharply defined rules relating to implied terms and damages. Given that the central question that the courts wrestled with related to the intention of the parties, a term could only be implied in a contract if a court could safely say that the parties had impliedly agreed upon that term, without having expressly stated it. While the courts were prepared to imply terms of fact, they were not prepared to imply terms of law. To imply a term of law would have constituted an unacceptable form of judicial intervention in an era of *laissez-faire* bargaining and commercial dealings. Implying a term of law would be tantamount to the court imposing a standard of justice

and fair dealing quite apart from what might have been intended in the contract agreed upon.

Rules relating to the measurement of damages centred on the desire of the courts to insure that the "reliance interest" was protected in a damage award. Given that the courts were looking to the commercial contract as their model, the only expectation that the plaintiff had with respect to the fulfillment of a contract was the making of a profit, assuming that the bargain was economically to his advantage. Non-pecuniary losses were not considered to be a proper head of damages.

In assessing the quantum of damages, courts would almost invariably make reference to the principles in *Hadley v. Baxendale*.<sup>2</sup> In that case, Alderson B. set out the following rule with respect to the assessment of damages:<sup>3</sup>

Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself 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 the breach of it.

In the absence of special circumstances, damages would be awarded on the basis of what was in the reasonable contemplation of the parties. This test, really appears to be a test of foreseeability. As a result one might suppose that the approach to damages in contract would have been little different from the approach to damages in tort. In fact, courts came to draw a clear distinction between damages that were available in contract as opposed to those available in tort. The concept of "reasonable contemplation" was applied restrictively. An expansive field of allowable damages would have increased the prospect of uncertainty in commercial dealings. The dictates of the times required an approach to damages that would allow traders to easily ascertain the consequences of breaching a contract.<sup>4</sup> Consequently, the approach to damages in contract was sharply differentiated from and far more narrow than the approach taken to damages in tort.

## II. *Application of Contract Principles to the Employment Relationship.*

It was within this context that contractual rules governing the employment relationship developed. Unquestionably, the benchmark case in this area is *Addis v. Gramophone Co., Ltd.*,<sup>5</sup> a 1909 decision of the

<sup>2</sup> (1854), 156 E.R. 145.

<sup>3</sup> *Ibid.*, at p. 151.

<sup>4</sup> Grant Gilmore, *Death of Contract* (1974).

<sup>5</sup> [1909] A.C. 488 (H.L.).

House of Lords. The plaintiff had been employed by the defendants as a manager of their business in Calcutta, and was paid on a salary and commission basis. It was a term of the employment contract that the plaintiff could be dismissed upon being given six months notice. During the course of his employment, the defendants gave the plaintiff the required six months notice but at the same time a successor was appointed who took over the plaintiff's job thereby preventing him from obtaining commissions during that six month period. The court held that the plaintiff was entitled to be paid his salary for the six month period together with the commissions that he would have earned had he remained at his post. The court then considered the plaintiff's claim, which the jury had allowed at trial, for compensation as a result of the "abrupt and oppressive way in which the plaintiff's services were discontinued and the loss he sustained from the discredit thus thrown upon him". The court held that no allowance could be made for either the manner of termination or the damage to reputation suffered as a result of his dismissal. An examination of the reasons for judgment indicates that the court clearly had an ordinary commercial contract in mind in construing the employment contract, as seen in the comments of Lord Atkinson:<sup>6</sup>

I have always understood that damages for breach of contract were in the nature of compensation, not punishment, and that the general rule of law applicable to such cases was in effect that stated by Cockburn, C.J., in *Engell v. Fitch*, in these words (L.R. 3 Q.B., at p. 330):

"By the law, as a general rule, a vendor who from whatever cause fails to perform his contract is bound, . . . to place the purchaser, so far as money will do it, in the position in which he would have been if the contract had been performed. . . . The purchaser will be entitled to the difference between the contract price and the market price."

The commercial contract was foremost in Lord Atkinson's mind and accordingly, he construed the question of entitlement to damages on that basis. Lord Atkinson then proceeded to consider the question of certainty in commercial dealings:<sup>7</sup>

. . . 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 uncertainty and confusion 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. For instance, in actions of tort, motive, if it may be taken into account to aggravate damages, as undoubtedly it may be, may also be taken into account to mitigate them, as may also the conduct of the Plaintiff himself who seeks redress. Is this rule to be applied to actions for breach of contract? There are few breaches of contract more frequent than those which arise where men omit or refuse to repay what they have borrowed or to pay for what they have bought. Is the creditor or vendor who sues for one of such

<sup>6</sup> *Ibid.*, at p. 494.

<sup>7</sup> *Ibid.*, at p. 495.

breaches to have the sum which he recovers lessened if he should be shown to be harsh, grasping, or pitiless, or even insulting in enforcing his demand or lessened because the debtor has struggled to pay, has failed because of misfortune, and has been suave, gracious, and apologetic in his refusal? On the other hand, is that sum to be increased if it should be shown that the debtor could have paid readily without any embarrassment, but refused with expressions of contempt and contumely from a malicious desire to injure his creditor?

Lord Atkinson concluded that so long as the plaintiff frames his action in contract, he is limited to those remedies which flow from the breach of an ordinary commercial contract:<sup>8</sup>

... if he should choose to seek redress in the form of an action for breach of contract, he lets in all the consequences of that form of action: *Thorpe v. Thorpe*. One of the consequences, is, I think, that he is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept, and no more.

For Lord Atkinson, it would have been contrary to law to award damages for non-pecuniary loss in a commercial contract. It follows then that such damages could not be recovered in the event of the breach of an employment contract. The approach taken by the House of Lords in *Addis* to intangible injuries has, until recently, been scrupulously followed in Canada.

Once one moves away from the concept that all contracts are to be treated as essentially commercial in nature, and one is able to discriminate with some precision between differing types of contract, so also one can begin to discriminate between different types of damages. For a number of reasons which will be discussed in the body of this article, the commercial contract is no longer the appropriate model when dealing with the employer-employee relationship. Termination without cause can no longer be treated as an ordinary breach of a commercial contract. Quite apart from developments in the common law, legislation has already expanded significantly the obligations owed by the employer in the employment relationship.

### III. *Limitation on the Freedom of Contract.*

#### *Statutory Intervention.*

In the last third of the twentieth century we have witnessed what can only be described as a sweeping tide of legislative and regulatory activity that has cut across all segments of society and classes of human endeavour. In the area of the employer-employee relations, statutory intervention was viewed as socially and politically necessary. Other areas of law, such as landlord and tenant, and consumer rights, were removed from contract and subjected to regulation by

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<sup>8</sup> *Ibid.*, at p. 496.

legislation. The primary purpose of this legislation was to guarantee certain minimum standards of fairness. It was precisely these standards of fairness, which were not part of traditional contract theory, that required and received a high degree of credibility and enforceability as a result of this legislative intervention.

In the employment area, minimum standards of fairness are encouraged by both provincial and federal legislation dealing with such subjects as workmen's compensation, unemployment insurance, employment standards, compliance with human rights in the work place, and fair labour practices. It was felt that unorganized employees lacked sufficient power to establish fair contracts of employment. The commercial theory of contract assumed equality of bargaining position. It was precisely this equality that was lacking in the employment relationship.

The proliferation of legislation excluded the application of the law of contracts from many vital areas of contractual relationships. Legislation limited freedom of contract by importing a variety of terms into the contractual relationship that were considered necessary to protect the less powerful and to provide minimum standards of fairness. Conceptions of social duty were translated into legislation enacted in order to ensure compliance with those duties.

#### *Judicial Intervention.*

The legislative desire to provide minimum standards of fairness in certain contractual relationships has, to some extent, been accompanied by a similar sentiment of the courts. Even in the areas of commercial contract adjudication, the courts have shown more willingness to scrutinize the contractual relationship, and, where necessary, encourage compliance with certain standards of fairness. Courts have begun to utilize the concepts of "implied terms" and "fundamental breach" as mechanisms for introducing fairness into contractual bargains. While the courts have continued to show a reluctance to re-write the contract itself, and are still largely influenced by the view that their purpose is to give effect to the contractual intention as expressed by the parties, one can detect subtle conceptual shifts which indicate a growing judicial willingness to approach the law of contracts with more sensitivity to the equities involved.

Courts have begun to use the device of "implied terms" to rein in, and mitigate against inherent unfairness of particular contractual bargains. Whereas in the nineteenth century a contractual term would only be implied where it was either clear from the contract that the parties had simply neglected to express this intention in their agreement or where it was a matter of necessity to imply such a term in order to give effect to such an intention, recent cases suggest a desire on the

part of the courts to use implied terms where they feel it would be reasonable and just to do so. Thus, in a decision of Lord Denning dealing with the question of implied terms, we find the following statement:<sup>9</sup>

And, if they (implied terms) are necessary to do justice, I think we should introduce them. It is a legitimate way of getting round the bad interpretation of the past.

Operating from a similar premise, namely the desire to infuse certain minimum standards of fairness into contractual arrangements, the courts have advanced the doctrine of "fundamental breach". Thus, notwithstanding the presence of an exemption clause contained within the contract which would otherwise limit the liability of the defaulting party, the courts have taken the view that where there has been a "fundamental" breach in the contract, the exclusionary provision will not apply.<sup>10</sup>

By utilizing the concept of fundamental breach, the courts are able to ignore a clause contained in the contract that would otherwise limit liability against the defaulting party. Such an approach is obviously at odds with the nineteenth century strict constructionist school of thought, given that the parties have freely expressed their intention as to what consequences, in terms of liabilities, should flow in the event of a breach.

In the realm of damages, the English case of *H. Parsons (Livestock) Ltd v. Uttley Ingham & Co. Ltd*<sup>11</sup> suggests a tendency to expand the scope of liability and to narrow the distinction between damages in tort and damages in contract. In that case, the plaintiffs had purchased a large storage hopper from the defendants for the purpose of storing pig nuts to be fed to their herd of pigs. This intention was known to the defendants. When the defendants installed the storage hopper, they failed to ensure that the ventilator located at the top of the structure was open. This failure led to the pig nuts going mouldy. The pigs developed an intestinal infection with the result that many of them died. The issue that was dealt with by the Court of Appeal was whether it was within the reasonable contemplation of the defendants that the feeding of mouldy pig nuts could have resulted in such damage. Lord Denning made the following remarks:<sup>12</sup>

Remoteness of damage is beyond doubt a question of law. In *The Heron II, Koufos v. C. Czarnikow, Ltd*, the House of Lords said that in remoteness of damage, there

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<sup>9</sup> *Federal Commerce and Navigation Co. Ltd v. Trades Exports S.A.*, [1977] 2 All E.R. 41, at p. 50 (C.A.).

<sup>10</sup> *Hong Kong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha*, [1962] 1 All E.R. 474 (C.A.).

<sup>11</sup> [1978] 1 All E.R. 525 (C.A.).

<sup>12</sup> *Ibid.*, at p. 531.

is a difference between contract and tort. In the breach of a contract, the Court has to consider whether the consequences were of such a kind that a reasonable man, at the time of making the contract would contemplate them as being of a very substantial degree of probability. . . . In the case of a tort, the Court has to consider whether the consequences were of such a kind that a reasonable man at the time of the tort committed, would foresee them as being of a much lower degree of probability. . . . I find it difficult to apply those principles universally to all cases of contract or to all cases of tort, and to draw a distinction between what a man "contemplates" and what he "foresees", I soon begin to get out of my depth. I cannot swim in the sea of semantic exercises to say nothing of the different degrees of probability especially when the cause of action can be laid either in contract or in tort.

Similarly, Lord Justice Scarman remarked:<sup>13</sup>

My conclusion in the present case is the same as that of Lord Denning, M.R. but I reach it by a different route. I would dismiss the appeal. I agree with him in thinking it absurd that the test of remoteness of damage should, in principle, differ according to the legal classification of the cause of action, though one must recognize that parties to a contract have the right to agree on a measure of damages which may be greater or less than the law would offer in the absence of agreement. I also agree with him in thinking that, notwithstanding the interpretation put on some dicta in *The Heron II, Koufos v. C. Czarnikow, Ltd.*, the law is not so absurd as to differentiate between contract and tort save in situations where the agreement, or the factual relationship, of the parties with each other requires it in the interest of justice.

The *Parsons* case is instructive because it demonstrates a judicial willingness to override the sharp distinction that had been drawn between damages available in tort and damages in contract. Once the distinction becomes less relevant, then the analysis that has developed in tort becomes more easily applicable to the adjudication of contract disputes.

#### IV. Expanding Contracts.

At the same time that the courts have shown a willingness to restrict the application of the "old view" of contract law by scrutinizing agreements for fairness, the courts have also demonstrated a willingness to free themselves from the constraints imposed by treating the commercial contract as the standard or model against which *all* contracts are to be read. The courts have begun to differentiate, at least by implication, between differing types of contracts, with the result that they have treated non-commercial contracts differently than they would otherwise have treated a truly commercial contract. The cases that most readily come to mind in this regard are the so called holiday cases, notably *Jarvis v. Swan Tours Ltd*<sup>14</sup> and *Newell et al. v. Canadian Pacific Airlines Ltd.*<sup>15</sup>

<sup>13</sup> *Ibid.*, at p. 535.

<sup>14</sup> [1973] 1 All E.R. 71 (C.A.).

<sup>15</sup> (1976), 14 O.R. (2d) 752 (Co. Ct).



In *Jarvis*, Lord Denning considered the circumstances surrounding the rather traumatic effect of an unpleasant and disappointing vacation on an English solicitor. The solicitor had purchased a holiday package on the strength of a brochure which promised a wonderful Swiss holiday at a fine resort. The brochure advised that the hosts at the Swiss resort spoke English, a welcome party would meet the traveller on arrival, afternoon tea and cake would be served for seven days, a Swiss dinner would be served by candle light, and in addition there would be a fondue party and an evening of entertainment with an honest-to-goodness yodler.

Things did not work out well for Mr. Jarvis. Instead of the promised parties, he found himself in the second week of his vacation the only person staying at the inn. Lord Denning said:<sup>16</sup>

Mr. Weibel could not speak English. So there was Mr. Jarvis, in the second week, in this hotel, with no houseparty at all, and no one could speak English except himself. He was very disappointed, too, with the skiing. It was some distance away at Giswil. There were no ordinary length skis. There were only mini-skis, about 3 ft. long. So he did not get his skiing as he wanted to. In the second week he did get some longer skis for a couple of days, but then, because of the boots, his feet got rubbed and he could not continue even with the long skis. So his skiing holiday, from his point of view, was pretty well ruined.

There were many other matters, too. They appear trivial when they were set down in writing, but I have no doubt they loomed large in Mr. Jarvis' mind, when coupled with the other disappointments. He did not have the nice Swiss cakes which he was hoping for. The only cakes for tea were potato crisps and little dry nut cakes. The yodler evening consisted of one man from the locality who came in his working clothes for a little while, and sang four or five songs very quickly.

Turning to the question of damages, Lord Denning gave consideration to several cases which precluded damages for mental distress where a contract was involved, and commented:<sup>17</sup>

I think that those limitations are out of date. 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.

*Jarvis* is revolutionary in that it represents a clear attempt to characterize the holiday contract as being different than the ordinary commercial contract. A contract for a holiday has as its purpose the objective of providing some form of relaxation. By failing to provide that relaxation, the defaulting party should be liable for mental distress given the foreseeability of that result.

*Jarvis* was applied in Ontario in a recent County Court decision of Judge Stephen Borins, *Newell et al. v. Canadian Pacific Airlines*,

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<sup>16</sup> *Supra*, footnote 14, at p. 73.

<sup>17</sup> *Ibid.*, at p. 74.

*Ltd.*<sup>18</sup> That case involved an elderly couple who purchased tickets to fly from Toronto to Mexico. The plaintiffs wanted to take their two pet dogs with them on their flight. The dogs were named Bon Bon and Patachou. The plaintiffs were so concerned about the safety of their dogs that they offered to purchase the entire first class section of the aircraft so that the dogs could be with them on their flight to Mexico. The defendant rejected this offer, advising the plaintiffs that the dogs would be well looked after and would arrive in "first class condition" if they were placed in the cargo compartment of the aircraft. Judge Borins describes what occurred upon the arrival of the flight in Mexico City.<sup>19</sup>

Unfortunately, when the flight arrived in Mexico City, it was found that Bon Bon had died and that Patachou was in a comatose state. With the cooperation of the defendant's representatives in Mexico City, medical aid was obtained for Patachou. For the next 48 hours the plaintiffs took turns administering oxygen to Patachou and it would appear that this saved his life.

Judge Borins found that the tragic death of Bon Bon and the illness of Patachou resulted from carbon dioxide poisoning. Evidently, the dogs had been placed beside a shipment of vaccine that was stored in dry ice. As the dry ice thawed, carbon dioxide was emitted resulting in serious injury to the dogs.

In their action against Canadian Pacific Airlines, a claim was made for damages for mental distress caused by the death and illness of their dogs. In his reasons for judgment, Judge Borins made the following remarks:<sup>20</sup>

It is clear that in England the rule in *Hadley v. Baxendale*, *supra*, permits a plaintiff to recover damages in a proper case where in the contemplation of the parties, vexation, frustration and distress are likely to result and do in fact result from a breach of contract. On the facts of the case before me it was, in my opinion, clear to the defendant from the obvious concern of the plaintiffs, with respect to the welfare of their pets that should anything happen to them, this would likely cause the plaintiffs vexation, frustration and distress. On the evidence it is very clear that the special circumstances of this case were brought home to the defendant at the time it entered into the contract with the plaintiffs. Thus, damages to the plaintiffs' health, anguish, unhappiness and inconvenience were a reasonably foreseeable consequence of the defendant's breach of contract.

Judge Borins also dealt with the problem of the commercial contract.<sup>21</sup>

To the extent that one conceptualizes damages for breach of contract in terms of commercial losses only, there can be little quarrel with the proposition that, in ordinary commercial settings, only commercial losses are as a rule within the contemplation of the parties as a likely consequence of breach and so bargained for

<sup>18</sup> *Supra*, footnote 15.

<sup>19</sup> *Ibid.*, at p. 754.

<sup>20</sup> *Ibid.*, at p. 767.

<sup>21</sup> *Ibid.*, at p. 769.

within the *Hadley v. Baxendale* test. Prior to the decision in *Jarvis v. Swan Tours Ltd* the cases exhibited a very narrow view with respect to the recovery of nonpecuniary damages. *Addis v. Gramophone Co., Ltd.*, [1909] A.C. 488—a case that was passed over rather lightly by Lawson, J., in *Cox v. Philips Industries Ltd*, [1976] 3 All E.R. 161—was generally regarded as authority for the proposition that injury to feelings and other non-material loss is never compensable in actions for breach of contract. . . . In my respectful opinion when Lord Denning, M.R., stated in the *Jarvis* case that “in a proper case damages for mental distress can be recovered in contract” he was equating “proper case” with the *Hadley v. Baxendale* test—it was in the reasonable contemplation of the parties that if the defendant failed to provide what it had promised, the plaintiff might sustain disappointment, distress, upset and frustration.

Judge Borins took the view that damages for mental distress are not limited to the “spoiled holiday cases”. Support for this proposition is made by way of reference to *Heywood v. Wellers*,<sup>22</sup> and *Cox v. Philips Industries Ltd*.<sup>23</sup>

In *Heywood v. Wellers* the plaintiff had retained a firm of solicitors named Wellers, in order to obtain an injunction keeping her former boyfriend from molesting her. It was found by the court that her solicitors were negligent in the conduct of the litigation having failed to enforce the injunction by bringing the former boyfriend before the court. As a result of this failure to enforce the injunction, the plaintiff was molested on two subsequent occasions by her former boyfriend and alleged that she suffered mental distress.

In finding for the plaintiff, Lord Denning fitted this case within a *Jarvis v. Swan Tours* style analysis, commenting:<sup>24</sup>

So here, Mrs. Heywood employed the solicitors to take proceedings at law to protect her from molestation by Mr. Marrion. They were under a duty by contract to use reasonable care. Owing to their want of care she was molested by this man on three or four occasions. This molestation caused her much mental distress and upset. It must have been in their contemplation that, if they failed in their duty, she might be further molested and suffer much upset and distress. This damage she suffered was within their contemplation within the rule in *Hadley v. Baxendale*. . . . Counsel for the solicitors urged that damages for mental distress were not recoverable. He relied on *Groom v. Crocker*, [1938] 2 All E.R. 394 and *Cook v. S.* [1967] 1 All E.R. 299. . . . In any case they were different from this. Here Wellers were employed to protect her from molestation causing mental distress—and should be responsible in damages for their failure.

*Cox v. Philips Industries Ltd*<sup>25</sup> is important for it removes the mental distress head of damages from the limitation imposed by the “spoiled holiday” cases. In that case the plaintiff was offered a better position by his employer in order to prevent him from accepting an offer of employment that had been made by a competing company.

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<sup>22</sup> [1976] 1 All E.R. 300 (C.A.).

<sup>23</sup> [1976] 3 All E.R. 161 (Q.B.).

<sup>24</sup> *Supra*, footnote 22, at p. 306.

<sup>25</sup> *Supra*, footnote 23.

Notwithstanding the offer that his employer had put to him whereby he would be given a better position and a higher salary, he subsequently found himself demoted to a position involving less responsibility and the same salary. It was found that as a consequence of his demotion, he suffered mental distress. Mr. Justice Lawson made these remarks with respect to the issue of mental distress:<sup>26</sup>

I now come back to this question of the breach of the contractual term which I find took place when he was relegated to a position of lesser responsibility. I have already said his salary remained the same but there is not the slightest doubt in my mind that the result of this relegation in breach of contract, contrary to the promise that the defendants had made, did expose him to a good deal of depression, vexation and frustration and indeed led to ill health. The question is: can I give him damages in respect of those matters for that breach of contract? . . . In my judgment, this is a case where it was in all the circumstances in the contemplation of the parties that, if that promise of a position of greater responsibility was breached, then the effect of that breach would be to expose the plaintiff to the degree of vexation, frustration and distress which he in fact underwent. . . . 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.

All of these cases involving awards for mental distress indicate a willingness on the part of the court to side-step the objections raised by Lord Atkinson in the *Addis v. Gramophone*<sup>27</sup> and to look more carefully at the nature of the contractual relationship between the parties. In doing so, the courts are taking a more expansive view of the nature of the contractual relationship. Once the courts indicate a willingness to take a broader approach as to the nature of the contractual relationship, then the objections raised by Lord Atkinson in *Addis v. Gramophone* lose their persuasiveness. Depending on the nature of the contract, the argument for commercial certainty may well be superseded by the argument for fairness.

#### V. *The Meaning of Pilon v. Peugeot Canada Ltd.*<sup>28</sup>

It is against the backdrop of this evolution in judicial flexibility that *Pilon v. Peugeot Canada Ltd* can most easily be analyzed. Mr. Pilon was an auto mechanic who worked for the Peugeot company for seventeen years, prior to his dismissal. He was forty-two years of age at the time of his dismissal and a regional service manager with the company. The court described Mr. Pilon as a "company man", devoted and loyal to Peugeot. The plaintiff brought a claim for wrongful dismissal following his termination from the employment of Peugeot and in his claim, sought compensation for damages suffered

<sup>26</sup> *Ibid.*, at p. 166.

<sup>27</sup> *Supra*, footnote 5.

<sup>28</sup> (1980), 29 O.R. (2d) 711 (H.C.).

by reason of the failure of Peugeot to give Pilon reasonable notice. Pilon's damages with respect to reasonable notice were minimal given that he was able to find a new position almost immediately after his dismissal. The substance of the damage claim was based on the mental distress suffered by Mr. Pilon as a result of the breach of his contract of employment by Peugeot.

In dealing with the claim for mental distress, Mr. Justice Galligan of the Ontario Supreme Court made reference to *Newell v. Canadian Pacific Airlines*,<sup>29</sup> and the principles articulated by Judge Borins in that decision were applied. Having established the proposition that damages for mental distress can be awarded in a contract action, Galligan J. turned to the contract in question, commenting:<sup>30</sup>

I turn therefore to consider what must have been within the contemplation of these parties. The relationship between Pilon and Peugeot in some important respects was not a normal master-and-servant relationship. The evidence convinces me of certain things. Peugeot encouraged its employees to feel that they were part of a family in which management was a father-figure. Long-term employees in positions of responsibility, such as Mr. Pilon, were paid less than the going rate in the industry for comparable jobs and in return were told that they have life-time security. Pilon accepted that assurance and relied upon it.

The court held that Mr. Pilon was entitled to claim damages for mental distress and allowed him an award of \$7,500.00 under that head of damage. Mr. Justice Galligan then turned to the claim advanced on behalf of the plaintiff that an award be made for exemplary damages given the manner of termination, stating:<sup>31</sup>

In assessing damages, I keep in mind what was said by Trainor J., in *Dignan v. Viceroy Construction Co. Ltd.*, unreported decision December 18, 1979 [summarized 1 A.C.W.S. (2d) 42], at p. 16:

"Vindictive damages are not to be awarded even in a case such as this, where the firing was accomplished in a high-handed arbitrary and insulting fashion."

The damages which I assess are not, and do not include any award for exemplary or vindictive damages for the discharge itself, or the manner thereof. These damages are solely in compensation for the mental distress caused to the plaintiff by the defendant's breach of contract. I think that the conduct of the defendant and the method used by it in callously, suddenly, and arbitrarily firing a long-devoted, loyal servant, aggravated the mental distress which the defendant's breach of contract caused the plaintiff. Its method of firing increased the distress and in that sense and only in that sense, do I consider the callous conduct of the defendant when I assess the plaintiff's damages for mental distress.

When we put *Pilon* in the context of recent developments in the common law of contracts, it becomes apparent that this case reflects an underlying shift in the law. As previously pointed out, the courts

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<sup>29</sup> *Supra*, footnote 15.

<sup>30</sup> *Supra*, footnote 28, at p. 715.

<sup>31</sup> *Ibid.*, at p. 716.

have demonstrated a willingness to disassociate their analysis of contracts from a strict application of remedies available to parties to ordinary commercial contracts. In doing so, the courts are more willing to take a broad view of the *Hadley v. Baxendale* test, linking the concept of "reasonable contemplation of the parties" to the concept of foreseeability. In this context then, the result in *Pilon* is hardly an "aberration". It represents an important step in the application of developing contract principles to the area of employment relationships.

#### VI. *Future Prospects for Damage Awards in Wrongful Dismissal Actions.*

Although Mr. Justice Galligan was prepared in *Pilon* to give an award for mental distress, he rejected any claim for exemplary damages or for damages flowing from the fact that Mr. Pilon had lost the opportunity to enhance his reputation in the foreign car field. Should courts grant exemplary damages in wrongful dismissal actions? The answer to this question turns on issues which take us beyond consideration of whether the commercial contract model should apply to limit remedies in wrongful dismissal actions. It is well settled, that the purpose to be served in damage awards in contract actions is compensation for the loss suffered. Recent cases have extended the field of compensable loss, but the basic premise of compensation as the rationale of recovery has remained. A very different purpose is served in awarding punitive damages. Punitive damages are designed to punish defendants for acting in a high-handed and oppressive manner and to deter others from acting in a similar fashion. Conceptually, an award for punitive damages is analagous to a criminal law sanction. A useful definition of exemplary damages is found in *Halsbury's Laws of England*:<sup>32</sup>

Where the wounded feeling and injured pride of a plaintiff, or the misconduct of a defendant, may be taken into consideration, the principle of *restitutio in integrum* no longer applies. Damages are then awarded not merely to recompense the plaintiff for the loss he has sustained by reason of the defendant's wrongful act, but to punish the defendant in an exemplary manner, and vindicate the distinction between a wilful and an innocent wrongdoer. Such damages are said to be "at large", and, further, have been called exemplary, vindictive, penal, punitive, aggravated, or retributory. Except in the case of breach of promise of marriage exemplary damages cannot be awarded in an action for breach of contract, since the existence of misconduct cannot alter the rule by which the damages for breach of contract are assessed. Exemplary damages may, however, be awarded in an action for tort, as, for instance assault, conversion, trespass, negligence, nuisance, libel, slander, seduction, malicious prosecution, and false imprisonment. In order to justify the award of exemplary damages, it is not sufficient to show merely that the defendant has committed a wrongful act. The conduct of the defendant must be high-handed, insolent, vindictive, or malicious, showing a

<sup>32</sup> (3rd ed., 1955), Vol. 11, Damages, para. 391.

contempt of the plaintiff's right, or disregarding every principle which actuates the conduct of gentlemen.

In short, an award of punitive damages does nothing to compensate the plaintiff but rather is an admonishment given by the court to a defendant that his conduct is reprehensible. Difficulty in applying the concept of punitive damages to contract actions turns on the fact that the law of contract does not treat a breach of contract from the same viewpoint as it treats a breach of some duty or standard imposed by the law of torts. Parties to contracts are entitled to break their agreements. The judicial function in contract actions is to ensure that there is fair compensation as a result of the agreement that has been broken. In a tort action the wrongdoer has breached an obligation imposed by law. A tortfeasor is not like a contract breaker who can assess the economic costs of breaching his legal duties. Obligations imposed by the law of torts are meant to be adhered to and those who are in breach of these obligations will not be treated sympathetically.

Accordingly, this difference in how the law approaches the contract breaker as opposed to the tortfeasor presents a conceptual obstacle to allowing an award for exemplary damages in wrongful dismissal litigation. The approach adopted by the American Law Institute in its *Restatement Second on the Law of Contracts*<sup>33</sup> is instructive. At section 355 in the *Restatement* the following rule is set down:

Punitive damages are not recoverable from a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.

The rule set out in the *Restatement* acknowledges the fact that in cases where the conduct of the defendant is itself tortious, principles involving exemplary damages should govern.

Thus, in the case of wrongful dismissal actions, consideration should be given to the defendant's conduct to determine whether, quite apart from the breach of contract, the defendant has acted in a tortious manner. In order to advance this approach, some resolution will have to be achieved of the problems relating to actions which potentially sound in both contract and tort. The statement of Mr. Justice Pigeon in *J. Nunes Diamonds Ltd v. Dominion Electric Protection Co.*<sup>34</sup> presents considerable difficulty in that regard. In that case, Mr. Justice Pigeon stated that where the relationship between the parties is governed by a contract, unless any negligent act committed could be construed as "an independent tort" that was unconnected with the performance of that contract, then no claim in tort could be brought. That statement of the law would make it very difficult to commence an action in tort given that in all probability the tortious

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<sup>33</sup> (1981)

<sup>34</sup> (1972), 26 D.L.R. (3d) 699 (S.C.C.).

conduct would arise out of the contractual relationship between an employer and an employee.

It is suggested that when the approach taken by the Court of Appeal in the *Dominion Chain Co. Ltd v. Eastern Construction Co. Ltd*<sup>35</sup> is applied in the context of professional negligence litigation, it assists in resolving the difficulties presented by *Nunes Diamonds*. It will be remembered that in *Dominion Chain*, Jessup J.A., applied the concept of concurrent liability in both tort and contract. Accordingly, if this rationale can be applied to wrongful dismissal cases, then as long as the actions resulting in dismissal can be said to be tortious in nature, there may be concurrent liability in both tort and contract.

On the question of damages to reputation, the law was most recently stated by Mr. Justice Dupont in *McMinn v. Town of Oakville*.<sup>36</sup> The *McMinn* case involved an interlocutory application by the defendant to strike out a damage claim brought by the plaintiff for damages for loss of reputation in a wrongful dismissal action. Mr. Justice Dupont considered *Addis v. Gramophone*,<sup>37</sup> and having found that the case had not been overruled, then proceeded to apply it:<sup>38</sup>

It appears that the *Addis* decision governs the state of the law in this area. As a result, neither injured feelings nor an injured reputation can be added as a head of damage in an action for breach of contract. . . .

Dupont J. considered cases involving artists wherein a claim is allowed for the loss of opportunity to enhance one's reputation. Such cases stand for the proposition that enhancement of reputation is an integral part of the artistic contract, and therefore within the contemplation of the parties to the contract. Mr. Justice Dupont stated:<sup>39</sup>

In *Addis*, damages for injury to reputation was rejected because such a factor was not considered to be part of the contract and hence could not be combined with the pure breach of contract action before the Court. For this reason I do not think that the artist cases are an exception to the *Addis* rule, but rather a separate category of cases to be considered and applied in the appropriate fact situations.

With due respect to Dupont J., it is suggested that in reality there is no valid reason why the principle of enhancement or reputation should necessarily be restricted to artists. The analysis applied in the artist cases is really the very same analysis that was applied by the courts in the early mental distress cases. In *Jarvis v. Swan Tours*,<sup>40</sup> the contract was designed to give the plaintiff a relaxing and enjoyable holiday. In breaching the contract, it was foreseeable that the plaintiff

<sup>35</sup> (1976), 68 D.L.R. (3d) 385 (Ont C.A.).

<sup>36</sup> (1978), 19 O.R. (2d) 366 (H.C.).

<sup>37</sup> *Supra*, footnote 5.

<sup>38</sup> *Supra*, footnote 36, at p. 370.

<sup>39</sup> *Ibid.*, at p. 371.

<sup>40</sup> *Supra*, footnote 14.



would suffer some distress given the purpose of the contract. Accordingly, given the purpose of the contract, the result suffered by the plaintiff was foreseeable and within the contemplation of the parties at the time the contract was entered into. Similarly, in the artist cases, the purpose of the contract is, in part, to advance the artist's reputation. If that contract is broken, then it is foreseeable that that objective will not be fulfilled and accordingly the consequences of that breach are within the reasonable contemplation of the parties.

It is worth pointing out that it is a judge who determines what the parties ought reasonably to have contemplated on the basis of facts that subsequently come out at trial. To that extent, the judge is imposing a standard of fairness based on the equities as he finds them. The court will, under proper circumstances, impose a duty on the employer very much akin to the kinds of duties so familiar to us in tort.

#### VII. *Advocacy in Wrongful Dismissal Cases.*

There are several methods of analysis that can be advanced before a court in order to assist it in coming to terms with *Addis v. Gramophone*.<sup>41</sup>

The most useful method of analysis is the usual process of distinguishing cases on the facts. If your case has factual features which take it out of the usual stream of wrongful dismissal cases, then these facts should be accentuated and relied upon in order to distinguish it from *Addis* and thereby avoid its application. The judge's task will be made easier if he can be shown that he does not have to deal directly with the rules set down in *Addis* with respect to contract damages because your client's employment relationship was unlike that which prevails between contracting parties in a truly commercial contract.

A second approach is to place your case within the ambit of one of the most fundamental principles of contract law, namely the damage rule as set out in *Hadley v. Baxendale*.<sup>42</sup> Establish the proposition that the damage suffered by your client lay within the reasonable contemplation of the contracting parties. As we have seen, the *Hadley v. Baxendale* principle is capable of a subtle adjustment. At present, the *Hadley v. Baxendale* principle is being broadly applied. Attempt to draw your case within the shadow cast by the "reasonable contemplation" principle.

A third method of analysis is to look to the law of torts in order to expand the remedies available in the law of contract. From a juris-

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<sup>41</sup> *Supra*, footnote 5.

<sup>42</sup> *Supra*, footnote 2.

prudential point of view, we are in a situation that is similar to that faced by the medieval lawyer.

There are certain junctures in the development of legal thinking when two distinct categories of law begin to merge. Although we are not yet at the point of intersection, the law of contract and tort have begun to converge. Certain areas, such as the professional negligence cases, are coming to be the battle lines with the concurrent application of both contract and tort principles. A transformation in our legal thinking is taking place when we appropriate concepts from tort law, and introduce them into contract law. In introducing tort concepts into the law of contract, the law of contract undergoes a further expansion given the availability of remedies that were formerly only available in the law of torts. In *Pilon*<sup>43</sup> the argument was advanced on Mr. Pilon's behalf that during the course of his employment, Peugeot had made certain representations to him to the effect that he would have life-time security with the company. Pilon relied upon these statements. The law relating to reliance upon such statements comes directly from the law of torts. The tort analysis is invoked here in order to expand the limit of liability in the face of a breach of contract of employment.

Another method of analysis is to assist the court in implying terms into the contract of employment. By reviewing the employment relationship and the essentials of that relationship, as evidenced by conduct, the court may be encouraged to imply specific terms into the contract of employment. This will enable the court to decide the case on the basis of what it believes to be fair.

For example, the English Court of Appeal in *O'Brien and Others v. Associated Fire Alarms Ltd.*,<sup>44</sup> has given some clues as to when a term will be implied in a contract of employment. In that case, the plaintiffs were electricians who had been employed by a firm which supplied and installed fire and burglar alarms. The plaintiffs lived in an area that was close to their place of employment. During the course of their employment business fell off in their area, and the employer requested them to work in a location that was some 120 miles away from where they lived. Such a move would have necessitated that these plaintiffs move away from their homes during the week. The plaintiffs refused to take up employment in this new location, and were promptly dismissed.

Lord Denning dealt with whether there was an implied term in the contract of employment that would oblige the employees to take up employment in this new location. He ruled that the question of whether a term was to be implied was a question of law and not fact.

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<sup>43</sup> *Supra*, footnote 28.

<sup>44</sup> [1968] 1 W.L.R. 1916 (C.A.).

He held that the facts served to assist the court in determining whether a term should be implied. On the question of whether a term should be implied into the contract of employment in issue, Lord Denning ruled that no term requiring these employees to travel 120 miles to work could be implied given that they had worked from their homes for years. They could not be expected to travel long distances to work or to leave their families during the week. The only term that could be implied was that they should be employed within daily travelling distance of their homes.

Counsel, by marshalling the facts, may convince the court that the parties have so conducted themselves that the court can imply a term or terms into the contract of employment. The term implied imposes a legal duty upon the employer, the breach of which may constitute a breach of contract.

### VIII. *Some Preventive Medicine.*

From the employer's point of view, increasing common law remedies create a great measure of uncertainty in dealing with the prospect of dismissing an employee in the absence of cause. With the intrusion of tort-like remedies into the employment law area, the scope for damages has expanded and the means for assessing potential liability are less predictable than they once were. Accordingly, the best security that can be given to employers is a well-drafted contract of employment.

In drafting the contract of employment, efforts should be made to draw a contract that closely resembles a commercial contract. By drawing the contract of employment into the ambit of the ordinary commercial contract, the court will be less likely to scrutinize a contractual relationship with a view to establishing minimum standards of fair dealing. Assuming the parties are dealing on a footing of equality, the policy reasons that lie behind potential judicial intervention are minimized.

In drafting the contract, one must ensure that provision is made for a notice period in the event of termination. Having provided for a notice period, one should instruct the employer that in the event of termination he should comply with that notice requirement. It will be remembered that in *Pilon v. Peugeot Canada Ltd.*, Mr. Justice Galligan held that no claim for damages for mental distress would be actionable where the employer had not committed a breach of contract.<sup>45</sup>

I am careful to keep in mind that discharge from one's position is frequently the cause of mental distress to the employee. I am not suggesting that such distress is

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<sup>45</sup> *Supra*, footnote 28, at pp. 715-716.

actionable in all cases of termination. Had Peugeot discharged the plaintiff legally by giving him either 12 months' notice or payment in lieu thereof, I doubt that he would have any right to recovery, because there would have been no breach of contract. I think that the right to recover damages for mental distress is conditional upon their being an actionable breach of contract. If Peugeot had wished to avoid legal responsibility for damages for mental distress, which they must have contemplated as a result of the sudden termination of Pilon's employment, they ought to have discharged him lawfully by proper notice or payment in lieu thereof.

In providing for a notice period in the contract of employment, the employer is able to know precisely what the consequences will be of a decision to terminate the employment relationship. In the absence of a contract of employment, the employer might well give what he considers to be the minimum period of notice, and yet discover to his dismay that this is not considered to be adequate by the court. Once the court finds the notice period to be inadequate it may then, pursuant to *Pilon*, award damages for foreseeable injuries such as mental distress, if the evidence supports such a claim. Accordingly, if the parties can reach agreement as to the period of notice, and it can be established that such a bargain has been complied with in the event of termination, the employer is saved the risk of an award of damages for mental distress or any other intangible injuries suffered in consequence of the termination.

The employer should be advised that if he provides for a period of notice in the contract of employment and then proceeds to ignore it when he terminates the employment relationship, he will leave himself open to the claim that there has been a fundamental breach in the contract of employment and that accordingly the notice period provided in that contract is not applicable. Given the tendency of the courts to expand the notice period, the employer could be left in the position where the judge would choose to ignore the minimum notice period provided in the contract of employment and apply what he considers to be reasonable in all of the circumstances of the case. When drafting contracts of employment, you must ensure that your client is instructed as to the need for strict compliance with its terms. A well-drafted contract of employment which is complied with in the event of termination, should provide some insurance against the intrusion of common law remedies.

In the absence of a written contract of employment, the employers should be advised to create a written contract through the use of written memoranda which can be provided to the employee during the course of the employment relationship. These memoranda can relate to all aspects of the contract of employment so long as they are not construed as a unilateral repudiation of the existing employment relationship. The employer-client must be educated as to the protective nature of the contract of employment and how much it can be utilized to his advantage to exclude common law remedies.

There are a number of helpful hints which assist in reducing corporate exposure to costly litigation. Most of these hints relate primarily to helpful documentation of the employment relationship. This becomes even more critical today because of the enormous increase in wrongful dismissal litigation, and the impossibility of predicting without any degree of assurance the damages which now may flow from the breach of an employment contract. The common law is expanding contractual remedies by the process of putting a little new wine into some very old bottles.