

Report No 18

Aspects of Damages: Employment Contracts
and the Rule in *Addis v Gramophone Co*

March 1991
Wellington, New Zealand

The Law Commission was established by the Law Commission Act 1985 to promote the systematic review, reform and development of the law of New Zealand. It is also to advise on ways in which the law can be made as understandable and accessible as practicable.

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7 March 1991

The Hon D A M Graham MP
Minister of Justice
Parliament House
WELLINGTON

Dear Minister

I am pleased to submit to you Report No 18 of the Law Commission, *Aspects of Damages : Employment Contracts and the Rule in Addis v Gramophone Co.*

The Report arises out of our ongoing work on damages and the introduction into Parliament late last year of the Employment Contracts Bill. The rule in the *Addis* case denies damages for the harshness and oppression accompanying a dismissal from employment and any loss sustained from discredit thrown upon the employee. That limit is inconsistent with the general principles of the law of damages; the application of the rule is uncertain; its scope of application in New Zealand is narrowed in an anomalous way by legislative provision (also contained in the new Bill); and its continued force in New Zealand is unclear in the light of recent judicial decisions and criticism.

The Law Commission has a particular responsibility for the accessibility and comprehensibility of the law. The relative inaccessibility and incomprehensibility of this law may lead to inefficiency and unnecessary cost.

Accordingly the Law Commission proposes a legislative reversal of the rule. Compensation for an employee who has been dismissed without good reason could include compensation for humiliation, loss of dignity, and injury to the feelings of the employee. That is subject to the freedom of the employer and employee to agree otherwise in writing.

The Commission will make copies of this Report available to members of the Select Committee currently considering the Employment Contracts Bill.

Yours sincerely

K J Keith
President

I

Introduction and Summary

- 1 The introduction into Parliament in December 1990 of the Employment Contracts Bill requires legislative focus on (among many other matters) the topic of remedies for breaches of contracts of employment. In particular, it provides an opportunity for reconsideration of the long-standing, often criticised but still potent judge-made "rule" in *Addis v Gramophone Co* [1909] AC 488. That rule is currently of uncertain scope in New Zealand but has long been regarded as severely restricting awards of damages as compensation for the intangible consequences of breaches of contracts, in particular of employment contracts.
- 2 The Law Commission has reviewed the *Addis* rule and recommends a statutory reversal of the rule in the employment context. For reasons summarised at the end of this chapter, we believe that that reversal would provide a desirable increase in the certainty, consistency and coherence of this area of the law. Recently, other matters on our programme have taken priority but the introduction of the Employment Contracts Bill has encouraged us to accelerate our work to make it available while the Bill is before Parliament. We have not had the opportunity to consult as widely on this topic as is our usual practice, but we are grateful for the prompt and helpful responses received from a number of interested individuals and organisations who considered a draft of this report.
- 3 The effect of *Addis* has been substantially displaced by New Zealand industrial relations legislation since the early 1970s. Thus the Labour Relations Act 1987, section 227(c)(i), expressly authorises a grievance committee or the Labour Court to order an employer to pay "compensation" to an unjustifiably dismissed employee for "humiliation, loss of dignity, and injury to the feelings of the worker". The Employment Contracts Bill as introduced does not include a similar express reference to humiliation, etc, but those matters would probably be embraced by the continued provision for "compensation" (rather than

``damages"). However, that provision would be mandatory only in relation to collective employment contracts. Thus most breaches of individual employment contracts would continue to involve questions of damages assessed in accordance with judge-made rules.

- 4 The rule in *Addis* has been considered in recent High Court cases, many of which have involved termination of employment of middle management personnel and others outside award coverage and the scope of the 1987 Act. It has also been the subject of comment in two recent Court of Appeal decisions. Some of those cases have included judicial suggestions that the *Addis* rule may cause injustice and is a suitable case for law reform. Those suggestions triggered the Law Commission's preliminary work on this topic.
- 5 Very recently, in *Whelan v Waitaki Meats Ltd* (unreported decision of Gallen J, High Court, Wellington, CP 990/88, 30 November 1990) the trial judge declined to apply *Addis* and awarded \$50 000 damages to compensate a manager for the manner of termination of employment which ``was such as to cause the plaintiff undue mental distress, anxiety, humiliation, loss of dignity and injury to his feelings". However, that approach involves a major departure from other recent High Court decisions and has not been directly considered by the Court of Appeal (we have been advised by counsel involved in the case that no appeal will be lodged in *Whelan* itself), although it does accord with the policy preference expressed by many commentators.
- 6 Although the *Addis* rule is generally understood to be applicable to all contracts - but subject to significant exceptions (see paras 33-34, below) - judicial and academic criticism has most often been directed at its application to employment contracts, and it is with those contracts that this report is concerned.
- 7 The structure of this report is as follows: this chapter concludes with a discussion of concepts and terminology found in judicial decisions on contracts and damages, and summaries of our reasoning and recommendations; Chapter II outlines the *Addis* decision itself; Chapter III reviews recent New Zealand developments on damages where employment contracts are terminated; Chapter IV outlines the reasoning and results in certain relevant decisions by English, Canadian and

Californian appellate courts; Chapter V reviews competing perspectives on the nature of employment contracts and of labour markets; Chapter VI reviews the policy factors relating to any further legislative intervention in New Zealand; and Chapter VII outlines the options for the form of any such legislation. The appendices contain a wider survey of relevant New Zealand cases, including non-employment cases and Labour Court decisions; and a selective survey of the comparable legal position in other countries.

CONCEPTS AND TERMINOLOGY

- 8 In order to appreciate fully the scope of the *Addis* rule, it is important to understand some of the general concepts and terminology found in this area of the law and to appreciate that much of the law relating to contracts in general – and especially to damages - is common law (that is, judge-made, and initially inherited from England), rather than the result of legislation, although there are many statutes which deal with some aspects or types of contracts and (less frequently) damages.
- 9 Contracts provide the basis for commercial activity and for many of our domestic and social activities. In essence, a contract is a bargain entered into by two or more parties: in a simple case, each party voluntarily and reciprocally undertakes obligations which are legally binding. Contractual obligations may be contrasted with those imposed by a statute or by other judge-made rules of the common law (generally described as torts) irrespective of any agreement or consent by those bound.
- 10 A contract is usually analysed as being made up of a number of component terms which would include, for example, the identity of the subject matter, the price to be paid, and dates for performance. Such basic terms would normally be the subject of explicit agreement - express terms - but others, less significant or obvious, may be implied by the courts as a matter of law (the deemed intention of the parties) or of fact (the presumed actual intention of the parties) or by statute. With some exceptions (notably, contracts relating to land), a contract need not be in writing.

- 11 The undertaking of contractual obligations generally carries with it an expectation of performance and of court-enforced remedies for breach (non-performance) - in particular (although not exclusively), remedies by way of monetary compensation or damages.
- 12 An explanation of the object of an award of damages and of the concepts of pecuniary and non-pecuniary loss is contained in the leading English treatise on the subject, *McGregor on Damages* (15th ed, Sweet & Maxwell, London, 1988), in the following terms:

The object of an award of damages is to give the plaintiff compensation for the damage, loss or injury he has suffered. The heads or elements of damage recognised as such by the law are divisible into two main groups; pecuniary and non-pecuniary loss. The former comprises all financial and material loss incurred, such as loss of business profits or expenses of medical treatment. The latter comprises all losses which do not represent an inroad upon a person's financial or material assets, such as physical pain or injury to feelings. The former being a money loss is capable of being arithmetically calculated in money, even though the calculation must sometimes be a rough one where there are difficulties of proof. The latter however is not so calculable. Money is not awarded as a replacement for other money, but as a substitute for that which is generally more important than money: it is the best that a court can do. (para 9)

- 13 The McGregor treatise also provides a convenient explanation of general damages as distinct from special damages, commencing with a citation from an early English case:

Prehn v Royal Bank of Liverpool [(1870) LR 5 Ex 92], where Martin B put the distinction thus: "General damages ... are such as the jury may give when the judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man Special damages are given in respect of any consequences reasonably and probably arising from the breach complained of." This type of general damage is usually concerned with non-pecuniary losses, which are difficult to estimate, the principal examples being the injury to reputation in defamation and the pain and suffering in cases of personal injury. Pecuniary loss is also occasionally general damage within this meaning, both in tort and in contract. In tort there is the loss of business profits caused by the defendant's inducement of breach of contract or passing off, while in contract there is the injury to credit and reputation caused by the defendant's failure to pay the plaintiff's cheques or honour his drafts, pecuniary losses which it is difficult to estimate at all accurately. (para 21)

- 14 In some cases - usually tort cases - the concepts of aggravated and exemplary damages are relevant. In earlier cases the distinction between these was somewhat blurred, but the modern approach is clear. Like ordinary damages, aggravated damages are compensatory:

to compensate the plaintiff when the injury or harm done to him by the wrongful act of the defendant is aggravated by the manner in which he did the act. They may include sums for "loss of reputation, for injured feelings, for outraged morality ..." (*Taylor v Beere* [1982] 1 NZLR 81, Somers J, at 95).

Exemplary or punitive damages are a punishment or a deterrent to show that malicious or outrageous conduct does not pay. They are not compensatory but rather a windfall for the plaintiff.

- 15 The common law has (perhaps inevitably) placed limits on the kinds of consequences of contractual breaches which may be compensated by damages. In addition to obvious causation requirements (establishing a causal link between the breach and the loss complained of), there are requirements relating to the remoteness of damage. The latter requirements are often referred to as the two limbs of *Hadley v Baxendale* (1854) 9 Ex 341, a case involving delay by a carrier in delivering a broken millshaft for repair. The first limb provides for recovery of damages for losses (resulting from the contractual breach) which parties to such a contract would have reasonably contemplated as liable to result from such a breach. The second limb provides for recovery for further losses which could have been so contemplated given the special knowledge of the particular parties at the time of entering into the contract.
- 16 The concept of employment is not entirely clear in some marginal situations - for example, commission-based agents, and owner-drivers. That point was illustrated by the recent confirmation by the Court of Appeal that commission-based real estate salesman are employees and not independent contractors: see *Challenge Realty & Ors v Commissioner of Inland Revenue* [1990] 3 NZLR 42. The key factors in identifying an employment contract are "control" and "economic reality", the latter being explained in an article (cited with approval by the Court of Appeal in *Challenge Realty*) by Adrian Merritt, "*Contract' v 'Economic Reality': Defining the Contract of Employment*" (1982) 12 Australian Business Law Review 105:

The issue that must be settled in today's cases is whether the worker is genuinely in business on his own account or whether he is "part-and-parcel of" - or "integrated into" - the enterprise of the person or organisation for whom work is performed. The test is, therefore, one of "economic reality". (118)

- 17 Dismissal is of course the termination of employment by the employer. As the common law presumes that employment contracts can be terminated by either employee or employer on giving reasonable notice, and that summary dismissal (without notice) can only be justified by good cause (eg, misconduct), wrongful dismissal occurs only where there is dismissal without proper notice or summary dismissal without cause or where it involves contravention of a statutory provision.
- 18 Since 1973 our industrial relations legislation has included the wider if less precise concept of unjustifiable dismissal, explained in the Court of Appeal decision in *Auckland City Council v Hennessey* [1982] ACJ 699:

It is plain, and the contrary was not suggested, that the word "unjustifiably" ... is not confined to matters of legal justification. If it were so the section would add only a claim to reinstatement to the law. [We] think the word "unjustified" should have its ordinary accepted meaning. Its integral feature is the word unjust; that is to say not in accordance with justice or fairness. A course of action is unjustifiable when that which is done cannot be shown to be in accord with justice or fairness.

This concept has resulted in a pragmatic case-by-case approach to dismissals, and in the development of procedural unfairness (the manner of the termination, absence of warnings, and failure to provide an opportunity for an employee to argue against dismissal) as an independent head of unjustifiable dismissal: see generally John Hughes, *Labour Law in New Zealand* (Law Book Co Ltd, Sydney, 1990), para 4.160 ff.

SUMMARY OF REASONING, RECOMMENDATIONS

- 19 The fate of the *Addis* rule involves many complex factors, including the nature of employment contracts and of labour markets. We outline these factors in the balance of this report but it may be helpful to set out in summary form our reasons for recommending statutory reversal of the *Addis* rule, and our recommendations for achieving that.
- 20 Our reasoning may be summarised in the following steps:
- (1) The driving force behind the *Addis* decision itself - that the law of contracts should try to avoid questions of damages for non-pecuniary loss - has little

force in the common law at the present time, leaving the *Addis* rule as an anomaly.

- (2) Termination of employment contracts may well involve non-pecuniary losses of the kind for which damages were denied in *Addis*.
- (3) Under the Labour Relations Act 1987 and the Employment Contracts Bill as introduced there is an undesirable distinction between workers subject to an award (or collective agreement) and others as to the availability of "compensation" for such non-pecuniary losses.
- (4) Employment contracts are different from other commercial contracts given their fundamental importance to the individual employee, continuing nature and hierarchical features.
- (5) At present the common law courts do not regard employment contracts as a simple exchange of wages for labour. They have long implied somewhat imprecise terms into employment contracts (eg, requiring a reasonable period of notice of termination, an employee's obligations of fidelity) and will continue to do so. It is most unlikely that any great precision could be achieved by attempting to specify implied terms in a statute.
- (6) The present uncertainty about the status of *Addis* and significant (if not easily quantifiable) related costs can be avoided by a statutory statement of a presumptive (ie, subject to contracting out) rule about the damages available on termination; that presumptive rule should provide for the general common law approach to damages - compensation for losses actually suffered - and would reflect a notional bargain achieved without any information imbalance between the parties (cf para 96, below).
- (7) Although non-pecuniary losses cannot be easily quantified in any area, including the employment termination context, in most areas this has been reflected in fairly modest awards for this kind of loss. If there is concern that more expansive awards have become part of the jurisprudence associated with "compensation" for "unjustifiable" dismissals, a ceiling on such awards would assist in minimising costs and enhancing predictability.

- (8) Consistency favours a uniform starting or trigger point for a remedy in damages. A preference for a wider view of the nature of employment contracts than that evident in the *Addis* decision (see para 103 and Chapter V, below) involves rejection of the narrow scope of the common law trigger of wrongful dismissal. On the other hand, the "unjustifiable dismissal" trigger of the present Labour Relations Act 1987 is both expansive and uncertain. Modern social expectations support the concept of dismissal only for good reason - being non-arbitrary and lawful reasons - with an ordinary onus of proof on the party alleging lack of good reason.
- (9) It is difficult if not impossible to quantify the disincentive costs for employers in being required to contract with employees on a dismissal for "good reason" rather than "at will" basis. In any event, provided that "good reason" is interpreted sensibly and the courts do not strain to second guess employers' decisions, there is no reason to think there will be significant additional costs.

21 In summary, our recommendations are:

- (a) the effect of the rule in *Addis* in employment contexts should be reversed by a statutory provision;
- (b) such a statutory provision could conveniently be included in the Employment Contracts Bill presently before Parliament;
- (c) consistency and clarity favour the form of that provision being along the following lines:
 - (1) A court or arbitrator or grievance committee may, subject to any written agreement between an employer and an employee, order that an employer pay compensation to an employee who has been dismissed without good reason, including compensation for humiliation, loss of dignity, and injury to the feelings of the employee.
 - (2) Good reason means a reasonable basis for the dismissal having regard to the terms of the employment contract, the employee's

conduct and performance record, and the legitimate economic needs of the employer.

- (d) if thought desirable, compensation payable in terms of (c)(1), above, could be made subject to a maximum equivalent to (say) six months' earnings for the particular employee; and
- (e) there should be a monitoring of the operation in practice of such a provision to ascertain whether contracting out of its benefits for employees becomes commonplace.

II The *Addis* Case

- 22 The *Addis* case involved a plaintiff employed as the manager of a company's business in Calcutta on a salary of 15 per week, entitled to a commission on the trade done, and liable to be dismissed on six months' notice. He was effectively removed from his position in October 1905 without prior notice in circumstances described in the judgment of Lord Shaw of Dunfermline:

Here a successor to the plaintiff in a responsible post in India was appointed in this country, without previous notice given by the defendants; the successor enters the business premises to take, by their authority, out of the hands of the plaintiff those duties with which the defendants have by contract charged him, and he does so almost simultaneously with a notice of the defendants bringing the contract to a sudden termination; while, even before this notice reached his hands, the defendants' Indian bankers had been informed of the termination of the plaintiff's connection with and rights as representing their firm. Undeniably all this was a sharp and oppressive proceeding, importing in the commercial community of Calcutta possible obloquy and permanent loss. (504)

- 23 Mr Addis returned to England and then commenced proceedings against his former employer. At the trial, the jury awarded the plaintiff 600 for wrongful dismissal (which may be contrasted with the 390 which would have equated with six months' salary in lieu of notice at 15 per week) as well as a sum for lost commission earnings. The Court of Appeal set aside the judgment on the basis that there was no cause of action. The House of Lords allowed the plaintiff's appeal in part, ordering that he be credited with six months' salary, as well as six months' commission.

- 24 The main issue canvassed in the judgments in the House of Lords was

whether in an action for wrongful dismissal the jury, in assessing the damages, are debarred from taking into their consideration circumstances of harshness and oppression accompanying the dismissal and any loss sustained by the plaintiff from the discredit thus thrown upon him. (Lord Collins at 497)

Four of the five judges sitting in the House of Lords reached a negative conclusion on that issue, and held that Mr Addis was entitled to no more than the salary and commission he would have earned had he been given proper notice and not summarily removed from his position. These judges were strongly of the view that a claim under the law of contract could not recover damages beyond those limited to compensation for the loss of the pecuniary benefit of the contract itself, and they were concerned to keep the law of contract free of the complexities and perhaps unpredictability of tort law. Thus Lord Atkinson said:

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 confusion and uncertainty 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. (495)

- 25 The majority judges saw the claim relating to the manner of dismissal as being either one for exemplary or aggravated damages (the terms appear to be used interchangeably in these judgments) or one that might have been brought as a separate tort action for defamation. In addition, they regarded the position as being well established ("too inveterate to be now altered, even if it were desirable to alter it": the Lord Chancellor, Lord Loreburn, at 491) and long reflected in the practices of the English bar in drafting court pleadings.
- 26 Of the majority judges, only Lord Shaw of Dunfermline expressed "a certain regret" at the majority conclusion, having noted that dismissal may be accompanied by an intangible but still very real injury from circumstances which did not establish a separate ground of action. Nevertheless, he considered that, if loss of earnings through lack of notice was fully compensated, he could not see why acts otherwise non-actionable should become actionable or relevant as an aggravation of a breach of contract which, *ex hypothesi*, is already fully compensated. (504)
- 27 The dissenting judge, Lord Collins, was of the opinion that juries had traditionally been able to award exemplary or vindictive damages in contract as well as in tort cases. Thus he considered it was neither necessary nor desirable to

curtail the power of the jury to exercise ... a salutary power, which has justified itself in practical experience, to redress wrongs for which there may be, as in this case, no other remedy. Such discretion, when exercised by a jury, would be subject

to the now unquestioned right of the Courts to supervise, just as is done every day, where the form of action is tort. (500-501)

THE LIMITS TO *ADDIS*

- 28 Two later decisions of the House of Lords indicate that *Addis* may be explained in terms of remoteness of damages: what was in the contemplation of the parties at the time of contracting would relate to the main objects of the contract; and those objects did not include the preservation of Mr *Addis* from mental distress for high-handed dismissal.
- 29 In *Wilson v United Counties Bank Ltd* [1920] AC 102 the House of Lords was concerned with a contract under which the Bank had agreed to supervise the plaintiff's business during his absence from England. After the Bank's negligence in that matter had caused the plaintiff's bankruptcy, the House of Lords upheld a jury's verdict for 7 500 for injury caused to the plaintiff's credit and reputation. Lord Atkinson (who had sat in *Addis*) distinguished the *Addis* decision in terms of remoteness:

... injury to the credit and reputation of a trader is not only a natural and reasonable result of his being made a bankrupt, i.e., such a consequence as would, in the ordinary course of things, flow from it, but must, in the present case, have been in the contemplation of the parties when they entered into the contract as a result which would probably follow from the breach of it, and ... the damages therefore are not too remote. (132)

- 30 Similarly, in *Herbert Clayton and Jack Waller Ltd v Oliver* [1930] AC 209 the House of Lords upheld a jury's verdict for 1 000 for loss of publicity in favour of an actor who had been engaged by theatrical producers to take one of the leading parts in a musical play but had then been allocated only a minor part. Lord Buckmaster (with whom the other Law Lords agreed) said:

In the present case the old and well established rule applies without qualification, the damages are those that may reasonably be supposed to have been in the contemplation of the parties at the time when the contract was made, as the probable result of its breach Here both parties knew that as flowing from the contract the plaintiff would be billed and advertised as appearing at the Hippodrome, and in the theatrical profession this is a valuable right. (220)

Lord Buckmaster went on to affirm that the question of damages was for the jury, notwithstanding that it seemed "extravagant" to him.

- 31 A caution against regarding *Addis* as decided on remoteness of damages is included in an article by Francis Dawson, ``*General Damages in Contract for Non-pecuniary Loss*'' (1983) 10 NZ Universities Law Review 232 at 242:

It is ... important to appreciate that the decision in *Addis v Gramophone Co Ltd* does go beyond questions of remoteness and the application of the rule in *Hadley v Baxendale*. It concerns a jury's or a trial judge's competence to award a sum by way of general damages in respect of an intangible injury such as mental distress. The reason that this point is of importance is that it is tempting to view *Addis* as turning on an application of *Hadley v Baxendale*, thus leaving the way open for the case to be distinguished in subsequent cases. A careful reading of their Lordships' speeches in *Addis* lends no countenance to this view, and a consideration of cases decided after *Addis* shows quite clearly that *Addis* was perceived as having laid down a general rule that prevented general damages from being awarded in a contract action to compensate for intangible injuries such as hurt feelings, or loss of reputation.

- 32 However, Dawson goes on to observe that

Addis v Gramophone Co Ltd said nothing about the case where the defendants specifically undertook a contractual obligation to provide enjoyment, or to enhance or maintain a reputation. In these cases, if content is to be given to the promisor's obligations, damages must be awarded for failure to perform the contractual undertaking. The court awards general damages because the damages are in their nature difficult to assess, and once a court is convinced that the damages are substantial, it must do its best to compensate the promisee.

EXCEPTIONS TO THE *ADDIS* RULE

- 33 That last observation explains *Wilson and Oliver* as examples of the first of a number of exceptions or qualifications to the rule in *Addis* which Dawson identifies, those of relevance being:

- (a) If a plaintiff could show that he had suffered pecuniary loss as a result of the breach, the fact that the pecuniary loss arose from a loss of reputation and was difficult to estimate did not of itself preclude an award of general damages.
- (b) Where the promisor specifically undertook not to cause injury to feelings or specifically undertook to maintain a promisee's reputation, the rule in *Addis* did not apply.
- (c) A sum by way of general damages was recoverable to compensate for pain and suffering or for real physical inconvenience suffered as a result of a breach of contract. (250)

Dawson goes on to suggest that a further exception is in the process of being developed by the courts:

(d) A plaintiff is entitled to be compensated for mental distress of a medically significant nature. (260)

34 Other commentators - and many of the non-employment cases noted in the appendices to this report (for example, the holiday and funeral cases) - would define the mental distress exception much more widely than Dawson allows: see, for example, Keith Mason QC, ``*Contract and Tort: Looking across the Boundary from the Side of Contract*'' (1987) 61 Australian Law Journal 228, at 236; and Mason concludes (at 238) that ``the exceptions [to *Addis*] are fast gobbling up the rule itself''.

III

Addis in New Zealand Employment Law

35 Until recently the rule in *Addis* was applied without question in New Zealand employment cases. Indeed, in many cases claims for damages for injury to feelings have been struck out before trial as being legally untenable.

GEE V TIMARU MILLING CO LTD

36 A relatively recent example of the application of *Addis*, although with some judicial disquiet, was *Gee v Timaru Milling Co Ltd* (unreported decision of Barker J, High Court, Auckland, A 387/85, 4 February 1986). There the plaintiff had resigned from his job in Auckland to take up an offer of employment as the defendant company's export manager in Timaru, but was informed a few days before he was due to commence work for the defendant that his services were no longer required.

37 The judgment records that the plaintiff had given up a reasonably responsible position in Auckland, that his wife had resigned from her job, that they had sold their home in Auckland, and that they changed the schooling for their two children. The plaintiff's claims against the Timaru company included one for \$15,000 for:

- loss of career advantage;
- loss of job satisfaction;
- time, trouble and inconvenience caused by the reduction in anticipated standard of living;
- costs incurred by way of bank overdraft interest caused by the lack of alternative employment;

- time, trouble and inconvenience in seeking alternative employment;
- costs incurred in seeking alternative employment;
- time, trouble and inconvenience in preparing and arranging tenancy of their property in Auckland. (3)

38 Although considering himself obliged to strike out that claim on the basis that it could not succeed in the face of *Addis*, Barker J indicated "considerable sympathy" for the plaintiff and observed:

As I remarked some eight years ago in the Bertram case [unreported, High Court, Whangarei, A 6/78, 3 August 1978], it is a matter of comment in these days of sensitive industrial relations, that, for persons not members of a union or covered by an individual award, the law in relation to damages properly claimable for unlawful dismissal has not moved from the intransigent position in *Addis v Gramophone Co Ltd*.

Industrial relations law provides remedies for unlawful dismissal for members of unions; however, for persons not belonging to a union (ie, those in the middle management sector as this plaintiff apparently was) the law has lagged behind.

It is not beyond the bounds of feasibility (and I have no idea whether it happened in this case or not) that a plaintiff could suffer loss to reputation and could incur expenses and losses which would not come within the parameters of *Addis v Gramophone Co Ltd*. One would hope that some reform of the law might be possible. (7)

THE COURT OF APPEAL

39 A lack of enthusiasm for *Addis* was indicated in the Court of Appeal decision in *Horsburgh v NZ Meat Processors Industrial Union* [1988] 1 NZLR 698 where the plaintiff had been expelled from the union and promptly lost his job. In the High Court the plaintiff's claims for general damages for loss of amenity, mental distress, anxiety, inconvenience, humiliation, loss of dignity, injury to feelings, and loss of reputation were rejected. However, the Court of Appeal awarded the plaintiff \$7 500 damages under those heads.

40 After agreeing with counsel's submissions that *Addis* was not directly relevant (it was not a claim against an employer), the Court observed that

Should this Court have to consider whether that rule [ie, in *Addis*] applies in New Zealand at the present day, it will be essential to give full consideration to such judgments pointing to the contrary as that of Linden J in *Brown v Waterloo*

Regional Board of Commissioners of Police (1982) 136 DLR (3rd) 49; but this is not the occasion for that exercise.

At least *Addis* is not an authority to be extended. (701-702)

41 The Court of Appeal went on to note that

The humiliation of unemployment is no light thing The Court should recognise that the right to work is valuable in itself. A reasonably substantial award should be made for knowingly unlawful deprivation of status and interference with the right to work. (702)

However, the Court suggested a possible distinction between employment and commercial contracts:

we are not suggesting that damages for distress can be awarded in, for instance, an action for breach of an ordinary commercial contract. Nor are we essaying any general propositions about when damages for distress can be recovered under various causes of action. (703)

42 A few months later, in *Hetherington v Faudet* [1989] 2 NZLR 224, where the Court of Appeal allowed an appeal against the striking out of allegations of tortious conspiracy to obtain the plaintiff's dismissal, *Addis* was again the subject of unenthusiastic comment:

The other line of reasoning [advanced on behalf of the defendants] is that the conspiracy pleading is an attempt to circumvent *Addis v Gramophone Co Ltd* [1909] AC 488. That may be so, but this Court has already indicated in *Horsburgh v New Zealand Meat Processors Industrial Union of Workers* [1988] 1 NZLR 698 that the applicability of the rule in *Addis* as generally understood calls for consideration in present-day New Zealand. We are aware that academic writers have argued against it; that it has been judicially questioned in Canada; and that some New Zealand High Court Judges have also voiced misgivings about it: see for example Barker J in *Gee v Timaru Milling Co Ltd*

To the extent that *Addis* rests on public policy, it seems contrary to the public policy now recognised in the industrial sphere by such legislation as the New Zealand Labour Relations Act 1987, which does not however apply to employees of the seniority of the present plaintiffs. (227)

IMPLIED TERMS

43 Earlier, in *Marlborough Harbour Board v Goulden* [1985] 2 NZLR 378, the Court of Appeal had upheld the setting aside by the High Court in judicial review proceedings of the dismissal of the Board's general manager, on the grounds that the Board had not acted fairly. The Court observed that

... the position has probably been reached in New Zealand where there are few, if any, relationships of employment, public or private, to which the requirements of fairness have no application whatever. Very clear statutory or contractual language would be necessary to exclude this elementary duty

In *Auckland Shop Employees Union v Woolworths NZ Ltd* [1985] 2 NZLR 372 this Court accepted that in the sphere governed by the Industrial Relations Act 1973 the relationship of confidence and trust that ought to exist between employer and employee imports duties on both sides, including a duty on the part of the employer, if carrying out an inquiry preceding a resignation or dismissal (in that case on the grounds of possible dishonesty) to do so in a fair and reasonable manner. Perhaps a similar application might quite readily be found in private contracts of employment not subject to the 1973 Act. Fair and reasonable treatment is so generally expected today of any employer that the law may come to recognise it as an ordinary obligation in the contract of service. (383)

WHELAN V WAITAKI MEATS LTD

- 44 Those indications from the Court of Appeal provided a basis for the rejection of *Addis* in *Whelan v Waitaki Meats Ltd* (see para 5, above) in November 1990. In that case the plaintiff had been the North Island manager for the defendant company, was well thought of within the corporate group, and prominent in his local community. However, in February 1988, as part of a somewhat arbitrary cost-cutting exercise, he was given until the end of the week to finish up and, after further discussions, finally dismissed as from the end of March. The plaintiff's proceedings included two major claims: for remuneration in lieu of proper notice; and for general damages for mental distress. The first claim failed on the basis that various payments made to the plaintiff exceeded the value of remuneration in lieu of proper notice (in this case, of 12 months), and thus it could not be said that he had been wrongfully dismissed or that there was a breach of contract for that reason.
- 45 However, it was in the process of allowing the second claim, and awarding \$50 000 general damages, that Gallen J considered the observations of the Court of Appeal outlined above, as well as a number of English and Canadian cases, and *Addis* itself, before concluding that *Addis* did not prevent such an award. In disposing of *Addis*, Gallen J suggested that the majority decision in the House of Lords was based on the proposition that the law did not permit general damages to be awarded for breach of contract, but that subsequent cases make that proposition untenable; that if *Addis* was more narrowly construed as a rule prohibiting damages for mental distress for breaches of employment contracts, the legal or

logical justification for it was doubtful and resulted in an illogical distinction between those entitled to invoke the Labour Relations Act 1987 and those who could not; and that he inclined to the view (advanced in some Canadian cases) that *Addis* merely illustrated a principle that general damages are inappropriate as not being foreseeable in commercial contracts, but that a contract such as that in *Addis* would no longer be regarded as commercial in nature.

- 46 After stating that a separate action for defamation in an employment context would be impractical and might well be unfair, Gallen J concluded that there was a relevant implied term which had been breached:

In this case as I have already concluded, the plaintiff occupied a senior position with substantial responsibilities. The position was one which because of the involvement of the company in the community generally and in sponsorship activities particularly, involved him in maintaining a high public profile. He was I think seen as an important man holding a significant position within the commercial community. The nature and extent of his service was such that combined with the position he held, I think he was entitled to assume that he would be treated by his employer in such a manner as to enable him to retain his dignity within the community and not to have his status affected by a precipitate act open to misinterpretation. I think these matters taken together become implied terms of his contract of service with the defendant and that the defendant in the circumstances in its turn had an obligation to observe them.

... In my view the action of the defendant amounted to a clear breach of the contractual obligations which it had towards the plaintiff having regard to all the circumstances.

... I find therefore that the action of the defendant in terminating the employment of the plaintiff in the manner in which it did was such as to cause the plaintiff undue mental distress, anxiety, humiliation, loss of dignity and injury to his feelings. (37-38)

- 47 In fixing the damages for the breach of that implied term at \$50 000, Gallen J indicated that the award should be basically compensatory. He acknowledged that such damages cannot be calculated with precision, but made specific mention of the possibility that the manner of dismissal would have made it more difficult for the plaintiff to obtain suitable replacement employment over the three years between the dismissal and the time of his intended retirement at the age of 60 years.

CONTRACTUAL REMEDIES ACT 1979

48 The Contractual Remedies Act 1979 is of general application but appears to have been the basis for an award in the nature of general damages in only one employment termination case. In *Burch v Willoughby Consultants Ltd* (unreported decision of Jeffries J, High Court, Wellington, CP 325/85, 29 July 1989) the plaintiff had taken employment with the defendant on the basis that he would be employed for six years until he reached the age of 65 but had been dismissed after two years when the business was sold. The High Court concluded that there had been a wrongful dismissal, awarded the plaintiff \$100 000 as special damages for loss of earnings, and went on to award a further \$10 000 under section 9 of the Contractual Remedies Act which provides:

(1) When a contract is cancelled by any party, the Court, in any proceedings or an application made for the purpose, may from time to time if it is just and practicable to do so, make an order or orders granting relief under this section.

(2) An order under this section may -

...

... direct any parties in a proceedings to pay to any other such party such sum as the court thinks just.

49 In his reasons relating to the \$10 000 award, Jeffries J observed that the 1979 Act

appears to seek to widen the discretion of the court in regard to damages whilst leaving common law remedies untouched. (21)

He went on to emphasise two matters which distinguished the plaintiff's case from "an ordinary wrongful dismissal": having regard to his position as a director of the defendant company, he had been treated with contempt; and throughout, including the trial, the defendant company had maintained "entirely unfounded allegations of dishonesty and sexual harassment" against the plaintiff.

LABOUR LAW STATUTES

50 Although New Zealand has long had legislation providing a statutory framework for many aspects of employer/employee relations, it seems that it was not until 1970 that such legislation affected the question of damages payable on termination of an employment contract. In that year the Industrial Conciliation

and Arbitration Act 1954 was amended by the addition of a new section 179 dealing with personal grievances which included "wrongful" dismissal. Section 179(5) included a provision for the payment of "compensation" to a wrongfully dismissed employee by the employer.

- 51 The Industrial Relations Act 1973 carried forward a standard procedure for the settlement of personal grievances but expanded the basis for such a claim to the wider notion of "unjustifiable" (rather than "wrongful") dismissal, for which "compensation" was payable to a dismissed employee. The position under the 1973 Act was summarised in Szakats and Mulgan, *Dismissal and Redundancy Procedures* (Butterworths, Wellington, 1985):

... in direct contrast to the *Addis* rule, not only unpaid wages can be granted but claims for humiliation, [and] injured dignity may also be taken into consideration. In addition the Arbitration Court has power to award travelling and shifting expenses, if a move was necessary to get another job. Generally all kinds of economic and non-economic loss may be recovered under the heading of compensation. (para 13.1)

- 52 In 1983 the Arbitration Court ruled that a society intended to represent the interests of middle management could not be registered as a union under the 1973 Act but recognised that the common law remedies available to middle or senior management were "unsatisfactory", and that this was an explicit purpose of the society's application: see *NZ Association of Professional, Executive, Scientific and Managerial Staffs v Registrar of Industrial Unions* [1983] ACJ 65.
- 53 An example of compensation for mental distress being awarded under the 1973 Act was *Canterbury Clerical Workers Industrial Union v Aabaas Bros Ltd* [1985] ACJ 548 where the Arbitration Court awarded \$1 000 each to two employees on the basis that

the actions of the employer were destructive of the contract of employment, induced such fear and stress into the circumstances of the employment that in the result the continuation of the employment became untenable as a result of the employer's actions. (550)

- 54 In the Labour Relations Act 1987 (which replaced the 1973 Act) the personal grievance procedure provisions were carried forward but the concept of "compensation" was elaborated in section 227(c) as including compensation for (i) humiliation, loss of dignity, and injury to the feelings of the worker; and (ii)

loss of any benefit, whether or not of a monetary kind, which the worker might reasonably have been expected to obtain if the personal grievance had not arisen.

- 55 Cases illustrating the operation of section 227(c) are included in Appendix B, but two recent Labour Court decisions may be mentioned here. In *Northern Hotel Employees' Industrial Union v Bosnyak Hotels Ltd* (unreported, Labour Court, Auckland, ALC 113/90, 27 September 1990) a chef was found to have been unjustifiably dismissed for alleged dishonesty as the employer had not inquired whether her innocent explanation was credible. The Court (Judge Colgan, Dr King and Mr McCarthy) awarded \$10 000 under section 227(c)(i):

The union sought, on behalf of Ms Thurlow, compensation for the stress, humiliation and loss of dignity caused to her by the dismissal. We have carefully considered all of the factors which must go to an assessment as to entitlement and quantum of such an award. There is evidence which we accept that each of these phenomena was visited upon Ms Thurlow by her dismissal. Although she had been in her position at the Boulevard Hotel for a relatively short time and although she was able to obtain some alternative employment relatively soon after her dismissal, we consider that its circumstances and in particular the prolonged threat and subsequent actuality of a police investigation of alleged criminal offending added significantly to these effects upon Ms Thurlow and should be the subject of proper compensation to her. In this regard we direct that the respondent pay to the applicant to the use of Ms Thurlow the sum of \$10,000 pursuant to s 227(c) of the Labour Relations Act 1987.

- 56 In *Post Office Union (Inc) v Telecom South Ltd* (1990) 3 NZELC 97,824, where the Labour Court (by a majority) held that the dismissal of a senior manager was substantively unjustified and procedurally unfair, not only was compensation of \$20 000 ordered under section 227(c)(i) but the very large sum of \$200 000 was awarded under section 227(c)(ii) for loss of the benefit of continued high-paid employment. That decision is the subject of an appeal to the Court of Appeal which is expected to be argued at the end of March 1991.

IV Appellate Consideration of *Addis*

57 The issues involved in awarding damages for non-pecuniary loss in employment contract cases are not unique to New Zealand, as is shown in the comparative survey of case-law in comparable countries included as Appendices C-G to this report. Because the decisions of appellate courts often contain valuable discussions of policy issues in the law, and because appellate consideration of this topic in New Zealand has been limited, this chapter focusses on recent and relevant appellate decisions in England, Canada, and California. Our researches have not revealed any comparable Australian appellate decision.

ENGLAND: BLISS

58 *Addis* has not been reconsidered by the House of Lords since it was decided but the English Court of Appeal decision in *Bliss v South East Thames Regional Health Authority* [1987] ICR 700 overruled recent trial decisions which suggested that *Addis* had ceased to be a bar to an award of damages for distress or breach of a contract of employment. The Bliss case involved the dismissal of a consultant orthopaedic surgeon employed by the defendant health authority. The trial judge held that the authority had breached the employment contract by requiring the surgeon to submit to a psychiatric examination and awarded 2 000 general damages for frustration and mental distress to the surgeon. The Court of Appeal reversed that award.

59 The continuing potency of *Addis* in England was explained in the judgment of the court (delivered by Dillon LJ) as follows:

It remains to consider the final point on the cross-appeal, viz the validity of the judge's award of 2,000 with interest by way of general damages for frustration and mental distress. In making such an award, the judge considered that he was justified by the decision of Lawson J in *Cox v Philips Industries Ltd* [1976] ICR

138. With every respect to them, however, the views of Lawson J in that case and of the judge in the present case are on this point, in my judgment, wrong.

The general rule laid down by the House of Lords in *Addis v Gramophone Co Ltd* [1909] AC 488 is that where damages fall to be assessed for breach of contract rather than in tort it is not permissible to award general damages for frustration, mental distress, injured feelings or annoyance occasioned by the breach. Modern thinking tends to be that the amount of damages recoverable for a wrong should be the same whether the cause of action is laid in contract or in tort. But in the *Addis* case Lord Loreburn regarded the rule that damages for injured feelings cannot be recovered in contract for wrongful dismissal as too inveterate to be altered, and Lord James of Hereford supported his concurrence in the speech of Lord Loreburn by reference to his own experience at the Bar.

There are exceptions now recognised where the contract which has been broken was itself a contract to provide peace of mind or freedom from distress: see *Jarvis v Swans Tours Ltd* [1973] QB 233 and *Heywood v Wellers* [1976] QB 446. Those decisions do not however cover this present case.

In *Cox v Philips Industries Ltd* [1976] ICR 138 Lawson J took the view that damages for distress, vexation and frustration, including consequent ill-health, could be recovered for breach of a contract of employment if it could be said to have been in the contemplation of the parties that the breach would cause such distress etc. For my part, I do not think that that general approach is open to this court unless and until the House of Lords has reconsidered its decision in the *Addis* case. (717-718)

- 60 However, it should be noted that in *Bliss* the Court of Appeal did confirm the existence of an implied term in the employment contract:

that the authority would not without reasonable cause conduct itself in a manner likely to damage or destroy the relationship of confidence and trust between the parties as employer and employee. (714)

That is the same implied term recognised by the New Zealand Court of Appeal in the *Auckland Shop Employees* case (see para 43, above).

CANADA: VORVIS

- 61 As noted in para 45, above, in the *Whelan* decision Gallen J found support in a number of Canadian decisions for departing from *Addis*. However, it appears that he was not referred to the May 1989 decision of the Supreme Court of Canada in *Vorvis v Insurance Corporation of British Columbia* (1989) 58 DLR (4th) 193 where, by a 3:2 majority, the continuing - if not absolute - force of *Addis* in Canada was confirmed.

62 In *Vorvis* the plaintiff had been employed as an in-house solicitor by the defendant company for approximately eight years before his dismissal. The trial judge found that the employee had been dismissed without cause and without reasonable notice, and accepted evidence that the plaintiff had been treated in a most offensive manner by his superior for several months before his dismissal. It appears also that the defendant company had persisted in unfounded allegations of incompetence against the plaintiff up to and including the trial. The trial judge awarded damages for loss of remuneration on wrongful dismissal but rejected claims for mental distress and aggravated and punitive damages. A similar approach was taken in the British Columbia Court of Appeal although a dissenting judge would have allowed the plaintiff's claim for punitive damages and awarded \$5 000 on account of his superior's conduct towards him. The minority in the Supreme Court of Canada would have supported that award for punitive damages but the majority of the Court dismissed the plaintiff's appeal.

63 The decision of the majority was delivered by McIntyre J and includes extended discussions of aggravated damages and punitive damages. In relation to aggravated damages, which was how the claim for general damages for mental distress was categorised, McIntyre J noted that the *Addis* principle had been effectively - but not explicitly - followed in an earlier Supreme Court decision, *Peso Silver Mines Ltd v Cropper* [1966] SCR 673. He accepted that a number of cases apparently inconsistent with *Addis* were explicable on the basis that

in some contracts the parties may well have contemplated at the time of the contract that a breach in certain circumstances would cause a plaintiff mental distress. (204)

64 Although accepting that aggravated or punitive damages may be available in "appropriate" contract cases and that this might extend to employment cases (particularly where the acts complained of were independently actionable), McIntyre J indicated that such damages were likely to be extremely rare in employment cases because of the long established rule in *Addis* and *Peso Silver Mines* as well as the traditional ability of either party to an employer/employee contract to terminate by due notice.

Furthermore, on the facts of *Vorvis* itself, the conduct complained of preceded the wrongful dismissal and therefore cannot be said to have aggravated the damage incurred as a result of the dismissal. (205)

- 65 In discussing punitive damages, McIntyre J stressed that the conduct of the supervisor prior to the plaintiff's dismissal was not of itself independently actionable and concluded that such damages might be awarded in breach of contract cases but that this would be extremely rare. He emphasised as well the distinction between claims in tort and claims in contract: unlike the plaintiff in tort, a plaintiff in contract

is not entitled to be made whole; he is entitled to have that which the contract provided for him or compensation for its loss. This distinction will not completely eliminate the award of punitive damages but it will make it very rare in contract cases. (208)

- 66 A dissenting judgment was given by Wilson J, with whom L'Heureux-Dube J concurred, who outlined her perception of the nature of the employment contract by reference to a leading Canadian legal text:

Professor Fridman [in *The Law of Contract in Canada*, (2nd ed, Carswell, Toronto, 1986)] notes that the most important type of contract in which damages for mental distress have been awarded is the employment contract (p 677). He suggested this is because of the nature of the relationship it creates which is one of trust and confidence (p 681). I would add that it may also be because of the vulnerability of the employee to the superior authority of the employer. (214)

- 67 On the topic of aggravated damages, she regarded the rule in *Addis* as "obsolete" and that that topic should be approached in terms of remoteness of damage and the rules in *Hadley v Baxendale*; on that basis, she rejected the approach taken by the English Court of Appeal in *Bliss* (see para 59, above).

- 68 Although disagreeing with McIntyre J's propositions that an award of aggravated damages might require a separate actionable wrong and could not involve conduct preceding dismissal, Wilson J agreed that the *Vorvis* case itself was not one where aggravated damages should be awarded: the plaintiff had not been employed by the defendant for a particularly long period, did not have security of tenure, was a member of a profession with a reasonably buoyant job market, and there were no special elements (such as a promise of promotion to avoid the employee's departure to a competitor) or special elements of trust and reliance, and thus

mental suffering would not have been in the reasonable contemplation of the parties at the time the employment contract was entered into as flowing from the appellant's unjust dismissal. (220)

- 69 However, Wilson J would have awarded punitive damages in the *Vorvis* case on the basis that a separately actionable wrong was not required, that there had been reprehensible conduct on the part of the employer (harassment, humiliation, and ultimate dismissal for no cause), and that any narrowing of the gap between tort and contract in this area was not a problem:

I agree with the appellant that it would be odd if the law required more from a stranger than from the parties to a contract. The very closeness engendered by some contractual relationships, particularly employer/employee relationships in which there is frequently a marked disparity of power between the parties, seems to me to give added point to the duty of civilised behaviour. (224)

CALIFORNIA: FOLEY

- 70 The December 1988 decision of the Supreme Court of California in *Foley v Interactive Data Corp* 254 Cal Rptr 211 includes a detailed examination of a number of issues relating to damages for mental distress in the employment contract context. The Court was considering an appeal against the striking out of an employee's claims against his former employer alleging wrongful termination (allegedly resulting from the employee's reporting to a superior that his immediate supervisor was under investigation by the FBI for embezzlement from a former employer). The seven judges of the Supreme Court were unanimous in holding that the plaintiff was entitled to proceed with his claim that the dismissal was in breach of an "implied-in-fact" contract which arose during the course of his employment; but they were divided (4:3) in holding that breach of an implied (in law) covenant of good faith and fair dealing in employment contracts could not give rise to tort damages.

- 71 The implied contract claim was explained by the presiding judge, Lucas CJ, as follows:

Although plaintiff describes his cause of action as one for a breach of an oral contract, he does not allege explicit words by which the parties agreed that he would not be terminated without good cause. Instead he alleges that a course of conduct, including various oral representations [and maintenance of written "Guidelines for Termination" that required good cause for discharge of an employee], created a reasonable expectation to that effect. Thus, his cause of action is more properly described as one for breach of an implied-in-fact contract. (221)

In English and New Zealand law this claim would be considered in terms of a collateral contract - one existing alongside but separate from another more explicit contract.

72 In ruling that the implied contract claim should go to trial, the Supreme Court upheld an earlier decision of a California Court of Appeal, *Pugh v See's Candies Inc* 171 Cal Rptr 917 (1981), where the plaintiff had worked his way up the defendant's corporate ladder from dishwasher to vice president over 32 years. During that time the company maintained a practice of not terminating administrative personnel without good cause, and the Court of Appeal concluded that a jury could determine the existence of an implied promise that the employer would not arbitrarily terminate the plaintiff's employment. That conclusion was reached notwithstanding a presumption in the California Labor Code (section 2922) of "at-will" employment (terminable by either party without cause) if the parties have made no express oral or written agreement specifying the length of employment or the grounds for termination. Further, such an implied-in-fact contract did not require separate "consideration" (ie, the undertaking of additional obligations) on the part of the employee on the basis that the courts should not inquire into the adequacy of consideration. (That approach to consideration is somewhat at odds to that conventionally followed in England and New Zealand.)

73 The judgment of Lucas CJ in *Foley*, in which three other judges concurred, expressly left aside the question of the measure of damages in a wrongful discharge action based on breach of contract. However, Broussard J, who concurred on the implied-in-fact contract point but dissented on the tort remedy point, did consider the question. After referring to the general rule that contract damages are limited to those within the contemplation of the parties at the time of the contract (citing *Hadley v Baxendale*) and to the assumption that ordinary commercial contracts do not contemplate damages for mental or emotional distress, the judge observed that such damages would be recoverable if the contracting parties did contemplate that breach would cause emotional distress, and suggested that a review of the facts of reported wrongful discharge cases

makes it clear that in many cases the employer is aware at the time of the contract that bad faith discharge will create great mental and emotional distress. (241)

74 As mentioned above, the Supreme Court in *Foley* was divided on the availability of a claim for damages in tort for breach of the covenant of good faith and fair dealing implied (in most US states, including California) into all contracts. The majority was of the view that the ordinary rule was that a breach of such a covenant provided remedies in contract but not in tort (where damages awards may be more substantial), and that this should be subject only to one established exception for insurance cases and (notwithstanding some earlier lower appellate court decisions) there should not be a similar exception for employment contracts; that there were a number of ways of dealing with deficiencies in the compensation provided by traditional contract damages; but that that issue was one involving significant policy matters more appropriately resolved by the legislature. The minority judges implicitly accepted that ordinarily a breach of the covenant gave remedies only in contract but were of the view that there was a recognised employment exception; that the reasons for that exception were as persuasive as those for the insurance exception; and that the exception should be confirmed as a matter of common law development.

75 Speaking for the majority, Lucas CJ commenced by reiterating certain principles relevant to contract law: predictability about the cost of contractual relationships plays an important role in the commercial system; and damages for breach of contract have traditionally been designed to compensate the aggrieved party rather than punish the party in breach. He referred to the "efficient breach" concept by citing the reporter's notes to Restatement Second of Contracts, chapter 16, s 344 et seq, 101-102:

A breach of contract will result in a gain in "economic efficiency" if the party contemplating breach evaluates his gains at a higher figure than the value that the other party puts on his losses, and this will be so if the party contemplating breach will gain enough from the breach to have a net benefit even though he compensates the other party for his resulting loss. (227)

76 The judgment of Lucas CJ goes on to state that

The covenant of good faith is read into contracts in order to protect the express covenants or promises of a contract, not to protect some general public policy interest not directly tied to the contract's purposes. (232)

In explaining the exception permitting tort recovery for breach of that covenant in insurance cases, Lucas J emphasised the "special relationship" between insurer

and insured and special features of the insurance contract: where a claim is wrongfully refused, an insured cannot turn to the marketplace to find another insurance company willing to pay for the loss already incurred; an insurance company is "quasi-public" with a "government-like function" of spreading losses across society; the insurance company is selling protection from potential specified economic harm; and the insurer's and insured's interests are inherently in conflict. As those factors do not apply to the employment contract, no similar exception should be made for such contracts.

77 In support of the proposition that the issues were better left to the legislature, Lucas CJ referred to the variety of possible courses to remedy the problem of inadequate contractual compensation, including increased contract damages, provision for award of attorney fees, establishment of arbitration or other speedier and less expensive dispute resolution, or the tort remedies sought in the Foley case itself.

78 In dissenting on the question of a tort remedy for breach of the implied fair dealing covenant in employment contracts, Broussard J disagreed with the distinctions between insurance and employment contracts drawn in the judgment of Lucas CJ (see para 76): the public interest in deterring arbitrary breach of employment contracts was at least equal to that in deterring arbitrary breach of insurance contracts; both insureds and employees depend on the respective contracts for security, well-being and peace of mind, and the consequences can be very severe if either insurance companies or employers act in bad faith. Both these kinds of contracts are thus in contrast with other commercial contracts which are generally negotiated between parties of more nearly equal bargaining strength, and entered into for the purpose of profit.

79 On the topic of economically efficient breach (see para 75 above), Broussard J responded in a footnote:

A party who can calculate damages can determine whether he can profit by breaching his contract, accepting liability in return for the benefits of breach. This attitude may be appropriate in a commercial context. It should not be condoned in the employer-employee relationship, where breach may cause injury beyond that of mere loss of income, injury which cannot easily be mitigated. It is difficult to summon sympathy for the employer who needs predictability of damages so he can

calculate whether he will profit by firing his employee in breach of the employment contract. (247)

- 80 In a separate judgment dissenting on the tort remedy issue, Kaufman J emphasised that the duty of fair dealing was not consensual in origin:

While the nature of the obligations imposed by this duty is dependent upon the nature and purpose of the contract and the expectations of the parties, these obligations are not consensual, not agreed to in the contract; they are imposed by law and thus reflect the normative values of society as a whole. (251, emphasis in original)

- 81 Kaufman J went on to criticise the majority view of the employment relationship as "unrealistic if not mythical" and based on an erroneous reluctance "to define the minimal standards of decency required to govern that relationship" (253). He went on to contend that the employment relationship is at least as "special" as that in insurance:

I can think of no relationship in which one party, the employee, places more reliance upon the other, is more dependent upon the other, or is more vulnerable to abuse by the other, than the relationship between employer and employee. And, ironically, the relative imbalance of economic power between employer and employee tends to increase rather than diminish the longer that relationship continues. Whatever bargaining strength and marketability the employee may have at the moment of hiring, diminishes rapidly thereafter. The marketplace? What market is there for the factory worker laid-off after 25 years of labor in the same plant, or for the middle-aged executive fired after 25 years with the same firm?

...

Peace of mind? One's work obviously involves more than just earning a living. It defines for many people their identity, their sense of self-worth, their sense of belonging. The wrongful and malicious destruction of one's employment is far more certain to result in serious emotional distress than any wrongful denial of an insurance claim. (253)

- 82 In concluding, Kaufman J anticipated suggestions of inappropriate judicial activism, and responded:

We overstep no institutional bounds or constitutional constraints in recognising that a willful and malicious termination of employment is so offensive to community values that it may give rise to tort remedies. (256)

- 83 As the *Bliss*, *Vorvis* and *Foley* decisions indicate, the topic of damages for breach of an employment contract touches on a wide range of issues and can lead to clear divisions of opinion. That range of issues includes the following:

(a) the distinctive features of the employment contract;

- (b) the relative power and bargaining strength of employer and employee;
- (c) the boundary between contract and tort;
- (d) the nature of "remoteness" of damages, and imputed contemplation of problems by contracting parties;
- (e) the basis for and scope of terms implied (whether by law or in fact) into contracts by the courts;
- (f) the technical requirements for discerning a collateral contract;
- (g) the doctrine of precedent (where decisions of high appellate courts are binding on lower courts in later cases);
- (h) the proper role of the courts as against the legislature;
- (i) considerations of economic cost and efficiency; and
- (j) perceptions of community values.

V

Employment Contracts, Economics and the Labour Market

- 84 A comparison of the approaches of the majority judgments in *Addis* with those of the dissenting minorities in *Vorvis* and *Foley* illustrates the scope for different perceptions of the nature of the employment contract. The narrow view is reflected in the *Addis* decision and sees the contract as a simple exchange of wages for labour and (consistent with that) terminable by either party with little or no notice. The wider view sees the elements of the employment contract as much more complex and including various intangible matters.
- 85 These different views have been articulated in recent years in a vigorous academic debate which has focussed on the operation of labour markets and on the basis of termination of employment contracts - "at will" (without reason) or "just cause" (justifiable). In this chapter we outline some of the reasoning advanced by leading protagonists in the debate.

THE NARROW VIEW

- 86 The leading contemporary advocates of a narrow view appear to be members of the "law and economics" or "contractarian" school of thought, notably Judge Richard A Posner of the US Court of Appeals for the Seventh Circuit, and Professor Richard A Epstein of the University of Chicago law faculty.
- 87 In his article "In Defense of the Contract at Will" (1984) 51 *University of Chicago Law Review* 947, Epstein argues that advocates of a change to a "just cause" termination rule focus on exceptional cases of employer abuse, overstate the inequality of bargaining power as between employers and employees, and overlook the persistence of the "at will" rule as indicative of its advantageous predictability and mutual benefits for both employers and employees. In part,

Epstein develops his case by referring to the "at will" aspect of partnerships where the ability to withdraw without reason provides an effective control against abuse which is itself the risk arising from the inherent conflict of interest between the economic actors involved in the partnership. Further, he suggests, the self-help remedy of withdrawal involves lower cost and greater predictability than seeking remedies through litigation. He goes on to argue that those considerations apply with similar validity to the employment relationship and that in reality the private pressures on employers (in particular, the risk of losing valuable employees) effectively curbs the legal ability of the employer to terminate at will in most cases. Epstein argues that the small minority of cases where this does not occur do not provide an appropriate basis for formulating a general rule applicable to most employment contracts. Epstein also contends that a "just cause" requirement for termination of employment contracts will make employers more reluctant to hire and, perversely, mean that dismissal will carry a greater adverse connotation than under a system where the "at will" rule dominates.

88 Epstein's thesis is partially summarised in his conclusion:

No system of regulation can hope to match the benefits that the contract at will affords in employment relations. The flexibility afforded by the contract at will permits the ceaseless marginal adjustments that are necessary in any ongoing productive activity conducted, as all activities are, in conditions of technological and business change. The strength of the contract at will should not be judged by the occasional cases in which it is said to produce unfortunate results, but rather by the vast run of cases where it provides a sensible private response to the many and varied problems in labor contracting. All too often the case for a wrongful discharge doctrine rests upon the identification of possible employer abuses, as if they were all that mattered. But the proper goal is to find the set of comprehensive arrangements that will minimize the frequency and severity of abuses by employers and employees alike. (982)

89 In "Hegel and Employment at Will: A Comment" (1989) 10 Cardozo Law Review 1625, Posner outlines the contractarian starting point:

Employment at will is a corollary of freedom of contract, and freedom of contract is a social policy with a host of economic and social justifications Employment at will happens to be the logical terminus on the road that begins with slavery and makes intermediate stops at serfdom, indentured servitude, forced servitude, and guild restrictions. That should be a point in its favor. (1627)

And:

The employee at will can leave his job whenever he wants and go work for someone else. Far from being a slave of his employer he is not even tied to him by a contract for a fixed term. Employment at will lies, as I have said, at the opposite end of the spectrum from slavery, with contracts for a fixed term in the middle (not in the exact middle, to be sure). It is true that the employee at will can be fired at will, but the consequences of being fired, in our society at any rate, do not include becoming someone's slave; given unemployment insurance and welfare, they do not even include becoming a poor person, in the sense of someone utterly destitute and without property. (1628)

- 90 In the same article, Posner stresses the costs of a "just cause" approach to termination of employment contracts:

... a free market institution as persistent and widespread as employment at will is presumptively more efficient than an alternative imposed by government. The reason it might be more efficient is not hard to find. Litigation, even when conducted before arbitrators rather than before judges and juries, is costly. Apart from these direct costs of legally enforceable universal tenure rights there are the indirect costs, potentially enormous, from the weakening of discipline in the workplace when workers can be fired only after a costly and uncertain proceeding. The sum of these costs should not be underestimated. If they did not outweigh the benefits to workers, why would employers not offer just-cause protection voluntarily, the way they offer other fringe benefits? Are the employers that do offer such protection – government agencies, unionized firms, and universities - the most efficient producers in the marketplace?

We should consider the likely incidence of the costs of the just-cause or rational-cause principle. Consumers would be hurt, because these costs would be passed on (in part) to consumers in the form of higher product prices. Less obviously, workers would be hurt too. In figuring what he can afford to pay, an employer considers not only the direct costs of labor but indirect costs as well (such as the employer's social security tax, unemployment insurance premiums, and workers' compensation insurance premiums), of which the costs of the just-cause or rational-cause principle would be one. The higher the indirect costs, the less the employer will be willing to pay the employee in the form of wages and fringe benefits. Now in a sense just-cause protection is a fringe benefit, so the worker does not lose out completely, but it is by definition a benefit he did not want as much as he wanted a higher wage, or else the employer would have offered it to him, provided only that the employer is a rational maximizer of his own self-interest.

Just-cause protection would increase unemployment. Employers would search longer before hiring a worker, because the cost of firing the worker if he did not pan out would be higher. Therefore it would take longer to find a new job, which would increase the unemployment rate because most unemployed people are people searching for a new job to replace the one they have just lost. Second, and more serious, would be the effect on new hires. Just-cause (or rational-cause) protection raises the cost of labor to employers, and therefore reduces their demand for it; they hire less, automate more, relocate plants to foreign countries that do not have such protection. (1633-4)

- 91 The narrow view does not accept that the market in which employers seek employees is marked by unequal bargaining power. In *Freedom at Work* (Oxford University Press, Auckland, 1990), Penelope Brook emphasises two matters,

citing W H Hutt, *The Theory of Collective Bargaining 1930-1975* (Cato Institute, San Francisco, 1980 reprint). First, that in so far as 'power' is exercised over employment relationships, it is the power of consumers, through their willingness to purchase the goods and services that employers and workers collaborate to produce. As Hutt puts it:

[T]he suppliers of assets and circulating capital are just as subordinate as the workers to the power of consumers' sovereignty. Consumers are the true 'employers'. The assets of the firm are employed just as the workers are. The services of both are embodied in output. The investors willingly submit to the ruthless discipline of the market.

- 92 The second matter stressed by Brook relates to the nature of the bargaining power that an individual worker has:

The wage that a worker can 'bargain for' depends on his or her access to alternatives. The worker's 'bargaining power' vis a vis a current employer is measured by the best remuneration package that he or she could attract from a competing employer; that is, by the competition that exists for his or her services. In this context, Hutt argues that notions of bargaining power can be used with consistency and meaning only in reference to the individual worker, not to workers as a mass or a class:

We cannot talk of 'labour's disadvantage in bargaining', although we can discuss the individual's. The remedy for the individual's 'bargaining power' depends (a) on his having scarce and valuable powers, which simply means that he can provide goods and services which consumers need, and (b) on his effective right to use those powers.

THE WIDER VIEW

- 93 A very different approach to analysing the contents of an employment contract is to be found in John Swan, '*Extended Damages and Vorvis ...*' (1990) 16 *Canadian Business Law Journal* 213:

The most obvious question that is not asked is why it is assumed that the views of the House of Lords in 1909 in *Addis v Gramophone* on what a contract of employment gave or provided to the employee must be accepted as still valid today. ... It is equally easy and as justifiable to say that implied in every contract of employment is a promise that the employee's dignity and sense of self-worth will not be violated should the employer decide to end the relation. (220)

- 94 Swan goes on to suggest that

... it is very probable that [in *Vorvis*] there was abundant evidence that the defendant did not offer just money for the plaintiff's work; it, like any other employer in the same situation, offered its employees the chance for professional

development and a sense of job satisfaction. Implicit in any such relation would be an undertaking to protect the benefits the employee was to obtain and an undertaking not to violate the plaintiff's sense of dignity and self-worth. (221)

- 95 A recent book review (of Paul C Weiler, *Governing the Workplace: The Future of Labor and Employment Law*, Harvard University Press, 1990- not available in New Zealand when this report was completed) by Samuel Issacharoff, "Reconstructing Employment" (1990) 104 *Harvard Law Review* 607, contains a number of responses to the general thesis advanced by Epstein. One of those of particular relevance relates to the position of the career employee and the suggestion that employers will often seek to encourage long service by paying a premium for seniority which is in part a reflection of a lower rate of earning at the outset of the career. On this thesis the increase in productivity during an employee's career is quite likely to be less than the increase in remuneration. Issacharoff then states the difficulty as follows:

Such a system disciplines employees to firm loyalty by raising the opportunity costs of discharge; the late-career employee cannot acquire the same premium wage from other employers.

Unfortunately, the structure of the employment market is filled with incentives to terminate employees at moments of greatest individual vulnerability, which results in opportunistic behavior at the expense of career employees. In times of crisis, the short-term costs of terminating senior employees may outweigh the long-term benefits of a career work force. The firm's reputational interests in inducing employee loyalty may not withstand the pressure to remove from the payroll high-wage employees of only slightly greater marginal productivity. (622)

- 96 A relative inequality of information as between employer and employee is contended for in a Note, "Protecting At Will Employees against Wrongful Discharge: The Duty to Terminate Only in Good Faith" (1980) 93 *Harvard Law Review* 1816:

Employees may for a variety of reasons misperceive their best interests at the outset of the employment relationship. For example, employees may tend to discount substantially the risk of wrongful discharge, and as a result systematically undervalue job security. This reflects a common psychological response; since most people prefer not to think about the possibility of disaster, employees understandably tend to disregard the possibility of job loss. In addition, most employees have only limited access to information about personnel relations in a firm and are unable to "shop around" by comparing the firm's relative turnover rate and firing histories. (1831)

- 97 A European view, critical of the deregulatory approach of the contractarian and libertarian schools of thought, is to be found in an article by Ulrich Muckenberger

and Simon Deakin, *From Deregulation to a European floor of rights: Labour law, flexibilisation and the European single market*" (1989) 3 *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* 153. Muckenberger and Deakin criticise the "state of nature" contractarian perception of the labour market:

... wage dependency is a pre-condition of a labour market, in which labour power is sold as a commodity. Wage dependency, however, is far from being a state of nature. It arises instead from the relative propertyless-ness of labour in relation to capital, and thus initially from the enforcement through the legal system of the employer's property and contract rights, and from the legal form given to the ownership of capital through incorporation and limited liability. But the degree of insecurity will also differ as between particular groups or individuals, according to their ability to organise, principally through trade unions and the family, to counter the effects of wage dependency and establish alternative sources of income. Thus the degree to which the legal system permits labour to organise collectively and the level at which it sets a floor of rights to protect those unable to organise effectively, will determine the manner in which the labour market is structured and segmented.

Rather than allocating scarce labour to jobs, the "labour market", understood [as] an institution which is formed historically, exists to ration the access of workers to the limited supply of good jobs. For those jobs which are left over, labour is relatively plentiful rather than the other way round, and this places an inherent pressure on the attempts of labour organisations to control competition with the aim of securing the minimum conditions for labour's reproduction. In an unregulated contract system, not only is the power of the employer over the individual employee left relatively untouched, but the differential bargaining power of separate groups within the labour force finds further expression in the relative degree of security through private welfare which they are able to achieve. (183-4)

- 98 Muckenberger and Deakin criticise the contractarian emphasis on the allocation function of wages, arguing that labour is not a simple commodity which will be sold if the price is advantageous to potential buyers. They note that the price of labour has three elements: net employee earnings; indirect benefits (including enterprise-based welfare and benefit costs); and dismissal and termination (redundancy, compensation, and re-engagement) costs. They note also that production is not concentrated in low wage areas, and that employment policies are influenced by the need for a qualified and skilled labour force. Further, there is a mutual dependence between employer and employee which exists notwithstanding the uncertainties (about length of service, work content, and intensity and quality of work) and asymmetrical obligations (or imbalance of power) of employment contracts.

- 99 This analysis leads Muckenberger and Deakin to argue that both wages (in the threefold sense noted above) and industrial relations legislation have a vital function in enhancing efficiency of performance:

In a society in which direct constraint such as slavery is no longer permitted, stimuli for better performance can only consist of incentives capable of creating intrinsic motivations to perform, or in other words of internalising the work obligation. The modern means of achieving this internalisation are regulation and the wage system.

Even net or explicit wages in modern industrial economies seem to be differentiated according not primarily to the seniority a person has already achieved, but rather to the seniority a person is expected to achieve during his or her future working career. The second wage, consisting of welfare costs on the enterprise and on society as a whole, can be regarded even more clearly as providing incentives for continuity of employment. This is especially the case with social insurance systems like the West German one which overwhelmingly rely upon earnings-related contributions and provide contribution-related benefits (as opposed to tax-financed funds and flat-rate benefits). In the same way, the third wage, dismissal costs, serves as an incentive for continuity of employment and as a premium for intrinsic commitment from the firm's point of view. (189, emphasis added)

... . Regulation in the form of labour and social insurance legislation is clearly a modern form and expression of this efficiency function of the wage. Only to some extent - but never only, and not at all essentially - can such regulation be said to be the outcome of "hazardous" events or of "class struggle" as the neoclassical view suggests. Its rationale is, rather, to express a certain need for continuity and stability in performance, which is common to both the employee's and the employer's perspectives. This need could not be met through individuated wage bargaining, which scatters the effect of stabilisation and segments it through competition. This is why labour law in some form has to intervene in this area, introducing a "rationalising" element. Its function is to institutionalise and, at the same time, to generalise a performance-related rationality within a given framework of production. (190)

- 100 A social/political perception of employment contracts in the United Kingdom was contained in a commentary on (and included in) Shenfield, *What Right to Strike?* (Institute of Economic Affairs, London, 1986) by Professor Cyril Grunfeld:

In contradiction to Mr Shenfield's preferred state of universal employment 'at will', subject to contract (Proposal 9), the existence of a law of unfair dismissal is not a significant obstacle to the development of a prosperous economy. The need for such a law illustrates the truism that economic problems may not always be purely economic. There may be a political dimension that demands a point of balance. In this instance, the political dimension takes the form of demanding acceptable standards of human behaviour in employment. The law of unfair dismissal, introduced by the Industrial Relations Act 1971, was an overdue reaction to the crudity and unavoidable limitations of the common law of contract as applied to the employment relationship. (50)

VI The Case for Legislative Intervention

- 101 In virtually all law reform exercises there are three broad options or questions:
- (a) the status quo - is the law working satisfactorily so that there would be no advantage in change?
 - (b) common law development - are any imperfections in the law such that over time the courts (in particular, the appellate courts) will eliminate or minimise these?
 - (c) legislative intervention - are the law's imperfections such that they would most expediently be eliminated or minimised by remedial legislation?

The first two questions are addressed in this chapter; the third provides the subject matter for Chapter VII.

IS THE *ADDIS* RULE SATISFACTORY IN THE EMPLOYMENT CONTEXT?

- 102 The Law Commission is of the opinion that the *Addis* rule is not beneficial in the employment context in New Zealand for three broad reasons:
- (a) in its original form it is undesirable;
 - (b) partial reversal by industrial relations legislation has produced unjustifiable anomalies; and
 - (c) the present uncertainty over its status in New Zealand is unhelpful.
- 103 Our rejection of the original *Addis* rule includes an acceptance of the propositions that employment contracts are in a special category which may be distinguished from ordinary commercial contracts, and that their nature is wider than that

allowed in *Addis* or contemporary contractarian analyses. The reasons for that acceptance are perhaps most effectively articulated in the dissenting judgments in *Foley* (see Chapter IV, above), and are reinforced by the judicial perceptions that, in the employment context at least, the rule is "intransigent" (Gee, Barker J, para 38, above), "illogical" (Whelan, Gallen J, para 45, above), and "obsolete" (Vorvis, Wilson J, para 67, above). And it is significant that in New Zealand the rule has been avoided by legislation in force over the past two decades in relation to those employees with access to personal grievance procedures.

104 However, we accept as well the force of the case for avoiding "confusion and uncertainty in commercial affairs", the words of Lord Atkinson in *Addis* (see para 24, above). We are of the view that the *Addis* rule has already been modified by case-law developments to be broadly consistent with ordinary rules as to remoteness of damages in non-employment cases; that damages for mental distress and injured feelings are generally too remote to be recoverable for breach of ordinary commercial contracts; that the uncertainties associated with quantifying non-pecuniary losses are particularly undesirable in the commercial contract context; but, as already stated, employment contracts are not analogous to routine commercial contracts.

105 We recognise that any move away from *Addis* - and the efficient breach model noted in *Foley* - involves some costs. As Posner and Epstein argue (see Chapter V, above), a requirement to pay no more than wages in lieu of a (fairly predictable) period of notice is unlikely to involve litigation (the amounts are predictable, and the post-dismissal activities of the employee are irrelevant), and permits a "clean break" - although the position is less clear in New Zealand. But the costs of the risk of or actual litigation must be weighed against the quite different benefits that would accompany a reversal of *Addis*. There is an absence of any (let alone clearcut) empirical cost information, and the balancing exercise is necessarily a matter of judgment. As a matter of judgment we have had little hesitation in concluding that the balance weighs in favour of a change from *Addis*.

SHOULD THE MATTER BE LEFT TO THE COURTS?

- 106 As mentioned at the beginning of this chapter, there is a general question in many debates on law reform as to whether a particular issue can be left to the courts to sort out over time. It may be argued that the common law rules are made by judges, and where shown to be undesirable or inconvenient can be unmade by judges: see, for example, the discussion in *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461 by Cooke J at 471-474. As has been seen, the *Whelan* decision would involve a major erosion of *Addis* if it were to be accepted as the law in New Zealand.
- 107 On the other side of that general question are arguments favouring certainty and lack of expensive litigation if the issue is clarified by statute after a potentially wider inquiry than courts can undertake. It may be argued strongly that employment contracts are too important to be left subject to great uncertainty, and that litigation is not a realistic option for individual (and dismissed) employees. Further, the result in *Whelan* and the reservations about *Addis* expressed in the earlier New Zealand cases were clearly prompted by the contrast with the availability of 'compensation' under the Labour Relations Act 1987 and its statutory predecessors.
- 108 In addition to that general question there are a number of related questions:
- (a) Has the *Whelan* decision already remedied the problems?
 - (b) Can the courts imply into employment contracts a more general implied term than that relied on in *Whelan*?
 - (c) Is the Burch approach to the Contractual Remedies Act likely to provide a satisfactory solution?
 - (d) Could a separate tort action be developed for dismissed employees?

IMPLIED TERMS

- 109 The likelihood of *Whelan* becoming accepted as good law is not at all easy to predict. It does not refer to the *Vorvis* decision and, as has been seen, is based on

the breach of an implied term that the employee would be treated in such a manner as to enable him to retain his dignity and status in his community. It seems that that term was specific to the particular employee - or his social and managerial positions - and arose late in the period of his employment as he attained those positions. It was not suggested by Gallen J that the term had been in existence from the outset of the plaintiff's employment with the defendant company, although it may be that it was regarded as part of a variation or new employment contract dating from his appointment to the senior position he held at the time of his dismissal.

- 110 In a number of respects the approach taken in *Whelan* is analogous to that in the "implied-in-fact" contracts considered in *Foley* (see paras 70-72, above). However, that area of United States law has developed in a way not yet followed in New Zealand or other Commonwealth jurisdictions. Thus, although New Zealand (and English) law recognises "collateral" contracts between parties who are already in a contractual relationship, it also requires fresh consideration (in the sense of new obligations) to be shown. The prospects for the New Zealand courts accepting that such fresh consideration could be established in a continuing employment relationship remain highly speculative.
- 111 There is then the question of whether the courts could or would imply a term into employment contracts which would negate *Addis*. As has already been seen, an implied duty of fairness has been suggested by our Court of Appeal (see para 43, above) although the *Goulden* case may be explained more narrowly in terms of administrative law rules relating to the observance of natural justice by public agencies; and the earlier *Auckland Shop Employees* case may be explained in the statutory context of "unjustifiable" dismissals.
- 112 One New Zealand commentator has drawn on those Court of Appeal decisions to suggest the development of an implied term that each party to an employment contract owes the other "a mutual duty of trust and confidence, and general reasonable behaviour": see Margaret Mulgan, "Implying Terms into the Contract of Employment - Damages for Wrongful Dismissal in New Zealand" [1988] NZ Law Journal 121 at 129 (but advanced on the basis of "little present likelihood of ... legislative developments", at 122); see also Swan, paras 93-94, above.

113 In our view, the suggested implied terms are vague, and likely to produce a greater degree of uncertainty and potential for litigation. It seems likely that the courts in New Zealand would hesitate long before implying a general duty cutting across the traditional ability of employers to terminate employment contracts on proper notice. Indeed, the Court of Appeal has recently reaffirmed aspects of an employer's entitlement to organise business in such a way as the employer believes will enhance profitability: see *G N Hale & Son Ltd v Wellington etc Caretakers etc IUW* (1990) 3 NZELC 97,985.

RELIEF UNDER THE CONTRACTUAL REMEDIES ACT 1979

114 Another possible route to avoid the *Addis* rule is section 9 of the Contractual Remedies Act 1979, as applied in *Burch* (see para 48, above). That approach was apparently endorsed in observations by Robertson J in *Thomas v Bournville Furniture Co Ltd* (unreported, High Court, Auckland, CP 2695/88, 20 October 1990); and it is consistent with what was said by Greig J in *Gallagher v Young* [1981] 1 NZLR 734:

It is clear that there is a wide discretion under s 9 to give justice as between the parties. Under that section it is no longer a question of applying the strict rules as to damages and it appears from the effect of s 10 that the just order may replace an inquiry into damages altogether.

115 However, this approach to section 9 has not been considered by the Court of Appeal and is questioned by some of our leading contracts scholars. As Professor John Burrows of the University of Canterbury has noted in a paper recently commissioned for the Law Commission's review of the New Zealand contracts statutes:

difficulty ... has arisen in relation to the power to award a monetary sum under section 9(2)(b). The Report of the Contracts and Commercial Law Reform Committee recommending the legislation said of this paragraph:

The proposed power is not intended to be a substitute for the right to recover damages ... The Committee envisages that the clause will serve [this purpose]:

(b) To enable the Court to make an immediate order directing payment of money as between the parties to the contract, notwithstanding that a claim for damages may be in contemplation or pending. The purpose here is to enable a party to obtain immediate

monetary relief where the Court is satisfied that that should be given to him. (*Italics supplied*)

It thus seems that section 9(2)(b) was meant to empower restitutionary orders (eg, the return of part payments and reimbursement in respect of services performed) and not awards in the nature of damages. That view is reinforced by the retention of damages as a separate remedy in section 10, and, as Professor Coote has pointed out ((1988) 13 NZULR 160), by the use in section 9 of the term "relief": damages are better described as a "remedy" than as a form of "relief".

116 More specifically, after noting the *Burch* decision, Professor Burrows commented:

This use of section 9 to award a head of damage that was only doubtfully available at common law (because of the rule in *Addis v Gramophone Co*) and to foreshadow a further award the calculation of which would have been difficult or impossible under the common law rules, can only be described as problematical. If correct, it enables the court to give the go-by to the carefully formulated rules of the common law as to remoteness, and assess on a ball-park basis. Justice may perhaps be achieved in this way, and it must be said that the New Zealand courts are in other cases taking an increasingly flexible approach to remedies, but it is difficult to imagine it is what the legislature intended in the Contractual Remedies Act. If the present common law rules about the assessment of damages are regarded as unsatisfactory, it may be that the remedy is to amend those rules by a separate statute, not to use section 9 to by-pass them.

REMEDIES IN TORT

117 A further question is as to the possibility of the courts developing a tortious duty of care, the breach of which would justify an award of general damages, relating to the manner of dismissal of an employee. That of course was the issue on which the Supreme Court of California was divided in the *Foley* case (see Chapter IV, above). In New Zealand, it raises the continuing uncertainty over the availability of a tortious cause of action in relation to a situation covered by contractual provisions. The Court of Appeal decision presently governing that issue, *McLaren Maycroft & Co Ltd v Fletcher Development Co Ltd* [1973] 2 NZLR 100, holds that no such tortious duty arises. Although the Court of Appeal has subsequently indicated that the *McLaren Maycroft* rule may require reconsideration, the issue is bound up in the current complexities over the development of tort law and what are perceived to be divergences in approach between the Court of Appeal in New Zealand and the Law Lords who sit in the House of Lords and on the Judicial Committee of the Privy Council.

118 Overall, the leaving of this area to common law development seems likely to result in some straining of traditional rules if the desired policy end is to be achieved. In summarising common law developments in the employment field, Samuel Issacharoff (see para 95, above), is highly critical, referring to the striking doctrinal absurdity of the developing case law. In the rush to carve out case-specific exceptions to the at-will rule, courts have become increasingly brazen in their manipulation of doctrine. Increasingly, the language of contract becomes simply an admonition to "be fair", and the critical requisites of consideration and reliance are "presumed" rather than proven. In the absence of any contract-based argument, courts use elusive tort doctrines to undertake an outcome-directed search for public policy that, curiously, the legislature has failed to articulate. (614)

IN SUMMARY

119 At this point it is convenient to summarise some of the matters - most already discussed - which might be seen as weighing against and for any legislative intervention to avoid the *Addis* rule. Matters weighing against such intervention would include:

- (a) the rule was made by judges and can be left to be unmade or bypassed (as has been done already in other contexts) by the judges;
- (b) the rule is valuable in minimising difficulties of quantifying damages for non-pecuniary loss, and thus enhancing commercial certainty and economic efficiency;
- (c) the traditional distinction between contract and tort is reinforced by the rule;
- (d) the same rules should apply to all contracts, without singling out employment contracts for anomalous treatment;
- (e) on a traditional remoteness of damages approach, the rule correctly assumes that loss from mental distress or injured feelings upon

termination is not in the reasonable contemplation of the parties at the time an employment contract is entered into;

- (f) alternatively, if such a loss is contemplated it is a risk which an employee - like any other contracting party - must bear;
- (g) unless conduct complained of as justifying general damages upon termination itself amounts to an independently actionable wrong (eg, defamation, or assault), its occurrence in a dismissal context should not make it legally relevant;
- (h) courts and other dispute resolution tribunals are likely to have considerable sympathy for a dismissed employee and may tend to be unduly generous in making awards for losses not easily quantifiable.

120 Arguments in favour of legislative intervention would include the following:

- (a) employment contracts are distinguishable from ordinary commercial contracts, not least in their importance to the financial and social well-being of the employee;
- (b) mental distress and injury to feelings are very real losses which may be suffered when the circumstances associated with dismissal aggravate the fact of dismissal itself;
- (c) the rationale for the *Addis* rule is founded in aspects of commercial convenience and certainty which are not self-evidently applicable to employment;
- (d) the courts are capable of assessing damages for non-pecuniary losses in a reasonable and not extravagant manner in a variety of cases, including tort cases and contract cases where the whole object of the contract (holidays and funerals, for example) means that the parties may well have contemplated that breach would incur mental distress;
- (e) the scope and future of qualification or limiting of the *Addis* rule in *Whelan* remains uncertain, and it may yet be regarded as limited to its

own particular facts or disapproved in later High Court or Court of Appeal decisions;

- (f) employees - especially those recently dismissed - are likely to be poorly placed to engage in expensive and uncertain litigation about the precise scope of the *Addis* rule or based on a separate claim for defamation or some other independent tort;
- (g) a degree of certainty as to the impact in the employment context of the *Addis* rule is desirable and can readily be achieved by legislation without unnecessary distortion of established common law rules.

121 On weighing those factors and the other matters previously discussed in this report, the Law Commission is persuaded that the topic is sufficiently important and the degree and consequences of uncertainty so significant that legislative intervention is justifiable and desirable.

VII

The Form of Legislative Intervention

122 A conclusion that legislative intervention is appropriate does not exhaust the questions that must be considered. Although the Employment Contracts Bill is designed to deal with all contracts of employment and thus offers a convenient and appropriate vehicle for legislative intervention to remove the undesirable effects of the *Addis* rule in the employment context, further questions remain, including:

- (a) Should such legislation be limited to employment contracts?
- (b) Would it distinguish between employees covered by individual or collective employment contracts of the kind contemplated by the Employment Contracts Bill?
- (c) Would it be appropriate to permit contracting out of the benefit of any such statutory provision?
- (d) Would it be available only where there was an independently "unjustified" dismissal?
- (e) Would it be achieved by an enabling provision relating to matters which could be compensated, or by providing that a specified term should be regarded as part of every employment contract?

123 The first question relates to the existence of some contracts analogous to employment - those involving commission agents and owner-drivers, for example (see para 16, above): Why should these be excluded by confining the intervention to "employment"? In response it may be observed that arguably anomalous exclusions are inevitable wherever defined lines are drawn in any area regulated by law. More positively, it seems likely that the courts could well follow the lead

that any such legislation might give - in a manner similar to that suggested in the Goulden decision (see para 43, above) – and interpret those analogous contracts so as to achieve a similar result. In any event, we are of the view that “employment contracts” provide an appropriately defined scope for the remedial legislation we favour.

- 124 Although the Employment Contracts Bill (as introduced) provides that a personal grievance procedure (including provision for “compensation” for “unjustifiable” dismissal) must be a part of every collective agreement, it merely permits such a procedure to be incorporated in an individual employment contract. It is the Commission's view that this distinction between employees may be inconsistent with the philosophy underlying the Bill and is likely to disadvantage those employees covered by individual employment contracts, particularly where these are unwritten. Because an important part of the rationale for legislative intervention is the removal of such inconsistencies and disadvantages, the Law Commission favours the provision of a remedy available to all employees (subject to the contracting out point, discussed below).

CONTRACTING OUT

- 125 On the question of contracting out, the Commission recognises that this would be entirely appropriate in situations where individual employment contracts are negotiated carefully and from relatively equal bargaining positions. In any event, there would be certainty: a potential employee would be well aware of the consequences of any termination of the employment. The arguments against contracting out are based on a presumption of inequality of bargaining power and of information. Some of those we have consulted fear a “standard form” employment contract would be presented on a “take it or leave it” basis, and would negate the effect of any statutory reversal of *Addis*. We acknowledge that possibility but are not inclined at present to deny freedom of contract or recommend any further layer of judicial review in the employment context. We do recommend that this matter be monitored if our main recommendations are implemented.

“COMPENSATION” OR IMPLIED TERM

- 126 There are perhaps two main legislative techniques which might be used to reverse the *Addis* rule. The first would essentially declare that dismissed employees may be awarded compensation for humiliation, mental distress and injured feelings. The second would declare or presume a specified term to be part of every employment contract, such term providing that an employer could not dismiss an employee in circumstances or in a manner which was likely to cause mental distress, humiliation or injury to feelings; breach of that term would then be one for which damages of the kind denied in the *Addis* case itself could be awarded.
- 127 The Law Commission prefers the first of those techniques. That preference is based on a number of factors including
- (a) the continuation of the legislative technique employed in section 227(c) of the Labour Relations Act 1987, and the retention of at least some of the benefits from its usage in the Labour Court;
 - (b) the real difficulties of drafting a precise term to be incorporated in a very wide variety of employment contracts; and
 - (c) the second technique requires a somewhat fictional element to insert as a term of a contract a provision which has not been agreed between the parties to that contract.
- 128 Although the use of the term “compensation” rather than “damages” implies that the *Addis* limits do not apply, we see some advantages in terms of clarity if the more detailed drafting of at least section 227(c)(i) (humiliation, etc) of the Labour Relations Act 1987 is retained. Section 227(c)(ii) (loss of benefits expected, etc) is more problematic, not only because of the use of that provision to compensate for loss of “continued high-paid employment” in *Post Office Union (Inc) v Telecom South* (see para 56, above), but also because it does not expressly cover claims for consequential losses of the type struck out in *Gee v Timaru Milling* (see para 37, above). On balance, we recommend retention of the section 227(c)(i) language with other matters left to be covered by the ordinary meaning of the word “compensation”.

``UNJUSTIFIABLE" DISMISSAL

129 That leaves the last and most difficult question requiring consideration in this chapter. As has been seen, the operation of the Labour Relations Act 1987 involves ``compensation" (defined to overcome the *Addis* rule) where there has been an ``unjustifiable" dismissal, and ``unjustifiable" is wider than the common law notion of ``wrongful" dismissal (see para 51, above). If all employment contracts are to be placed on an equal footing in relation to remedies, as our recommendations thus far imply, the question is whether the trigger for remedies available would be a dismissal that is ``wrongful", ``unjustifiable" or categorised in some other terms. A departure from the ``wrongful dismissal" test would mean the end of the common law rule that employment may be terminated on giving reasonable notice or payment in lieu. Although that rule has not applied in New Zealand to employment covered by the Industrial Relations Act 1973 and then the Labour Relations Act 1987, it has continued to apply to employment outside those statutes.

130 The Employment Contracts Bill (as introduced) contemplates the continuation of ``unjustifiable" dismissal (but excluding procedural unfairness from this concept) rather than ``wrongful" dismissal as a trigger for remedies for breaches of collective employment contracts. This leaves an argument based on consistency which favours the extension of the ``unjustifiable" criterion to all employment contracts. On the other hand, economic considerations of cost and efficiency as well as mutual benefit have been advanced in the United States debate on the same issue: whether employment contracts should be able to be terminated ``at will" (which incorporates minimal notice or payment in lieu) or only for ``just cause". These issues and the competing arguments were outlined in Chapter V.

DISMISSAL FOR ``GOOD REASON"

131 Although the United States debate has produced powerful articulation of the arguments available to each side, the New Zealand position is significantly different: the statutory use of the concept of ``unjustifiable" dismissal since 1973 has meant that in effect a ``just cause" rule has applied since that date to New Zealand employees with access to personal grievance procedures; and implied

terms requiring reasonable notice seem more prevalent (and generous to employees) than in the United States. As the Employment Contracts Bill (as introduced) would overrule the "procedural unfairness" aspect of unjustifiable dismissal (which stems from the Court of Appeal decision in *Hennessey*, see para 18, above), we believe that there would be advantages in a change in terminology from "unjustifiable" dismissal to dismissal "without good reason". This would permit concentration on substantive rather than procedural aspects of dismissal. On that basis we believe that the arguments in support of consistency of legislative treatment favour the extension of such a concept of dismissal "without good reason" to all contracts of employment. As discussed above, we would see this extension as being subject to contracting out by agreement of the parties.

- 132 There may be a case for providing statutory guidance on the nature of "good reason" for dismissal. One model in which we see merit is a 1989 Draft Employment Termination Act prepared by the National Conference of Commissioners on Uniform State Laws. As recorded in an article by Lucy A Singer, "*Employment-at-will and the Aftermath of Foley v Interactive Data Corp*" (1990) 34 St Louis University Law Journal 695 at 721, the Draft Act defines "good cause" for termination of employment as

a reasonable basis for the employment action taken, in light of the employee's duties and responsibilities, the employee's conduct and performance record, and the legitimate economic needs of the employer.

- 133 There may be residual concerns about the lack of predictability in quantification of damages for mental distress, injury to feelings and humiliation, and a reluctance to leave the matter to those tribunals and courts empowered to award compensation. If so, it would be possible for legislation to contain a ceiling. That might be prescribed in terms of a specified monetary limit or of a period of a particular employee's recent earnings. Either form of ceiling would be arbitrary but we have concluded that the difficulty of choosing a single monetary figure, and a greater degree of flexibility in the second form, favour the latter. Thus, such compensation could be made subject to a maximum amount equivalent to, say, three or six months' remuneration. In broad terms, the amounts awarded by Gallen J in *Whelan* and by the Labour Court in the *Kiwi Cartons* case (see Appendix B)

appear to be equivalent to approximately six months' earnings for the respective employees.

CONCLUSION

134 Accordingly, while reiterating that it has not engaged in its usual extensive consultative processes in relation to this topic, the Commission concludes that it is timely to recommend that:

- (a) the effect of the rule in *Addis* in employment contexts should be reversed by a statutory provision;
- (b) such a statutory provision could conveniently be included in the Employment Contracts Bill presently before Parliament;
- (c) consistency and clarity favour the form of that provision being along the following lines:
 - (1) A court or arbitrator or grievance committee may, subject to any written agreement between an employer and an employee, order that an employer pay compensation to an employee who has been dismissed without good reason, including compensation for humiliation, loss of dignity, and injury to the feelings of the employee.
 - (2) Good reason means a reasonable basis for the dismissal having regard to the terms of the employment contract, the employee's conduct and performance record, and the legitimate economic needs of the employer.
- (d) if thought desirable, compensation payable in terms of (c)(1), above, could be made subject to a maximum equivalent to six months' earnings for the particular employee; and
- (e) there should be a monitoring of the operation in practice of such a provision to ascertain whether contracting out of its benefits for employees becomes commonplace.

APPENDIX A

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APPENDIX B

CASE-LAW: NEW ZEALAND

[In this appendix "P" refers to the plaintiff and "D" to the defendant.]

SUMMARY OF NEW ZEALAND DEVELOPMENTS

Whether the rule in *Addis v Gramophone* [1909] AC 488 (HL) has been followed in New Zealand has depended largely on whether it has been interpreted in its narrow or wide sense. In the narrow sense the rule states that an employee who is wrongfully dismissed cannot claim general damages for distress and humiliation arising from the manner of dismissal or for loss of reputation. As early as in 1913 *Addis* was followed in New Zealand in *Cutler v Dimdore* (1913) 33 NZLR 489 (SC), and it has been followed subsequently - without reservation - in other wrongful dismissal cases such as *Cowles v Prudential Assurance* [1957] NZLR 124 (SC), *Vivian v Coca-Cola Export Corporation* [1984] 2 NZLR 289 (HC), and *Francis v Bryce Francis Ltd*, unreported, HC, Wellington, CP 79/86, 8/9/1986. However, *Whelan v Waitaki Meats Ltd*, unreported, HC, Wellington, CP 990/88, 13/11/1990 marks a recent more radical approach.

In its wider sense, *Addis* has been taken to exclude general damages arising out of breaches of contract generally. But it seems that only in two cases - *Last-Harris v Thompson Bros Ltd* [1956] NZLR 995 (SC) and *Geron v Cable-Price Corporation*, unreported, HC, Auckland CP 988/88, 1/8/1990 - has the *Addis* rule been applied to exclude non-pecuniary damages in non-employment contracts. New Zealand courts have tended to follow English precedents excluding the rule such as *Jarvis v Swans Tours Ltd* [1973] QB 233 and *Heywood v Wellers* [1976] QB 446. They have found it convenient to distinguish *Addis* either on the ground that distress and anxiety as a result of breach were within the reasonable contemplation of the parties at the time of making the contract, or on the ground that freedom from mental distress had actually been contracted for. Cases which encompass such reasoning are *Bass v Arbuckle*, unreported, HC, Christchurch, CP 48/88, 20/8/1990 (relating to a building contract), *Gaunt v Gold Star Insurance*, unreported, HC, Wellington, CP 754/88, 15/8/1990 (insurance contract), *Innes v Ewing* [1989] 1 NZLR 598 (sale and purchase of land) and *McKaskell v Benseman* [1989] 3 NZLR 75 (solicitor/client). The contracts at issue in these cases might all be said to be of a "personal" rather than a "commercial" nature.

In assessing non-pecuniary damages, the courts have adverted to the difficulty of fixing an appropriate amount (*Clemance v Hollis*, *McKaskell v Benseman*), and to the necessity of keeping awards in perspective (*4 Aces Cleaning v Barrell*, unreported, HC, Whangarei, A 27/82, 3/10/90). The largest award so far has been \$50 000 in *Whelan v Waitaki Meats Ltd*; \$25 000 was awarded in *Clemance v Hollis*; and in *Monkley v Guardian Royal Exchange Assurance*, unreported, HC, Hamilton, CP 209/8, 23/8/1990,

the sum of \$10 per day from the date of breach was arrived at. Modest sums in the region of \$1 000 to \$2 500 have been more usual, which perhaps reflects not only some unease at departing from *Addis* but also the difficulty of putting a figure on mental distress.

CASENOTES

A **ADDIS FOLLOWED (SELECTED)**

(1) *Cutler v Dimdore (1913) 33 NZLR 489 (SC)*

Damages for wrongful dismissal were reduced from 82 to 50 because P "was not entitled to sue for more than two months' salary" (491). Following *Addis*, Stout CJ held that "if slander and libel accompanied the dismissal, that would be an independent tort and not a cause for giving damages for a breach of contract" (491).

(2) *Last-Harris v Thompson Bros Ltd [1956] NZLR 995 (SC)*

D negligently breached an agreement not to proceed upon a summons which had been issued against P. P claimed damages for injury to credit and business reputation. Following *Addis*, Archer J held that "damages [could] be recovered only in respect of pecuniary loss, and that the plaintiff [was] not entitled to punitive damages, or to damages for loss of reputation" (999). However, the Court did agree that an award for pecuniary loss in addition to or as an alternative to special damages may be allowed.

(3) *Cowles v Prudential Assurance [1957] NZLR 124 (SC)*

This case raised the issue of an "imputation of dishonesty or incompetence" arising from wrongful dismissal of a person holding a responsible position in an insurance company. F-B Adams J held that "[w]hat is necessary is some separate and specific act accompanying the dismissal, and itself amounting to the tort of defamation" (125), and further that the "law as laid down in [*Addis v Gramophone*] is of perfectly general application, and must be applied in all cases without regard to the nature of the employment" (126).

(4) *Bertram v Bechtel Pacific HC, Whangarei, A6/78,3/8/1978*

On an application to strike out a claim for general damages arising out of wrongful dismissal, Barker J felt bound to follow *Addis* and *Cowles*, but added:

It is perhaps a matter of comment in these days of sensitive industrial relations, that the law in relation to damages properly claimable for unlawful dismissal, has not moved from the rather intransigent position of *Addis v Gramophone Co Ltd*. In areas where changes to industrial law is [sic] happening, such damages are possibly not quite so important. However, for persons in executive positions, summary and unfair dismissal can work injustice and there may be a case for reform of the law (5).

(5) *Blake v L W R Gent Ltd SC, Christchurch, A 46/79, 18/2/1980*

P claimed damages for alleged wrongful dismissal from his position as general manager of D company. *Addis, Cowles and Bertram v Bechtel Pacific* followed and *Cox v Philips Industries* [1976] 3 All ER 161 distinguished; in *Cox*, P was suing for a breach of the term of his contract of employment, not for wrongful dismissal, and the mental distress for which he recovered damages was within the contemplation of the parties as a result of such a breach. *Withers v General Theatre Corp* [1933] 2 KB 536 (in which an award of damages for loss of opportunity to enhance reputation as a result of breach of contract was limited to theatrical artistes and actors) was also distinguished.

(6) *Vivian v Coca-Cola Export Corporation [1984] 2 NZLR 298 (HC)*

P brought an action claiming damages for wrongful termination of his employment as New Zealand manager of the D company. D moved to strike out a claim for general damages for shock, anxiety and disappointment. Prichard J held that damages for wrongful dismissal could not include compensation for injured feelings or for loss because the circumstances of dismissal made it more difficult to obtain fresh employment. He further stated that *Addis* "is not concerned with whether the damage is caused by the breach or whether it is too remote - but whether it is of a kind for which damages will be awarded" (292), although he acknowledged "that the rule is subject to qualifications or exceptions (... none of which affect the instant case)" (293).

(7) *Gee v Timaru Milling Co Ltd HC, Auckland, A 387/85, 4/2/1986*

P had an offer of employment withdrawn after resigning the position he already held and selling the family home. He claimed damages as a result of breach of contract of employment, inter alia for loss of career advantage and of job satisfaction, as well as for time, trouble and inconvenience. Barker J held that the claim should be struck out, on the authority of *Addis* and *Vivian*, but he repeated his hope that "some reform of the law might be possible" (7).

(8) *Klarwill v CED Distributors Ltd HC, Auckland, A 150/85, 14/4/1986*

P sought to recover damages as a result of his unjustifiable dismissal from his position as sales manager with the D company. Sinclair J held that general damages for undue hardship, anxiety, injury to livelihood and for trouble, inconvenience and expense could not be recovered, and that it was not open to the Court at that level to create new law, which "must be the prerogative of the Court of Appeal or Parliament" (7, 9).

(9) *Francis v Bryce Francis Ltd HC, Wellington, CP 79/86, 8/9/1986*

P claimed damages for wrongful (constructive) dismissal as a result of breach of implied term of contract - the term being P's right to appointment as managing director. Greig J struck out P's claim for general damages in respect of loss of benefits he would have received as managing director and for distress, injury to feelings and standing etc, but distinguished between a claim based on a breach of contract and a claim for wrongful dismissal. P might have succeeded on the former, but the rule in *Addis* excluded recovery on the latter cause of action.

(10) *Caddick v Griff Holdings Ltd HC, Wellington, CP 565/86, 15/5/1987*

On an application to strike out P's claim for exemplary damages arising out of wrongful dismissal, Heron J held that exemplary damages may not run in contract, but that in any case *Addis* and *Vivian* precluded damages for anxiety and distress.

(11) *Neeson v Wrightson NMA Ltd HC, Auckland Registry, CP 2368/88, 2/6/1989*

P claimed general damages for "physical inconvenience and discomfort" as a result of a land agent's negligence in arranging the sale of a farm. Wallace J said that "[b]earing in mind some of the recent cases in this area of the law I would have been minded to give serious consideration to [such] an award". However, in view of P's failure "to give any significant evidence concerning mental distress or vexation suffered by them", he was unable to do so (55).

(12) *Geron v Cable-Price Corporation HC, Auckland, CP 988/88, 1/8/1990*

This case arose out of the failure to deliver a motor vehicle in accordance with the contract. P claimed inter alia damages for distress, inconvenience and loss of holiday. Gault J held that the so-called "holiday" exception of *Jarvis v Swan Tours Ltd* was not applicable because D "certainly did not contract to provide P with a holiday" (19). He also did not accept that it was "to be taken as contemplated between the parties to the contract at the time it was made, that a delay in delivery would lead to distress and frustration" for P (20).

B ADDIS DEPARTED FROM (SELECTION)

(13) *Byrne v Auckland Irish Society Inc [1979] 1 NZLR 351 (SC)*

P sought damages for wrongful expulsion from the D society. Vautier J held that it was "reasonably within the contemplation of the parties that vexation and distress could follow from a member being wrongfully expelled from such a society" (365). He added that "the modern authorities as to damages for breach of contract in my view amply support the view that damages can be annexed in contract for such a loss as the enjoyment of club amenities" (366) (presumably because it is the very thing contracted for). Award of \$100 to each of the Ps.

(14) *Sing v O'Driscoll HC, Hamilton, A 104/83, 6/11/1984*

Following *Byrne*, Gallen J awarded general damages for strain and suffering caused to Ps as a result of D's failure to complete a transaction involving sale and purchase of land. Award of \$1 000.

(15) *Clemance v Hollis [1987] 2 NZLR 471 (HC)*

Ps purchased a kiwifruit orchard relying on representations made by vendor's real estate agent's salesman. The orchard failed, and Ps claimed inter alia damages for anxiety and distress. Gallen J agreed "that in an appropriate case, an award of damages of the kind contemplated can be made, but the question of quantum is difficult" (482). The anxiety of Ps "was directed towards [their] financial position and future" (482). He concluded

that the quantum "in the end is perhaps mostly a matter of impression", but fixed the award at \$25 000.

(16) *Stuart v Guardian Royal Exchange Assurance (No 2) (1988) 5 ANZ Insurance Cases 60-844 (HC)*

D refused to accept a claim for fire damage to P's house, alleging that the fire had been deliberately started. The allegation having been dismissed P claimed \$50 000 general damages. Heron J held that because it was within the reasonable contemplation of the insurer that a failure to indemnify by the insurer would lead to inconvenience and distress, P was entitled to recover \$4 000.

See also:

Kerr & Kerr v State Insurance General Manager (1987) 4 ANZ Insurance Cases 60-781;

Monkley v Guardian Royal Exchange Assurance HC, Hamilton, CP 209/8, 23/8/1990;

Gaunt v Gold Star Insurance HC, Wellington, CP 754/88, 18/8/1990.

(17) *Horsburgh v NZ Meat Processors Industrial Union [1988] 1 NZLR 698 (CA)*

P was expelled from the union, and thereupon immediately lost his job. He sued the union for wrongful expulsion, claiming damages inter alia for "loss of amenity, mental distress" etc. Cooke P agreed that *Addis* was not in point, but added that "[a]t least *Addis* is not an authority to be extended" (702). He went on to hold that the damages "arising from the deliberate refusal to accord P the status to which he was entitled" were "not only foreseeable, but highly probable". (702) Damages of \$7 500 were awarded not merely for mental distress but also

to compensate for loss of status or standing and interference with the right to work. These are heads of loss that cannot be measured merely by lost income. (702)

Cooke P concluded by cautioning that

we are not suggesting that damages for distress can be awarded in, for instance, an action for breach of an ordinary commercial contract. Nor are we essaying any general propositions about when damages for distress can be recovered under various causes of action. We are simply holding that if the facts warrant it, distress is a kind of damage to be taken into account in assessing damages for loss of status and interference to work in a case of the present kind. (703)

(18) *Innes v Ewing [1989] 1 NZLR 598 (HC)*

Ds were unable to complete a transaction for the sale and purchase of land because they did not obtain the consent of the Land Valuation Tribunal and the Land Settlement Board. P vendor sued on the basis that Ds had not taken all necessary steps to obtain consents, and claimed inter alia damages for mental distress occasioned by having to get bridging finance, coping with the management of two farms, additional expenses etc. Eichelbaum J was not prepared to accept that the concern caused by the litigation itself was recoverable, but on the principle of the reasonable contemplation of the parties, awarded damages of \$1 000. He commented that the "guiding principle ... should continue to be the reasonable contemplation of the parties" (630), and "notwithstanding the inroads made into the historical doctrines as to recovery of damages in this field, it

would be undesirable to encourage this aspect to become a prominent feature of contract litigation. The approach should be conservative" (631).

(19) *Hetherington v Faudet [1989] 2 NZLR 224 (CA)*

In a case relating to wrongful dismissal, Ds moved to strike out allegations of conspiracy which were seen as an attempt to circumvent *Addis*. Cooke P made the following obiter remarks:

the applicability of the rule in *Addis* as generally understood calls for consideration in present-day New Zealand To the extent that *Addis* rests on public policy, it seems contrary to the public policy now recognised in the industrial sphere by such legislation as the New Zealand Labour Relations Act 1987, which does not however apply to employees of the seniority of the present plaintiffs. (227)

(20) *McKaskell v Benseman [1989] 3 NZLR 75 (HC)*

The D solicitor failed to disclose to clients the full contents of an offensive letter received from the solicitor of neighbours with whom they were in dispute. Ps sued for \$60 000 general damages and \$100 000 punitive damages. D was found liable, and although punitive damages were held to be inappropriate on the facts, Jeffries J held that Ps were entitled to reasonable compensation for emotional distress: "There is no definite method of calculation for pain and suffering of this type" (91). Award of \$1 000 against each D.

(21) *Bass v Arbuckle HC, Christchurch, CP 48/88, 20/8/1990*

P brought action against D, a builder, for failing to complete contract work, and sought inter alia general damages for worry, disturbance and distress. Williamson J accepted that D "should reasonably have contemplated that as a result of his failure to complete the work under the contract P would suffer worry and distress" (25). It seems that in this decision the Court relied on authorities such as *Gabolinscy v Hamilton City Corporation [1975] 1 NZLR 150* and *Stieller v Porirua City Council [1986] 1 NZLR 84*, actions for negligence involving a builder. Award of \$2 000.

(22) *4 Aces Cleaning Establishment Ltd v Barrell HC, Whangarei, A 27/82, 3/10/1990*

As a result of failing to carry out obligations towards clients in a transaction involving the sale of their land, the D solicitor exposed his clients to proceedings which extended over a number of years. The clients sought general damages for vexation and distress. Robertson J acknowledged that the "law in this area is in the process of change In more recent years there has been a gradual erosion of [the *Addis*] rule ..." (16), and that "the availability of damages for emotional distress for breach of contract is wider in New Zealand than in England" (21). He went on to award \$2 500 damages because it was foreseeable that the solicitor's conduct would result in his client's suffering "real and significant anxiety" (26). A relevant factor for the Court was the "non-commercial, private nature of the original transaction" but it cautioned that "[a]wards under this head must be kept in perspective" and "[e]ach case must be approached on its own facts" (21).

(23) *Thomas v Bournville Furniture Co Ltd HC, Auckland, CP 2695/88, 26/10/1990*

P claimed exemplary damages or, alternatively, damages under the Contractual Remedies Act 1979 for wrongful dismissal. Robertson J expressed a willingness to reconsider *Addis*, in the light of *Horsburgh v NZ Meat Processors Union*, and to adopt the approach taken in *Burch v Willoughby Consultants*. But he did not regard the instant case as appropriate for either purpose (39).

(24) *Whelan v Waitaki Meats Ltd HC, Wellington, CP 990/88, 13/11/1990*

P was a senior manager of many years' standing who had been abruptly dismissed. General damages of \$200 000 were claimed for "undue mental distress, anxiety, humiliation, loss of dignity or injury to feelings". In this decision, Gallen J subjected *Addis* and the subsequent case law to a detailed analysis, and concluded that he was not bound to follow it. He noted that in *Horsburgh* and *Hetherington* the Court of Appeal had expressed a lack of enthusiasm for the *Addis* rule (32) and also noted the "obligation to act with fairness" found by the Court of Appeal in *Goulden and Auckland Shop Employees Union* (33). He further considered each of the two formulations of the rule. He found the wider rule no longer "a tenable proposition" (33), particularly in view of the fact that it has been frequently departed from. And the narrow interpretation he found to be not only without legal or logical justification, but also contrary to the current attitude of the Court of Appeal to employment law (34). Gallen J's preferred approach was to consider *Addis* as a particular application of the rule in *Hadley v Baxendale*. He commented:

It seems to me that as the Canadian Courts have indicated, when parties enter into a contract which affects one of them at least personally, then that involves consequences which can properly reflect in the award of damages if reasonable expectations of the parties are not met and a breach of terms which are explicit or at least implicit in the requirements relating to such contracts are broken. (36)

Thus Gallen J not only suggests that neither interpretation of *Addis* is still strictly applicable, but also accepts (and this is the crux of the decision) the "implied term" argument. The proviso is that the contract must affect one of the parties "at least personally". It is significant that in this case, the Court did not find wrongful dismissal established, but nevertheless awarded damages for a breach of contractual obligations brought about by the manner of dismissal. Although Gallen J stated that such an award should be "basically compensatory in nature rather than exemplary" (39), he added that it should nevertheless reflect the behaviour of D, and arrived at the figure of \$50 000.

C THE IMPLIED TERM

(25) *Auckland Shop Employees Union v Woolworths (NZ) Ltd [1985] 2 NZLR 372 (CA)*

Although not strictly relevant to the *Addis* rule, because it involves an employee covered by the Industrial Relations Act 1973 (s 117), this decision has been taken to have wider ramifications. In an instance of constructive dismissal Cooke J held "that there must at least be an implied term or a duty binding an employer, if conducting an

inquiry into possible dishonesty by an employee, to carry out the enquiry in a fair and reasonable manner" (376). He was unwilling, however, to state a final opinion on the general question as to whether "a relationship of confidence and trust is implied as a normal incident of the relationship of employer and employee" (376).

(26) *Marlborough Harbour Board v Goulden* [1985] 2 NZLR 378 (CA)

In this case, which concerns the dismissal of a senior employee by a local body, the Court (Cooke J) commented (obiter) that a similar implication to that in the Auckland Shop Employees Union case - namely "a duty on the part of the employer, if carrying out an inquiry preceding a resignation or dismissal ... to do so in a fair and reasonable manner" - "might quite readily be found in private contracts of employment not subject to the 1973 Act" (383).

(27) *Clarkson v Aztec Corporation HC, Auckland, CP972/88, 9/3/89*

Robertson J declined to strike out a paragraph in a statement of claim relating to a term of fair dealing implied into contracts of employment by operation of law. The decision was based on two grounds: "[t]he attitude of the Courts to its [sic] jurisdiction to strike out has always been one of caution" (4), and because "there are at various levels in the judicial hierarchy indications of the possibility of an alteration of the law in the area alleged in the statement of claim ..." (5). Goulden, Hetherington and Horsburgh were all referred to in this judgment.

D LABOUR RELATIONS ACT 1987 - s 227(c)

(28) *Otago Hotel ... and Related Trades IUW v Shiel Hill Tavern Ltd LC, Christchurch, CLC 42/90, 27/6/1990*

The Labour Court held that the grievant had been unjustifiably dismissed "as a retaliatory and discriminatory reprisal" (25) for having engaged in union activities. In addition to reimbursement of lost wages (\$3 850) and costs (\$500), the Court awarded \$2 500 under s 227(c)(i) for "humiliation, loss of dignity, and injury to feelings" and a further \$2 500 under s 227(c)(ii) for the "loss of any benefit, whether or not of a monetary kind, which the worker might reasonably have been expected to obtain if the personal grievance had not arisen".

In respect of the award under s 227(c)(i), it is significant that the Court construed the dismissal as a process and not as an isolated event (28); and there is an interesting discussion of *Horsburgh v NZ Meat Processors etc IUOW* [1988] 1 NZLR 698 in relation to subpara (ii). Although this decision was not strictly relevant to s 227(c), it had recognised that "the right to work is valuable in itself". Thus, the grievant in Shiel Hill Tavern was also to be compensated both for the immediate benefit of employment which the respondent unjustifiably terminated, and the related social and economic benefits reflected in the grievant's 'lifestyle' as he maintained it during his employment by the respondent. (29)

(29) Northern Hotel ... Employees' IUW v Southern Pacific Hotel Corporation LC,
Auckland, ALC 101/90, 27/8/1990

After an extended period of sick leave the grievant was offered alternative employment which was not acceptable to her (because of the terms and conditions, and not because of a reduction in salary), and her employment was terminated. A grievance committee had found that the employer had acted properly in terminating her employment, and the union appealed on her behalf to the Labour Court.

The Court held that the employer had not kept the grievant properly informed of its staff decisions and had therefore not enabled her "to make her decisions in the light of all relevant information" (14). Thus her dismissal had been unjustified for procedural reasons, and she was awarded \$6 000 under s 227(c)(i) as "compensation for the means by which dismissal was effected and the results of that" (14).

(30) Northern Hotel ... Employees' IUW v Bosnyak Hotels Ltd LC, *Auckland, ALC 113/90, 27/9/1990*

The grievant had been dismissed for alleged dishonesty, but the Court held that the dismissal was unjustifiable, both substantively and procedurally. In addition to reimbursement of lost wages, the Court awarded compensation of \$10 000 under s 227(c) for "stress, humiliation and loss of dignity". It was satisfied that "each of these phenomena was visited upon [the grievant] by her dismissal", and concluded that the circumstances of the dismissal "and in particular the prolonged threat and subsequent actuality of a police investigation of alleged criminal offending added significantly to these effects upon [the grievant] and should be the subject of proper compensation to her" (12).

(31) New Zealand Printing and Related Trades IUW v Kiwi Cartons Ltd LC,
Auckland, ALC 119/90, 15/10/1990

The grievants had been dismissed for alleged dishonesty ("theft of company time"), but the Court held the dismissal to be unjustifiable, both substantively and procedurally. The employer had not ensured that the workers appreciated the rules and the consequences of breaching them, nor had the allegation of an attempt to defraud the employer been properly put to the grievants. In addition to reimbursement of lost remuneration amounting to \$3 601.79, one of the grievants, an elder in the local Samoan community, was awarded a global order under s 227(c) of \$25 000, on the following grounds:

We are satisfied that the dismissal deeply shamed [the grievant] and affected his standing within his community. It also had a deleterious affect on his marriage and on his financial situation Because of that sense of shame, he did not seek reinstatement to his position with the respondent. (11)

The other grievant, a young and inexperienced man, was reinstated, with reimbursement of lost wages.

(32) Northern Clerical ... IUW v New Zealand Workers IUW LC, Auckland, ALC 125 and 125A/90, 17/10/90 and 29/10/1990

The grievant's employment was terminated on the ground of redundancy, a decision which the Court found to be substantively justified. However, the dismissal was held to be procedurally unfair, in that no reasons were given for it. In addition to reimbursement of lost wages amounting to \$4 445.64, the Court awarded "a further compensatory payment of \$14 000, all inclusive and without deduction" (3). The grounds for the latter are not specified, although it would seem that they included compensation for loss of use of a motor vehicle and loss of a redundancy payment.

(33) New Zealand Nurses Union v Auckland Methodist Mission LC, Auckland, ALC 126/90, 18/10/1990

The union appealed to the Labour Court on behalf of the grievant, a hospital aid, who had been dismissed for alleged gross misconduct (mistreating an elderly patient). The Court found procedural deficiencies in identifying the grievant as the culprit, and also held that at the time of dismissal the employer had insufficient evidence to warrant dismissal. Reinstatement was considered to be impracticable, but the Court awarded compensation for lost wages and \$8 000 under s 227(c)(i), having accepted "evidence about [the grievant's] general character, and about the effect of this dismissal upon her personally and upon her employment prospects" (13). This evidence was weighed against "the good character of the employer as well, and the difficult balance which the employer had to maintain between its responsibilities to [the] patients on the one hand and its responsibilities to [the grievant] on the other" (13).

E CONTRACTUAL REMEDIES ACT 1979 - s 9

(34) *Burch v Willoughby Consultants Ltd HC, Wellington, CP 325/85, 21/7/89*

P brought an action for wrongful dismissal, claiming inter alia additional damages, pursuant to s 9(2)(b) Contractual Remedies Act 1979, for disappointment, worry and anxiety. Jeffries J concluded that the statute "appears to seek to widen the discretion of the court in regard to damages whilst leaving common law remedies untouched"(21). Such discretion is conferred by subs 3 and 4, particularly 4(f). The Court found the manner of the P's dismissal and the conduct of the defence throughout, including the trial, of relevance, and held the P entitled to an award of \$10 000 under s 9(2)(b). No mention is made in this decision of *Gallagher v Young* [1981] 1 NZLR 734 (HC), where in a decision respecting a breach of contract for the sale and purchase of land Greig J held: "It is clear that there is a wide discretion under s 9 to give justice as between the parties. Under that section it is no longer a question of applying strict rules as to damages and it appears from the effect of s 10 that the just order may replace an enquiry with damages altogether" (740).

APPENDIX C

CASE-LAW: ENGLAND

[In this appendix "P" refers to the plaintiff and "D" to the defendant.]

SUMMARY

In England, as in New Zealand, it is important to distinguish between the application of the *Addis* rule to wrongful dismissal and its application to damages for non-pecuniary loss in general. Since 1971 employees in England have had fairly comprehensive statutory protection against unfair dismissal under what is now Part V of the Employment Protection (Consolidation) Act 1978. That Act applies (s 54) to every employment under a contract of employment (subject to certain exclusions), and s 75 has been held to allow compensation for the manner of dismissal: *Norton Tool Co Ltd v Tewson* [1973] 1 All E R 183. Unfair dismissal must be distinguished from wrongful dismissal in that in the former a dismissal can be lawful and nevertheless unfair. However, in the majority of cases the two categories coincide.

In recent years there has consequently been little need to resort to the common law in the context of wrongful dismissal, and the case law on *Addis* is correspondingly sparse. But that the rule in *Addis* is still good law in England is evidenced by two decisions involving employment falling outside the statutory regime - *Shove v Downs Surgical plc* [1984] 1 All ER 7 and *Bliss v S E Thames Regional Health Authority* [1985] IRLR 308 (CA) - where the rule has been applied.

However, English courts have also been able to isolate exceptions to *Addis* within the employment area. These have been based on the second limb of the *Hadley v Baxendale* rule: that mental distress and/or loss of reputation were within the reasonable contemplation of the parties at the time of contracting. Thus damages for loss of publicity have been awarded to performing artists where they have been denied the opportunity to perform in a particular role or at a particular venue: *Marbe v George Edwardes Ltd* [1928] 1 KB 269 (CA), *Withers v General Theatre Corporation* [1933] 2 KB 536 (CA). Damages have also been awarded where an employer has prematurely terminated an apprenticeship: *Dunk v George Waller & Son Ltd* [1970] 2 QB 163 (CA), and where an employer has relegated an employee to a position of lesser responsibility: *Cox v Philips Industries Ltd* [1976] 1 WLR 638.

As to general damages in contract for non-pecuniary loss, it is clear that *Addis* has never applied to physical inconvenience: *Hobbs v L S W Railway* (1875) LR 10 QB 111, *Bailey v Bullock* [1950] 2 All ER 1167. But English courts have also been prepared to use the *Hadley v Baxendale* rule where mental distress or loss of reputation have been held not to be too remote. This has been most conspicuous in the so-called "holiday" cases: *Jarvis v Swans Tours Ltd* [1973] 1 QB 233 (CA), *Jackson v Horizon Holidays*

[1975] 1 WLR 1468 (CA), although it should be noted that a more recent decision, *Kemp v Intasun Holidays Ltd* (20.5.1987, CA), evidences some limitation to this approach. A practice of allowing non-pecuniary damages as not too remote has also been evident in cases involving negligence by professionals (treated as breach of contract rather than tort): *Heywood v Wellers* [1976] 1 QB 446 (CA), *Perry v Sidney Phillips & Son* [1982] 1 WLR 1297 (CA).

There have also been certain cases involving purely commercial contracts where damages for loss of reputation have in effect been awarded: *Wilson v United Counties Bank* [1920] AC 102 (HL); *Aerial Advertising v Batchelor's Peas* [1938] 2 All ER 788. In the latter, at least, the Court was careful to establish such a loss as a pecuniary one; but the distinction is not an easy one to maintain, given the difficulties in quantifying such losses.

In their approach to non-pecuniary loss the English courts have perhaps been less predictable and consistent than their New Zealand counterparts. In *Groom v Crocker* [1939] 1 KB 194 (CA), another solicitor-client case, the Court followed *Addis* in refusing to award general damages for loss of "credit" (reputation), but upheld an award for libel. In *W v Edgell* [1989] 2 WLR 689, which involved a breach of medical confidentiality - seemingly analogous to cases of the solicitor-client variety - the Court declined to award general damages, following *Addis* and *Bliss*. Finally, in *Perera v Vandiyar* [1953] 1 WLR 672 (CA) and *Kenny v Preen* [1963] 1 QB 499 (CA), both of which arose out of breaches of the landlord's covenant of quiet enjoyment, it was held that damages for pecuniary loss only were available to the P tenants. But if there is any contractual relationship which implies that it is within the reasonable contemplation of the parties that a breach of contract will lead to mental distress, it is surely that between landlord and residential tenant.

CASE NOTES

A EMPLOYMENT CONTRACTS: ADDIS FOLLOWED

(1) Shove v Downs Surgical plc [1984] 1 All ER 7 (QBD)

P, a managing director, claimed damages for distress and injury to health arising out of the manner of dismissal. Evidence of injury to health could not be established and Sheen J followed *Addis* in declining to award damages for distress. (Note that this case was not pleaded under the Employment Protection Act.)

(2) Bliss v S E Thames Regional Health Authority [1985] IRLR 308; [1987] 1 CR 700 (CA)

P was a consultant surgeon, who because of doubts as to his mental state was required by his employer to undergo a psychiatric examination. He refused, was suspended, and although later absolved, he did not return to his employment. Alleging that D had repudiated P's contract by its conduct, P brought an action for damages for breach of contract, claiming inter alia general damages for mental distress. The issue was effectively one of constructive dismissal, and the decision is important for two reasons.

First, the Court of Appeal affirmed *Woods v WM Car Services (Peterborough) Ltd* [1981] CR 666 (EAT), which held that it was an implied term of P's contract of employment that the employer would not without reasonable cause conduct itself in a manner calculated, or likely, to damage or destroy the relationship of confidence and trust between the contracting parties. But, second, it disallowed the lower court's award of 2 000 general damages, applying *Addis*, which it held should not be disturbed "unless and until the House of Lords has reconsidered [it]." (718) Further, *Cox v Philips Industries Ltd*, which distinguished *Addis*, was said to have been wrongly decided.

B EMPLOYMENT CONTRACTS: ADDIS DISTINGUISHED

(3) *Marbe v George Edwardes Ltd* [1928] 1 KB 269 (CA)

An actress claimed damages for injury to reputation when D refused to allow her to appear in a role as advertised. The Court held that an actress's reputation depends on "the continued and successful practice of her art": where there has been a breach of contract to employ her, damages may include a sum for "loss of the reputation which would have been acquired, or damage to reputation already acquired, or ... for loss of publicity" (281). The unusually large sum of 3 000 was awarded. A later case, *Withers v General Theatre Corp* [1933] 2 KB 536 (CA), modified *Marbe* to the extent that it excluded from consideration "damage to a reputation already existing" (547).

(4) *Dunk v George Waller & Son Ltd* [1970] 2 QB 163 (CA)

Where an employer had wrongfully terminated an apprenticeship agreement, it was held that *Addis* was not applicable. Denning MR held that

The very object of an apprenticeship agreement is to enable the apprentice to fit himself to get better employment. If his apprenticeship is wrongly determined, so that he does not get the benefit of the training for which he stipulated, then it is a head of damage for which he may recover. (168)

Out of total damages of 500 the Court awarded 180 "for the future term" (which may be equated with a loss of reputation).

(5) *Cox v Philips Industries Ltd* [1976] 1 WLR 638 (QBD)

P was relegated to a position of lesser responsibility in breach of a contractual term, and was awarded general damages of 500. Lawrence J distinguished *Addis* because it was in the contemplation of the parties in all the circumstances that, if that promise of a position of better responsibility without reasonable notice was breached, then the effect of that breach would be to expose P to the degree of vexation, frustration and distress which he in fact underwent. (644)

(6) *Edwards v SOGAT* [1971] 1 Ch 354 (CA)

(7) *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183 (NIRA)

These two cases are also of interest. The first has strong parallels with the New Zealand *Horsburgh* case, involving as it does the wrongful exclusion of P from a union. Like the New Zealand Court of Appeal, the English Court of Appeal held that *Addis* was not

applicable. The second decision is of interest because it was held that the common law rules on wrongful dismissal (which would include the *Addis* rule) are irrelevant to unfair dismissal under the Industrial Relations Act 1971 (now the Employment Protection (Consolidation) Act 1978), and that the employee's loss could be considered *inter alia* under the head of the manner of dismissal.

C NON-EMPLOYMENT CONTRACTS: *ADDIS* FOLLOWED

(8) *Groom v Crocker* [1939] 1 KB 194 (CA)

P brought an action against D solicitors for breach of contractual duty (wrongly admitting negligent driving on the part of the P). The Court, following *Addis*, refused recovery of general damages for humiliation but did uphold an award of 1 000 for libel. It further distinguished *Wilson v United Counties Bank* [1920] AC 102 (HL) by drawing a distinction between injury to credit as a trader and credit as a careful driver, only the first of which could result in a loss recoverable in contract.

(9) *Cook v Swinfen* [1967] 1 WLR 457 (CA)

P brought an action against D solicitor for loss caused by negligence in defending divorce proceedings on her behalf. Although the Court (Denning MR) stated that in principle "...in the law of contract, damages can be recovered for nervous shock or anxiety state if it is a reasonably foreseeable consequence" (461), in this case such a "breakdown in health" was not a reasonably foreseeable consequence of a solicitor's negligence. It also followed *Addis* and *Groom v Crocker* in not allowing P to recover for injured feelings, mental distress, anger and annoyance.

D NON-EMPLOYMENT CONTRACTS: *ADDIS* NOT FOLLOWED

(10) *Wilson v United Counties Bank* [1920] AC 102 (HL)

The D bank had agreed with P customer to supervise the latter's business during his absence. Through negligence in the discharge of its duties D had caused P's bankruptcy. P claimed *inter alia* general damages for injury to credit and reputation. The Court distinguished *Addis*, and awarded 7 000, the reason being (in the words of Lord Atkinson)

...injury to the credit and reputation of a trader is not only a natural and reasonable result of his being made a bankrupt...but must, in the present case, have been in the contemplation of the parties when they entered into the contract as a result which would probably follow from the breach of it, and their damages therefore are not too remote. (132)

(11) *Aerial Advertising v Batchelor's Peas* [1938] 2 All ER 788 (KBD)

The P advertising company injured the reputation of D which subsequently suffered a loss in sales. Awarding 300 in general damages to D, Atkinson J said

...one has to be very careful that one is not giving damages for injury to reputation and that type of thing. One can only give general damages in respect of the pecuniary loss which has been sustained. (796)

Presumably, such damages were awarded because the loss here was quantifiable.

(12) *Foaminol Laboratories v British Artid Plastics* [1941] 2 All ER 393 (KBD)

Because D failed to deliver goods in time for the start of a sales campaign, P claimed damages for loss of reputation. Hallett J held that damages were not recoverable, because no evidence of pecuniary loss had been brought, and such a loss had not been within the contemplation of the defaulting party at the time of contract. In this way, *Aerial Advertising* was distinguished, but Hallett J did add, obiter, that

if pecuniary loss can be established, the mere fact that the pecuniary loss is brought about by the loss of reputation caused by a breach of contract is not sufficient to preclude the plaintiffs from recovering in respect of pecuniary loss. (400)

(13) *Jarvis v Swan Tours Ltd* [1973] 1 QB 233 (CA)

This is the first of the "holiday" cases, where P claimed damages for inconvenience and loss of benefit arising out of a holiday which did not measure up to expectations. It was held that because a contract for a holiday was specifically "to provide entertainment and enjoyment" (238), damages could be awarded for mental distress and loss of enjoyment arising out of a breach, and P recovered 125. The reasoning in this decision is somewhat cursory. However, it was followed in *Jackson v Horizon Holidays* [1975] 1 WLR 1468 (CA), where damages of 500 for mental distress were extended beyond P to his wife and children. More recently, it seems that the English Court of Appeal has moved to limit the "holiday" exception to *Addis*. In *Kemp v Intasun Holidays Ltd* (20.5.1987), P had a medical condition which was exacerbated by the dusty state of the hotel room he and his family were staying in. He argued that his condition had been made known to the travel agent and this knowledge was therefore to be imputed to D. The Court of Appeal, however, overturned the lower court's decision to award 800 for loss of enjoyment because P's special circumstances had not been "brought home" to D when the contract was made. This decision strictly applies the doctrine of contractual privity by examining the circumstances of the agreement between the contracting parties themselves and excluding the position of third parties. Thus, although the facts of *Kemp* are distinguishable from those in *Jarvis* - a medical condition is not necessarily within the contemplation of a holiday operator, whereas enjoyment must be - it invests the "holiday" exception to *Addis* with a more precise test.

(14) *Heywood v Wellers* [1976] 1 QB 466 (CA)

D solicitors failed to obtain an injunction to stop molestation of P by a male friend. She brought an action for breach of contract in not exercising due skill and care, and was awarded 125 for mental distress arising from the continuing molestation. This decision is in direct contrast with *Cook v Swinfen*, which, significantly, Denning MR said that along with *Groom v Crocker* "may have to be reconsidered" (459). The reason is that here the solicitors were specifically "employed to protect [P] from molestation causing mental distress" (459). But, as Denning MR seems to have recognised in *Heywood*, the distinction is so fine that it is of little assistance. Another case involving a professional,

which was similarly decided, is *Perry v Sidney Phillips & Son* [1982] 1 WLR 1297 (CA). Here, P claimed damages for vexation and inconvenience arising out of D surveyor's breach of contract in negligently making a report on a property which P subsequently purchased. It was held that the vexation and inconvenience were reasonably foreseeable, and that "not excessive, but modest compensation" was available (Denning MR, 1303).

APPENDIX D

CASE-LAW: AUSTRALIA

[In this appendix "P" refers to the plaintiff and "D" to the defendant.]

SUMMARY

These Australian decisions adopt the familiar pattern of following *Addis* in connection with wrongful dismissal, and departing from it in connection with breach of contract in general. As in England, a distinction has to be made between wrongful dismissal at common law, for which only the remedy of damages can be awarded, and unfair dismissal under the relevant industrial legislation (eg, the Industrial Relations Act 1979 of Victoria), which makes provision for reinstatement and re-employment, as well as for Compensation.

CASENOTES

A Employment contracts

Where compensation is available for unfair dismissal, the courts have noted that the common law measures of damages are not always appropriate (*Royal Children's Hospital v President of the Industrial Relations Commission of Victoria & Zappulla* [1989] VR 527); and that it may be awarded inter alia under the heads of inconvenience, the difficulty of finding alternative employment, and the necessity of the applicant and family relocating (*O'Dwyer v Karratha Recreational Council* 1981 AILR 152). If the employee is not covered by an industrial award or agreement, then the employment contract is a matter for the common law, but it would seem that Australian industrial agreements offer a more comprehensive coverage than do those in New Zealand. The applicant in *O'Dwyer*, for instance, was the manager of an incorporated body, while the applicant in another case which came under the Victorian Industrial Relations Act, *Bunnett v Henderson's Federal Spring Works Pty Ltd* 7 July 1989, Case No 88/2634, Decision No D89/0430, was a general manager. However *Addis* is still followed in some cases.

(1) Thorpe v South Australian National Football League (1974) 10 SASR 17 (SC)

P had been appointed general manager of the D League in 1967, but in 1974 was given three months' notice of termination, because D was no longer satisfied with the manner in which P was discharging his duties. No specific misconduct was alleged against P. P claimed that the notice was not reasonable, and Jacobs J held that in the circumstances a reasonable period of notice would have been six months, and that P was entitled to damages for failure to give reasonable notice. However, he further held

The plaintiff is not entitled to damages in respect of his wounded feelings or the prejudicial effect of his dismissal upon his reputation and chances of finding other employment (*Addis v Gramophone Co Ltd*). It is but fair to the League to add that if the plaintiff has suffered any loss of reputation it is largely by reason of the publicity which he himself gave to his dismissal. (38-39)

(2) *Dyer v Peverill [1979] 2 NTR 1 (SC)*

Addis was also followed in this case. Muirhead J commented:

The summary manner of the dismissal, the apparent refusal by the defendant to discuss the matter, to assign reasons, was unfortunate, but this is not a matter which can affect the assessment of damages, nor has it contributed to my determination of what was reasonable notice, a consideration tied basically to the contract of service and the nature of such service rather than the consequences upon breach. (6)

He thus tied the question of damages strictly to the question of reasonable notice. See also *B A Tucker v The Pipeline Authority [1981] AILR 429*.

(3) *Flamingo Park Pty Ltd v Dolly Dolly Creation Pty Ltd [1986] 65 ALR 500*.

In this case, Wilcox J distinguished *Addis* on the facts, while accepting that it remained "authoritative in relation to the precise question there decided and arising out of wrongful dismissal" (524). *Flamingo Park* was primarily concerned with loss of reputation. D had sold inferior quality garments made up from fabric printed in breach of contract with P's design. Wilcox J was prepared "in the light of recent authorities" (particularly English) "to depart from what was once thought to be a strict general rule against permitting recovery for non-pecuniary damage ... at least in a case where the purpose of the breached term was to enhance or safeguard a reputation" (524). The award was \$30 000, and it is evident from the Judge's remarks that it was made on the basis of the *Hadley v Baxendale* remoteness test.

B NON-EMPLOYMENT CONTRACTS

(4) *Silberman v Silberman (1910) 10 SR (NSW) 554 (SC)*

This is an early example of Australian decisions which similarly circumvent *Addis* by resorting to the "reasonable contemplation" argument. An action had been brought by a wife against her husband for breach of an order not to molest her; there was no evidence of pecuniary loss. D cited *Addis* in argument. Cullen CJ found in favour of P, commenting: "There is proof that the very thing the covenant intended to guard against had occurred, a thing that both parties to the deed contemplated" (560).

(5) *Athens-MacDonald Travel Service v Kazis [1976] SASR 264 (SC)*

This was a "holiday" case which anticipated *Jarvis*. Zelling J concluded:

This was a contract by a travel agency to provide a tour of a certain kind and the type of inconvenience and discomfort which is proper to be considered in relation to such a contract must of necessity have a mental element in it. (274)

(6) *Galambos and Son Pty Ltd v McIntyre* (1974) 5 ACTR 10

This was a building case, where on the authority of *Kazis* and the *English Bailey v Bullock* decision damages of \$500 were awarded for a "distinct diminution in the enjoyment of a home - amounting to more than a mere annoyance" (Woodward J, 14).

The remoteness test has also worked to P's disadvantage in some cases.

(7) *Fink v Fink* [1946] 74 CLR 127 (HCA)

P wife brought an action for breach of contract against her husband for breaching a matrimonial agreement. The Court was divided on whether the *Hadley v Baxendale* test was satisfied. The majority held that it was not, drawing a distinction between "the fortuitous elements upon which the healing or the exacerbation of domestic differences depend" and "the contingencies and conditions which are recognized for some commercial purpose" (143).

(8) *Falko v James McEwan & Co* [1977] VR 447 (SC)

P sued inter alia for inconvenience after D breached a contract by failing to complete the installation of an electric heater. In setting aside an award for \$400 (made on a rather arbitrary basis by a lower court), Anderson J acknowledged cases such as *Jarvis, Heywood v Wellers and Cox* as "exceptions to the general rule", but concluded:

Not every inconvenienced or disappointed plaintiff or disgruntled customer can recover damages beyond monetary loss for breach of contract. There may be some signs of a judicial thaw, but spring is yet to come. (452)

APPENDIX E

CASE-LAW: CANADA

[In this appendix "P" refers to the plaintiff and "D" to the defendant.]

Since *Newell v Canadian Pacific Airlines Ltd* was decided, the Canadian approach to the wide construction of *Addis* has been fairly settled. This cannot be said of its application in the employment context however; and in the last decade there has been a proliferation of cases concerning wrongful dismissal which has resulted in some inconsistency. If we examine the line of cases from *Pilon v Peugeot Canada Ltd* (1980) 114 DLR (3d) 378 (Ont. HCJ) to *Vorvis v Insurance Corporation of British Columbia* (1989) 58 DLR (4th) 193 (SCC), it seems that an increasing willingness to compensate plaintiffs for mental distress has been followed by a more recent retreat.

CASENOTES

A EMPLOYMENT CONTRACTS

(1) *Peso Silver Mines v Cropper* (1966) 58 DLR (2d) 1

This is the leading Canadian case following *Addis*. The court declined to award damages for loss of reputation.

(2) *Tippett v International Typographical Union* (1977) 71 DLR (3d) 146

(BCSC)

This case demonstrated a move away from *Addis*. Like the *Horsburgh* case in New Zealand and *Edward v SOGAT* in England, it involved wrongful expulsion from a union. The court was able to distinguish *Addis* on the ground that union membership is a "social contract" conferring social benefits (149), rather than commercial ones. The Court made a "conservative" award of \$500 "for the discomfort, distress and annoyance which must necessarily have followed from the humiliating features of [the plaintiffs'] daily lives" (151).

(3) *Pilon v Peugeot Canada Ltd* (1980) 114 DLR (3rd) 378 (Ont HCJ)

Galligan J accepted *Newell* as stating the correct principle of law with respect to damages for mental distress and anxiety arising out of wrongful dismissal. Distinguishing *Cropper* (because the issue in *Pilon* was mental distress and not loss of reputation), Galligan J was careful to emphasise that the damages awarded were "solely

in compensation for the mental distress caused to the plaintiff by the defendant's breach of contract" (383). Only because the manner of dismissal had increased the distress did he take it into account in assessing damages. But he was not prepared to consider awarding damages under the head of loss of job opportunity - which P had also sought, in analogy with the English Withers case - although no reasoning was given.

(4) *Cringle v Northern Union Insurance (1981) 124 DLR (3d) 22 (BCSC)*

An important feature of Pilon is the Court's finding that P had actually suffered injury caused by mental distress; in other words, his physical health had been affected. The lack of such evidence led the Court in this case to decline to award damages, holding that the shock caused by "peremptory dismissal" was not sufficient to establish such evidence (26).

But the emphasis appeared to shift back to the conduct of the employer in two later cases: *Brown v Waterloo Regional Board of Commissioners of Police (1984) 150 DLR (3d) 729 (Ont. CA)* and *Speck v Greater Niagara General Hospital (1983) 2 DLR (4th) 84*. Brown actually overturned a lower court's award of damages for mental distress on an unrelated ground (making its observations on the matter obiter). Although the Court insisted both that the remoteness test must be satisfied and that damage "must flow from the want of reasonable notice, and not from the fact of dismissal" (735), it went on to state that the correct rule must take into account "mental suffering caused by the wanton or reckless breach of a contract" (736). This rule derived from the US position (as summarised in Corbin on Contracts) and was subsequently applied in Speck.

(5) *Vorvis v Insurance Corporation of British Columbia (1989) 58 DLR (4th) 193 (SCC)*

The Vorvis case involved a particularly brutal manner of dismissal, but the decision has both complicated the issue and suggested a retreat. Here, the majority accepted that "aggravated" damages for mental distress may be awarded in appropriate cases - although this was not such a case because the "conduct complained of preceded the wrongful dismissal and therefore cannot be said to have aggravated the damage incurred as a result of the dismissal" (205). Thus, the acts complained of had to be "independently actionable" to sound in damages. Wilson J, dissenting, rejected the independent action approach, favouring the orthodox remoteness test, although she was unable in this case to find special elements in the employment contract to make damages for mental distress foreseeable (220). Her reasoning was thus more in line with that of the Court in Brown and Speck, even though it could not be turned here to P's advantage. But neither she nor other Canadian courts have confronted the underlying issue: whether in every contract of employment it is not implied that both the manner of dismissal and the employer's conduct preceding it can have mental distress as a consequence, and should therefore sound in general damages.

B NON-EMPLOYMENT CONTRACTS

(6) *Newell v Canadian Pacific Airlines Ltd (1976) 74 DLR (3d) 574*

In spite of its seemingly trivial factual basis, this is an influential case. Ps sought general damages for "anguish, loss of enjoyment and sadness" as a result of D's breach of contract in failing to transport Ps' pet dogs in a safe manner: one of them had died, and the other had become seriously ill. Borins Co.Ct J cited English authorities such as *Jarvis* and two Canadian "holiday" cases (*Keks v Esquire Pleasure Tours (1974) 3 WWR 406 (Manitoba Co.Ct)* and *Elder v Koppe (1974) 53 DLR (3d) 705 (NSSC)*), then simply applied the remoteness test, stressing the importance of disclosure:

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. (589)

Award of \$500.

See also:

Dunn v Disc Jockey Unlimited Co (1978) 87 DLR (3rd) 408;

Fuller v Healey Transportation Ltd (1978) 92 DLR (3rd) 277;

Wilson v Sooter Studios Ltd (1989) 55 DLR (4th) 303.

C QUEBEC - THE CIVIL JURISDICTION

Quebec has a civil law system (cf Appendix G, below), which has been influenced by its immediate common law environment. Although in Quebec the courts are liberal in allowing recovery for non-pecuniary loss in delict, it is uncertain what scope they would give to actions in contract; but there seems to be no objection in principle to so doing. It should be noted that art 1074 of the Quebec Civil Code stipulates a remoteness of damage test, which would constitute a limiting factor to claims in contract.

(See Bridge, "Contractual Damages for Intangible Loss: A Comparative Analysis" (1984) 62 Can Bar Review 323, 326-342, 352-359, 361, 369-370)

APPENDIX F

UNITED STATES

In the United States the doctrine of at will employment still generally prevails. This holds that employment for an indefinite term can be terminated at any time by either party to the employment agreement for any or no reason (provided the notice due under the contract is given). It has, however, been subject to both legislative and judicial erosion, and there are now numerous exceptions, varying from jurisdiction to jurisdiction. Any general statement is thus difficult. In its unadulterated form the at will doctrine would preclude the award of any damages whatsoever, and certainly of damages for mental distress, which perhaps explains the harshness of 56 Corpus Juris Secundum art 58. This states that where there is wrongful discharge, in the absence of any agreement, damages are not recoverable for an injury to the employee's good name, character, or reputation, or for an injury to his business reputation or good will, or for any injury to his health, or for physical or mental pain and suffering, or for the loss of advantages which would have accrued by a continuation of employment.

Excluding injury to health and physical pain and suffering as it does, the position in the United States seems more intransigent even than under *Addis*.

More generally, according to the Restatement (Second) of Contracts art. 353 (1981) and 25 Corpus Juris Secundum art 69, recovery of damages for "emotional disturbance" is excluded in an action for breach of contract. The reason given is that such damages are generally too remote and could not have been within the contemplation of the parties at the time of making the contract. Thus the American law adheres faithfully to the rule in *Hadley v Baxendale*, which may explain why two exceptions are commonly accepted. First, where the emotional disturbance accompanies a bodily injury; and secondly, where "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result" or "a natural and probable consequence".

Neither exception is foreign to New Zealand or English law (see *Summers v Salford Corporation* [1943] AC 283; *Heywood v Wellers*), nor is a further exception, namely that recovery is possible where there is a loss of business credit and reputation - provided that it is connected with a tangible pecuniary loss and the remoteness test is satisfied (cf *Wilson v United Counties Bank*). United States law also allows recovery in two circumstances which have not generally been recognised in New Zealand or England: where the breach of contract is accompanied "by willful, insulting, or wanton conduct" (the test approved in the Canadian *Brown* decision); or where the manner of breach itself constitutes a tort. With respect to the latter, it is significant that there is less reluctance in the United States than in other common law jurisdictions to blur the boundary between contract and tort; and that in most states it is unnecessary to specify contract or tort in the pleadings.

In certain states, notably California and Montana, an implied covenant of good faith and fair dealing is recognised in contract. Thus, a tort action can arise out of the manner in which the contract is breached. Courts seem to have been willing to accept the introduction of this tort into actions in contract because of the inadequacy of traditional contract remedies and because of their wish to deter certain types of breach.

The tort cause of action for bad faith originated in insurance cases, the leading one being *Gruenberg v Aetna Insurance Co* (1973) 9 Cal 3d 566, which also held that liability included damages for emotional distress. A later decision, *Egan v Mutual of Omaha Insurance Co* (1979) 24 Cal 3d 809, provided the rationale for placing insurance contracts in a category of their own, a rationale encountered in such New Zealand cases as *Gaunt v Gold Star Insurance*: the insured enters into a contract for the specific purpose of obtaining peace and security, as opposed to commercial advantage. The tort was then extended into the area of employment in cases such as *Cleary v American Airlines Inc* (1980) 111 Cal App 3d 443 and *Smithers v MGM Studios* (1983) 189 Cal Rptr 20. It was applied in instances where the employee had not been accorded the protection of due process rules, where attempts had been made to force the employee into forgoing agreed contractual terms, where there had been age discrimination etc. The damages awarded tended to be punitive rather than compensatory, reflecting the courts' desire to deter bad faith in employer conduct. A recent decision, however, *Foley v Interactive Data Corp* (1988) 47 Cal 3d 654, has disapproved *Cleary* and the line of cases it influenced, precisely because they allowed recovery in tort for breach of the implied covenant; and it limited recovery to contract damages. The bad faith tort has been further extended into the strictly commercial arena, the leading case being *Seaman's Direct Buying Service v Standard Oil of California* (1984) 36 Cal 3d 752; but no doubt the *Foley* decision will also have an inhibiting effect on seeking tortious remedies in such cases.

(See Chutorian, eg, "Tort Remedies for Breach of Contract ..." (1986) 86 Columbia LR 377, 378-391, 396-398;

Iwanaga "A Comparative Approach to Japanese and United States Wrongful Termination Law" (1990) 13 Hastings Int'l & Comp LR 341, 342-352;

Kuntz "The Muddled State of the Law of Wrongful Discharge ..." (1989) 30 New Hampshire Bar J 253, 255-257.)

APPENDIX G

FRANCE AND GERMANY

A FRANCE

In France, scope for awarding damages in contract for non-pecuniary loss is afforded by the much resorted to art 1382 of the Code Civil, which formulates a general principle of fault: "Any act whatsoever by a person which causes harm to another, obliges the person at fault to make good the harm". Articles 1146-53 provide for a defendant's liability to pay damages in contract, with art 1147 specifying that recovery is only possible if the plaintiff's loss is both "direct" and "certain". Foreseeability at the time of making the contract, on the other hand, does not appear to be a necessary requirement.

The equivalent French term for non-pecuniary or intangible loss is "dommage moral" or "prejudice moral" (as opposed to "dommage materiel"). Francophone jurisdictions make a distinction between injury to external and public feelings, and injury to internal and private feelings; and further, between claims asserted by the immediate victim and those by persons closely connected with the victim. Although liability in contract is not so well established as in delict, in France it appears that courts award damages for intangible loss whatever category of feelings is affected, and whoever the claimant might be. The only limiting factor - and a significant one - is the question of causation. Examples of claims which have been allowed are where a breach of contract by undertakers caused mental anguish to relatives of the deceased; and where a worker broke his contract and undermined his employer's authority by abusing him. The jurisprudence in employment cases is scanty, but it has been suggested that an employer's liability would be no less than that of the employee, should the latter situation be reversed.

(See Bridge, "Contractual Damages for Intangible Loss ..." (1984) 62 Can Bar R 323, Treitel "Remedies for Breach of Contract", c 16, Int. Encyc. of Comp. L., 85-86)

B GERMANY

Recovery for non-pecuniary loss in Germany ("immaterielle Schaden" or "Nichtvermogensschaden") is governed by arts 253 and 847 of the Civil Code (BGB). Article 253 provides that such damages are only available where stipulated by the law; art 847 specifies that they are only available where the plaintiff's person or health has been injured, where he or she has been deprived of liberty, and "at the suit of a female plaintiff in certain cases of seduction". On its face German law is as strict as the common law - if not stricter - in its approach to non-pecuniary loss; and, in principle at least, art 847 is not applicable to instances of breach of contract.

However, over the course of time some relaxation in the application of art 847 has been apparent. It was drafted with a late 19th century reluctance to quantify "immaterial" loss in mind, as well as the fear of opening the floodgates to spurious claims. But certain categories of non-pecuniary loss have become recognized, especially when they arise from situations in which a market price can be put on the satisfaction of immaterial needs. There are German "holiday" cases, for instance, as well as cases in which deprivation of the use of a private motorcar has sounded in damages. German courts now allow recovery for a wide range of mental distress, ranging from the psychological consequences of physical injury through to impairment of enjoyment of life, anxiety and inconvenience. This has been extended to employment-related cases: where the plaintiff has had to retire prematurely, for instance, or been forced to change occupation, or had to come to terms with a less satisfying occupation than the one trained for. Finally, there has been a general recognition since 1955 that damages for intangible loss are awarded on a double basis: to provide appropriate compensation for what has been lost, whether it is enjoyment of life or convenience ("Ausgleich": the equivalent of general damages), and to provide satisfaction ("Genugtuung": the equivalent of aggravated damages).

(See Staudinger, Kommentar zum BGB arts 253 and 847; Treitel, "Remedies for Breach of Contract" Int. Encyc. of Comp. L, 86-87)

Two concluding points should be made. First, in civil law jurisdictions such as France and Germany, it is difficult, if not impossible, to isolate the availability of damages for intangible loss in contract from their availability in delict. Secondly, although the two jurisdictions approach the question of non-pecuniary loss in contract from differing directions, they seem to differ little in practice. Where in France the starting-point is the broad principle enunciated in art 1382 CC, which is then limited by remoteness rules, in Germany the starting-point is a strict rule (art 847 BGB), which has been extended by the courts in response to changing social conditions and expectations.

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