Ken Martin QC

(Perth)

"Damages for mental distress arising out of contracts of carriage"

DAMAGES FOR MENTAL DISTRESS ARISING OUT OF CONTRACTS OF CARRIAGE

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--- 'The Tracks of my Tears' ---

Smokey Robinson and the Miracles (1965)

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Introduction

Hadley v Baxendale (1854)

1. It sometimes forgotten that the seminal common law decision *Hadley v Baxendale* (1854) 9 Ex 341; (156) ER 145, was a carriage case. It involved a defendant common carrier, who specialised in carrying goods between Gloucester (where the plaintiff's flour mill was located) and Greenwich (where W Joyce & Co, Engineers, who specialised in making new crankshafts suitable as replacement parts in steam engines, were located). In 1854, the carriage fee for a conveyance of a crankshaft from Gloucester to Greenwich was £2 4 shillings.

2. *Hadley v Baxendale* is of course the cornerstone contractual damages recovery case in most common law jurisdictions, setting out two cardinal rules applicable to assessing the foreseeability of loss and damage for breach of contract (see (156) ER 145 at 151, per Baron Alderson).

3. It will be remembered that the plaintiff mill owners, had been successful in a trial before Crompton J and a jury, at the Gloucester Assizes, obtaining damages for loss of profits, arising out of the failure of their chosen carriers to deliver the plaintiff's broken engine crankshaft to engineers at Greenwich, within a reasonable time. (The broken crankshaft was required to go to Greenwich so that a new replacement could be retooled by the engineers – in such a way that it fitted appropriately as a replacement for the presently dysfunctional steam engine and hence allow the flour mill to resume operations).

4. Instead of taking two days to deliver the broken crankshaft to Greenwich, the carriers for inexplicable reasons, took days longer, with the end result that the retooled replacement crankshaft was delayed in its arrival back at Gloucester by some five further days. The plaintiffs were seeking an award of £300 for the disruption and lost profits in their business – during the extra time that the mill was out of commission.

5. The carrier defendants appeared to accept some measure of responsibility before trial, by paying an amount of £25 into court in proffered satisfaction of the claim.

6. However, the plaintiffs were dissatisfied with £25 and pressed on to have their case heard before a jury, which after deliberation, delivered an award of a further £25 above the amount paid into court, ie £50 total.

7. An Appeal Court, after application to show cause, set aside the jury's award and ordered a new trial (the Appeal Court appearing to comprise Chief Baron Pollock and Barons Parke, Alderson and Martin). During the course of argument, see (156) ER 145 at 151, Baron Parke observed that the sensible rule appeared to him to be that laid down in France under the (Continental) Commercial Code, namely that:

> "The debtor is only liable for the damages foreseen, or which might have been foreseen, at the time of the execution of the contract, when it is not owing to his fraud that the agreement has been violated."

8. Albeit ordering a new trial, after setting out the now famous dual analysis of the common law rules applicable to foreseeability of damage for breach of contract, the Court made it plain that the plaintiffs would face an uphill battle to hold onto their £50 damages award:

> "It follows, therefore that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps would have made it a reasonable and natural consequence of such a breach of contract, communicated to or known by the defendants. The Judge, ought, therefore, to have told the jury, that, upon the facts before them, they ought not to take the loss of profits into consideration at all in estimating the damages."

Contemporary Carriage Exposures

9. It is sometimes postulated whether the same result (ie failure) would have been reached nowadays, had *Hadley v Baxendale* been litigated before a judge in the kinder and more sensitive climate of the 21st Century. Moreover, had the facts of *Hadley and Baxendale* been run today against a common carrier (putting limitation issues aside), would there not also have been a damages claim thrown in for inconvenience, annoyance or general vexation – arising out of the frustrations of poor delivery performance?

10. A "general rule" applicable to recovery of damages for non-pecuniary losses, both in Australia and in England, still seems to prefer the 19th Century disdain for contractual damages claims for non-pecuniary loss. Nevertheless, examination of the facts of some contemporary cases reaching trial in the 21st Century seems to confirm an observation of Lord Bingham of Cornhill in the House of Lords in *Johnson v Gorewood & Co* [2002] 2 AC 1 at 37 that, "some inroads" had been made against the general rule.

Baltic Shipping v Dillon

11. In Australia, the leading case authority in the area is the High Court of Australia's decision in *Baltic Shipping Co v Dillon* (1992-93) 176 CLR 344. Mrs Dillon had been a passenger aboard the *Mikhail Lermontov*, enjoying a 14 day cruise of the South Pacific. At 5.30pm on 16 February 1986, the tenth day of her cruise, the ship struck a rock and began to sink in Cook Strait. That evening, Mrs Dillon sustained minor injury, scrambling down a rope ladder from the sinking *Mikhail Lermontov*, into a life boat. She sued in the Admiralty Division of the Supreme Court of New South Wales for breach of contract. Whilst the case is important as a leading restitution authority, it also reaffirmed for Australia the "general rule", that damages for disappointment and distress are not recoverable – unless they proceed from physical inconvenience caused by the breach of contract, or unless the contract is, in its very object – directed towards providing enjoyment, relaxation or freedom against molestation.

12. Part of Mrs Dillon's overall award of damages at first instance (in aggregate $51,396) was an amount of $5,000 – as compensation for her overall disappointment and distress caused during her holiday. Mrs Dillon succeeded in obtaining her $5,000 award on the basis that the very object of her contract had been to provide her and her husband with pleasure and relaxation (see Mason CJ at [363], Brennan J at [370] to [371], Deane and Dawson JJ at [381] and McHugh J at [405]).

13. She succeeded in defending her entitlement to that damages sum of $5,000 in two successive appeals brought against her by Baltic Shipping Co.

14. In the course of delivering his reasons for judgment in the High Court, Mason CJ, (with whom Toohey and Gaudron JJ agreed) said for Australia, after reviewing the leading English authorities, including *Addis v Gramophone Co Ltd* [1909] AC 488, that:

> "The general rule that damages for anxiety, disappointment and distress are not recoverable in actions for breach of contract is, in any event, subject to exceptions to which I shall refer."

15. Mason CJ then proceeded, between pages 362 and 366, to identify five areas of exception to the general rule, namely:

    1. Damages for injured feelings in actions for damages for breach of promise of marriage.

    2. Damages for pain and suffering, including mental suffering and anxiety, where the plaintiff's breach of contract causes physical injury to the plaintiff.

    3. Cases of compensation for the physical inconvenience suffered by the plaintiff in certain circumstances such as where a train does not carry a passenger to a stipulated destination.

4. Where there is an element of subjective mental suffering associated with the plaintiff sustaining physical inconvenience as a result of a breach of contract and the mental suffering is directly related to that physical inconvenience.

5. Damages for distress, vexation and frustration can be recovered where the very object of the contract has been to provide for pleasure, relaxation or freedom from molestation.

16. Mrs Dillon succeeded as to her $5,000 damages award on the basis of exception 5.

17. A significant conceptual basis for the general rule against such damages, is acknowledged as being the decision in *Hadley v Baxendale* (per Mason CJ at 363-364).

England and Wales

18. In England, the position is similar. The leading case is the House of Lords' decision in *Addis v Gramophone Co Ltd* [1909] AC 488, which was relatively recently reaffirmed by the House of Lords in *Johnson v Gorewood & Co* [2002] 2 AC 1. There, Lord Cooke of Thorndon at 49, who was dissenting in the result, said somewhat bluntly, that contract breaking is an:

> "incident of commercial life which players in the game are expected to meet with mental fortitude."

19. *Johnson v Gorewood* was a case where damages for mental distress and anxiety were pursued as a result of exposure to a protracted litigation process to which the plaintiff had been subjected – resulting in extreme financial embarrassment and a deterioration in his family relationships particularly with his wife and son.

20. Lord Bingham of Cornhill noted that "some inroads" see [2002] 2 AC 1 at page 37, had been made against the general rule that damages for breach of contract cannot include damages for mental distress. However, those inroads remain very limited (see generally the essay, "Damages for Non-Pecuniary Distress" by McKendrick and Worthington, published as Chapter 13 in "Comparative Remedies for Breach of Contract" by Cohen & McKendrick; Oxford and Portland Oregon (2005)).

West Australian 'inroads' Against the General Rule

21. The inroads made in Australia are highlighted in a recent decision of the WA Court of Appeal in *Thorpe v Lochel* [2005] WASC 85; (2005) 31 WAR 500 which has some factual similarities to *Johnson v Gorewood*. The Lochels had sued their first solicitor, Mr Thorpe, for negligence and neglect over time in respect of his handling of litigation arising out of the unsuccessful efforts of the Lochels to settle a sale of their outer Perth property. The purchaser had

refused to settle. In the end, default notices had issued. Numerous controversies arose about the validity of default notices and a myriad of other issues, involving entitlement to specific performance, damages and the like. The case dragged on. The first solicitor was sacked and joined as a third party – in case the Lochels lost – as they did. However, the loss sharing tactic was successful.

22. The trial judge McLure J (as she then was) found in the third party proceedings, that the Lochels first solicitor, Thorpe had been negligent in his conduct of the Lochels file over time. Applying *Baltic Shipping* (see her first instance reasons at [2004] WASC 61) she nevertheless found it appropriate, under exceptions 3 and 4 to the general rule, to make a joint award of $30,000 to Mr and Mrs Lochel for "physical inconvenience, discomfort and associated mental distress (first instance reasons para [275D]). The Lochels had actually sought a $100,000 damages (reasons para [261]).

23. The relevant physical and inconvenience appeared to be two-fold. First was the Lochels need to make an economy class plane flight back to Perth from Germany, by reason of the delays in litigation occasioning physical inconvenience, discomfort and consequential mental distress. Second was their need to move to rented accommodation after selling their remaining house to fund the protracted litigation.

24. Whilst Mr Lochel did not give evidence at the trial, the trial judge found he had started to become withdrawn and moody, then became more withdrawn, had panic attacks and started to become aggressive, in about 2001. The physical inconvenience and discomfort was chiefly based upon the exposure to the drawn out legal proceedings (see reasons at [266]).

25. However, the $30,000 damages award was reversed on appeal, by a bare majority of 2/1. Pullin JA at reasons [152] identified the two matters that underlay the award of $30,000 damages:

> "These two matters, ie the inconvenience of returning to Perth from Germany and the inconvenience of having to shift from their existing property into rented accommodation, were the foundation for the award of $30,000."

Pullin JA said at [153]:

> "... a plane journey is not in my opinion an event which can be categorised as 'physical inconvenience' warranting an award of damages."

26. Furthermore, an award of damages for physical inconvenience – based upon living in rented accommodation was not justified – distinguishing the English case of *Bailey v Bullock* [1950] 2 All ER 1167; see reasons of Pullin JA [154].

Pullin JA concluded at [157]:

> "Finally, the 'physical inconvenience' of living in rented accommodation does not satisfy the requirements of either limb of *Hadley v Baxendale* insofar as a claim is based in breach of contract. It is also too remote to be compensable in tort for breach of the duty to act with reasonable care in relation to the settlement of the contracts and termination of the contracts."

27. Roberts-Smith JA at [41] agreed with Pullin JA's analysis, allowing the appeal on this damages issue.

28. However, Steytler P (dissenting on this issue) would have upheld the $30,000 award, even though Mr Lochel did not give evidence at the trial. The President was prepared to conclude, see reasons [36], that it:

> "sufficiently appeared from Mrs Lochel's evidence that she and her husband suffered from stress and anxiety as a direct result of each of the aspects of physical inconvenience to which they have been subjected."

29. More recently in *Nouvelle Homes v G & M Smargiassi* [2008] WASC 127 Beech J refused to allow leave to appeal against an arbitrator's award of damages for distress and inconvenience, in circumstances associated with the breach of a building contract – following the Victorian Court of Appeal in *Boncristiano v Lohmann* [1988] 4 VR 82 at 94-95, see Beech J at [80] and [81]. The award was $32,000 in respect of distress and inconvenience in respect of the adults as owners and their two children of $25,000 to the owners and $7,000 in respect of the two children. Beech J did not set aside the award of $7,000 in respect of the children, albeit making some negative observations as to its legitimacy, see reasons [102] and [103]. The case involved an application for leave to appeal against an arbitrator's decision and that aspect of that case alone did not warrant a grant of leave, see reasons [104].

30. Finally as regards England, Wales and Australia, I make mention of the facts of three seminal English cases which are mentioned in *Baltic Shipping v Dillon*, but which repay a deeper factual analysis from a policy perspective of reviewing the modern day receptiveness to 'tear-jerker' breach claims.

Hamlin's Case (1856)

31. First is the decision in *Hamlin v The Great Northern Railway Company* (1856) 1 H&N 408; 156 ER 1261. In *Hamlin's case* in (1856), a master tailor had taken a ticket to go by railway from London to Hull. When he arrived at Grimsby en route, there was no train to take him on to Hull that same night, as had been represented. Accordingly, he had to stay overnight at Grimsby and then pay a further fare of 1 shilling and 4 pence to make the morning train to Hull. As a consequence he suffered delay and missed appointments with his

customers at Driffield, his ultimate destination in a journey extended he said by an unnecessary eight further days!

32. However, his claim for damages failed in respect of his economic loss of profit, did although he receive nominal damages – in respect of his additional fare from Great Grimsby to Hull and "perhaps" the cost of his bed at Grimsby. The 1854 decision in *Hadley v Baxendale* was influential to the outcome. Having suffered the directed verdict result from his jury trial before Baron Martin at the Middlesex Sittings, Mr Hamlin then moved for a new trial – being dissatisfied with that directed verdict of 5 shillings. He failed again on appeal, with Chief Baron Pollock saying:

> "... the plaintiff is entitled to recover whatever damages naturally result from the breach of the contract, but not damages for the disappointment of mind occasioned by the breach of contract."

The Guano WAR's Case; Burton v Pinkerton (1867)

33. Eleven years later, the decision in *Burton v Pinkerton* (1867) Vol II LR Ex Ch 340 represents a high watermark of failure by a plaintiff in respect of not holding onto a jury award.

34. Mr Burton had been a seaman aboard the merchant ship the *Thames* in 1866, signing-on to work for 12 months on voyages from London to Rio de Janeiro and to other exotic ports of the new world. However, he became trepidatous when the *Thames* changed its merchant character and began to supply coal and ammunition to two Peruvian war steamers in a naval war between Peru and Spain, known as the first Guano War of 1865-66, and was acting under orders of the Peruvian Government.

35. As part of the Guano War, Spain essentially had been blockading by its navy, the Chilean port of Valparaiso, as well as the Peruvian port of Callao. A naval war ensued.

36. When the *Thames* reached Rio, an unhappy Mr Burton left his ship and went to see the British Consul. He wanted to complain about the increased perils he had been exposed to by being dragged without consent into the war between Spain and Peru, even though the ship Master, Captain Pinkerton offered to pay an extra £1 per week! Britain incidentally remained neutral in the conflict.

37. This change of character from merchant ship to supply ship in naval war, was plainly in breach of Mr Burton's contract of service. Unfortunately Mr Burton was arrested in Rio as a suspected Peruvian deserter, and was thrown into jail for some 10 days. Whilst languishing in prison in Rio, the *Thames* sailed away, taking with it his clothes and his tools.

38. Upon his return to England, Mr Burton sued for damages for breach of contract. He was successful, before a jury directed by Chief Baron Kelly. He

received £12 10 shillings for loss of wages, £20 for loss of clothes and £30 for general damages for imprisonment and otherwise.

39. Kelly CB not only presided at trial but (somehow?) also sat on the appeal by the Solicitor General brought against his allegedly misdirected verdict. On the appeal, Kelly CB appears to have expressed divergent views over the issue, first against Mr Pinkerton, but later in his favour.

40. See first, page 348, where Kelly CB said:

> "I am, therefore, of opinion that there should be no rule, **except to reduce the damages in respect of the loss of clothes and of the imprisonment of the plaintiff**;"
>
> [my emphasis in bold]

41. Baron Bramwell dissenting at 348, strongly disagreed, albeit invoking terminology legendary for its 19th Century politeness. Bramwell B said as regards the decision:

> "I am not prepared to say that the Lord Chief Baron (ie Kelly CB) was wrong at trial, but I am not satisfied he was right".

42. However, Mr Burton in turn was dissatisfied over loss of his £30 damages for his imprisonment and £20 for his clothes, and so, he then appealed.

43. This time, Baron Bramwell was in the majority (with fellow Barons Martin and Channell). Baron Martin said:

> "In respect of his imprisonment and loss of clothes, he is, in my opinion entitled to nothing. The defendant was not immediately concerned in causing either the loss of one or other. Damages for breach of contract must be the direct consequence of the breach; and in this case these two items are too remote for it to be recoverable."

44. It was noteworthy that Chief Baron Kelly, now reverted to type, this time by dissent, and strongly defending his original directions to the jury, as regards damages for imprisonment and loss of clothes. He said at 351:

> "And as the danger would be greater if he had been obliged to land on a desolate island, without food or clothing, and among savages, than if he had been left in a town where, at a small expense, he could be well provided for, so I thought the jury might consider the difference between his being left in a place of security against all but ordinary risks and inconveniences and his finding himself at Rio exposed to the consequences of his having belonged to a vessel engaged in the hostilities being carried out between Peru and Spain ..."

Hobbs (1875)

45. The last venerable English case in the trilogy is *Hobbs and Wife v The London and South Western Railway Company* (1875) 10 LR QB 111, where a man, purchased tickets from Wimbledon to Hampton Court by the midnight train for himself, his wife and their two small children. However, instead of going to Hampton, the train instead travelled to Esher, ie away from Hampton, and stopped there. The plaintiff could not obtain a carriage as between Esher and the family home. Nor could they find accommodation at an inn at Hampton. Accordingly, they were forced to walk for over three hours all the way from Esher to their home at Hampton in the middle of the night, a distance of between 4 and 5 miles, where they arrived at 3 in the morning. It was a cold and drizzling night. Mrs Hobbs caught cold. She was laid up for some time and could not assist her husband in his business. Medical expenses were incurred for her.

46. At a trial, again before Chief Baron Kelly and a jury, the Hobbs obtained an award of £28, being £8 for physical inconvenience suffered on the long walk home, and £20 for the wife's illness and its consequences. On appeal however, only the £8 award for physical inconvenience, was upheld.

47. As regards the lost £20, Cockburn CJ said, at 118:

> "Here, I think, it cannot be said that catching cold by the plaintiff's wife is the immediate and necessary effect of the breach of contract, or was one which could fairly said to have been in the contemplation of the parties ... So far as the inconvenience of the walk home is concerned, that must be taken to be reasonably within the contemplation of the parties; because if a carrier engages to put a person down at a given place, and does not put them down there, but puts him down somewhere else, it must be in the contemplation of everybody that the passenger put down at the wrong place must get to the place of his destination somehow or other. ... But in this case the wife's cold and its consequences cannot stand upon the same footing as the personal inconvenience arising from the additional distance which the plaintiffs had to go."

19th Century Perspectives of England and Australia

48. The Courts of the 19th Century, it must be said, seem to have expected a more significant degree of fortitude against unexpected adversity by plaintiffs, or at least English and Australian Courts used to!

49. I turn now to look at some case authority from the other side of the Atlantic. I am very grateful to my pupil at Francis Burt Chambers GiGi Visscher, for her assistance in locating these materials.

American Distress

50. I had expected to find a litany of outrageous jury award cases from the United States of America, home of the McDonald's Coffee Case, in which a jury awarded $2.86 million to a woman who burned herself with hot McDonald's coffee in the drive thru. [The trial judge reduced the total award to US$640,000].

51. It appears however that US companies engaged in contracts of carriage have by various means, formed such formidable lobby groups that they have effectively managed to thwart outrageous jury awards, including for mental distress.

Athens Convention

52. Some international maritime carriers have the benefit of Athens Convention Relating to the Carriage of Passengers and Their Carriage by Sea for Admiralty claims (in other words the limitation of liability of admiralty claims convention). I note however that this Convention has not been ratified by either the US or Australia.

53. Nevertheless, claims may still be limited by a "well drafted" limitation of liability clause. I say "well drafted", mindful of the case of Bobbie Jo Wallis, Administrator of the Estate and Personal Representative of Joel Anderson Wallis, Deceased v Princess Cruises, 306 F.3d 827, 834 (9th Cir. 2002)

Bobbie Jo's Case (2002)

54. Bobbie Jo brought an action against a cruise line for damages, including for mental distress, based on the death of her husband, who drowned off the coast of Greece, after falling (in undetermined manner) from the cruise line's ship.

55. A court of appeals, reversed a grant of partial summary judgment limiting recoverable damages. It held that a contract clause printed on the passenger's ticket which merely referred to the "Convention Relating to the Carriage of Passengers and Their Luggage by Sea' of 1976 (Athens Convention)", did not reasonably communicate a liability limitation.

56. The Appeal Court determined that it was unrealistic to assume the average passenger with no legal background would even attempt to analyse conditions under which the Athens Convention, would or would not, apply. Further, the Court said that even if a passenger was motivated to undertake such effort, he or she would require some legal and financial sophistication, and that the ticket's failure to provide an approximate monetary limitation did not meaningfully inform a passenger of a liability limitation, which was therefore unenforceable.

57. In order to be effective, a damages limitation in a Passage Contract needed to be reasonably communicated, "so that a passenger can become meaningfully informed of [Passage Contract's] terms."

Paul v Holland America Line, Inc.

58. However, I contrast Bobby Jo's case with *Paul v Holland America Line, Inc.*, 463 F. Supp. 2d 1203 (W.D. Wash. 2006).

59. In this 2006 case, a cruise line sought an order that recovery against it be limited to 46,666 Special Drawing Rights (SDR) pursuant to the Athens Convention, and that a husband's loss of consortium claim be dismissed. The Federal District Court granted that motion, holding that the physical characteristics of plaintiffs' ticket were such that the terms and conditions were sufficiently conspicuous to plaintiffs. Further, the provision at issue identified a relevant limitation of 46,666 SDRs. This meant that the plaintiffs need only visit the International Monetary Fund (IMF) website to view the current value of an SDR, in American dollars. Moreover, it was held that the language on the ticket was sufficient to have put the plaintiffs on notice of the liability limitation.

60. Furthermore, there was nothing confusing about the contract's reference to the Athens Convention, as well as to the laws of the US.

Carnival Cruise Lines – Contract of Carriage – Mental Distress Disclaimer

61. By way of passing observation only, I note a most comprehensive limitation clause in a prominent US cruise line's contract of carriage as regards limiting mental distress claims:

> Clause 11:
>
> (d) Carnival shall not be liable to the passenger for damages for emotional distress, mental suffering/anguish or psychological injury of any kind under any circumstances, except when such damages were caused by the negligence of Carnival and resulted from the same passenger sustaining actual physical injury, or having been at risk of actual physical injury, or when such damages are held to be intentionally inflicted by Carnival.
>
> (e) In addition to all the restrictions and exemptions from liability provided in this Contract, Carnival shall have the benefit of all statutes of the United States of America providing for limitation and exoneration from liability and the procedures provide thereby, including but not limited Title 46 of the United States Code sections 30501 through 30509, and 30511. Nothing in this Contract is intended to nor shall it operate to limit or deprive Carnival or any such

> statutory limitation of or exoneration from liability under any applicable laws.

[I do not review Title 46 of the United States Code sections 30501 through 30509, and 30511 here. Suffice to say that these sections are contained within:

> TITLE 46. SHIPPING
> SUBTITLE III. MARITIME LIABILITY
> CHAPTER 305. EXONERATION AND LIMITATION OF LIABILITY]

Aviation Carriers

62. Aviation carriers, appear to have lobbied for protection even more successfully than maritime carriers, at least in the USA. I say this because the Montreal Convention, which replaced the Warsaw Convention, has been ratified by the USA, thereby becoming US law.

63. Under the Montreal Convention, air carriers are strictly liable for proven damages up to 100,000 Special Drawing Rights (SDR), approximately US$152,500 per passenger (as at October 2008). If damages of more than 100,000 SDR are sought, an airline may avoid liability by proving that the accident which caused the injury or death was not due to their negligence, or was attributable to negligence of a third party. The defence is not available, where damages of less than 100,000 SDR are sought.

"Bumped" Air Passengers (USA)

64. I turn to briefly examine a situation easily imagined when travelling by air in the United States, that is, being "bumped" from a flight.

65. Since 1990, on average, almost 900,000 domestic US passengers are "bumped" annually. A 2003 study of data by the United States Department of Transportation found that 96% of such passengers accept the compensation offered by the airlines, leaving approximately 36,000 "bumped" passengers per year – who refuse such offers and so, may raise damages claims.

66. A bumped passenger is one who, despite having booked and paid for a seat, **and** having turned up at the airport ready to travel, **and** having his or her baggage loaded onto the aircraft, is denied access to the plane, or asked to vacate the plane, because the airline has simply overbooked the flight. It is not difficult to foresee a claim for mental distress, inconvenience or anguish arising out of being "bumped".

Thatcher A Stone v Continental Airlines 905 F. Supp. 823

67. A person who apparently experienced significant distress upon being bumped was Thatcher A Stone, who was travelling (or rather, was hoping to travel) with his 13 year old daughter on a Christmas Day flight, for a week-long ski vacation. The only substitute flight offered would have left the Stones with a

one-day ski trip. Furthermore, the airline **refused to unload the Stone's luggage**, so they could not attempt a substituted ski vacation, nearer home.

68. Unfortunately for Continental Airlines, they bumped the wrong passengers on Christmas Day 2004, because Thatcher Stone was a partner in a New York law firm, as well as a lecturer in aviation and airline industry law, at the University of Virginia School of Law. [I wonder if he may have mentioned this?]

69. The much aggrieved Thatcher Stone brought action to recover damages, including for his emotional distress. However, not even he appears to have been able to overcome the myriad of protections US airlines hold in such cases, as the damages awarded to him were in the end, only for the very modest amount of US$3,110.

70. The court held that although 49 United States Code Service (**U.S.C.S.**) § 41713 precluded a passenger from pursuing claims under New York consumer protection statutes, another law 14 Code of Federal Regulation (**C.F.R.**) § 250.5 entitled him to pursue a contract action under State law, albeit with some limitations on particular items of damages.

71. The Court found the account of his bumping experience, credible and therefore awarded him his out-of-pocket expenses, including a penalty imposed by his ski lodge, the value of the loss of the luggage and its contents during the period when an alternative trip might have been possible, and an award for inconvenience, delay, and uncertainty, as permitted under New York case law.

72. Claims of "bumped" passengers are governed by 14 C.F.R. pt. 250. Under 14 C.F.R. § 250.5, a bumped passenger is entitled to compensation of $ 400 per passenger or a lower amount – computed at the rate of 200 percent of the sum of the value of the passenger's remaining flight coupons – up the passenger's next stopover, or if none, to the passenger's final destination. But this compensation rule applies **only** if the passenger has actually been bumped from the flight because of **overbooking** 14 C.F.R. § 250.6. If a bumped passenger rejects the airline's compensation offer, the passenger is entitled to seek to recover **damages** in a court of law, or in some other manner, under 14 C.F.R. § 250.9(b) – language universally regarded as permitting a claim for contract **damages** that may exceed the amount of compensation offered by the airline.

73. However, the court found that a claim for emotional distress was not permitted for a contract-based "bumping" claim – absent a duty upon which liability can be based. There was no right of recovery for mental distress resulting from the breach of a contract-related duty.

The Lopez Case

74. *Lopez v Eastern Airways* 677 F Supp 181, a court awarded compensatory damages for inconvenience, loss of time, anxiety and frustration in the amount

of US$450, when Mr Lopez almost missed a wedding he was flying to, because of delay caused by the airlines overbooking.

The Loss of Man's Best Friend: Floyd's Case

75. In *Gluckman v American Airlines, Inc.* 844 F.Supp. (151 S.D.N.Y., 1994), a plaintiff sued American Airlines for emotional distress damages, inter alia, after his dog suffered fatal heatstroke, while being transported in the cargo hold of defendant's airliner (the temperature had reached 140 degrees Fahrenheit, in violation of the airline's cargo hold guidelines).

76. Whilst the airline acknowledged negligence, it countered by arguing that the plaintiff's ticket contained an express limit of liability for baggage, in the amount of US$1250.

77. The heartbroken plaintiff invoked state cases *Brousseau v Rosenthal* and *Corso v Crawford Dog and Cat Hosp. Inc* in support of a negligent infliction of emotional distress claim. However, the court characterised both *Brousseau* and *Corso* as "aberrations". The court rejected plaintiff's claim for loss of companionship, as well as pain and suffering of the dog itself – absent any prior authority that established a basis for such claims.

78. Of side interest is that throughout the case, the judge referred to the unfortunately deceased dog, as 'Floyd". Mr Gluckman alleged that American Airlines grossly negligent and reckless conduct – resulted in Floyd's destruction. Specifically, Mr Gluckman had sought:

    (1) both compensatory and punitive damages, as a result of Floyd's death and his own emotional distress (Count One);

    (2) compensatory damages for loss of the companionship of his pet (Count Two);

    (3) compensatory damages for Floyd's own pain and suffering (Count Three); and

    (4) compensatory damages based upon "**the tort of outrage**," on the grounds that American Airlines had acted with reckless disregard of the probability that its conduct would cause Mr Gluckman severe mental anguish (Count Four).

79. It would be unkind to conclude on the note that *Floyd's* was a paw (sic) decision, at least as far as Mr Gluckman was concerned.

Ken Martin