

# ANALYSIS



## Recovery in Contract of Damages for Mental Distress

### Introduction

Hong Kong courts have a tendency to follow slavishly English developments in contract law. It is for this reason that the leading Hong Kong authority on damages for mental distress arising from a breach of contract<sup>1</sup> reflects the state of English law at a time when a challenge was being made to the general rule that no damages can be recovered in contract for injury to feelings. That challenge has been successfully quelled in the last ten years by the English Court of Appeal with the circumscription of limited exceptions to the rule. It will be argued in this note, however, that the Hong Kong courts should not follow the current English paradigm on the issue of damages for mental distress; that the challenge was healthy to the development of satisfactory remedies for breach of contract; and that the recent English cases have delimited too restrictively the exceptions to the general rule and as a consequence have established a threshold test for the recovery of damages for mental distress at too high a level, potentially depriving deserving plaintiffs of an adequate remedy for their losses.

Recovery in contract by the innocent party of damages for mental distress has been problematic, not as a result of the limitations imposed by the concept of remoteness of damages,<sup>2</sup> but because it stands at the juxtaposition between the cardinal principle in contract law that the plaintiff who has sustained a loss by reason of a breach of contract is to be placed, so far as money can do it, in as good a position as he would have been had the contract been performed<sup>3</sup> and the necessity for certain limits on recovery.

The general rule is that no damages in contract will be awarded for injury to the plaintiff's feelings or the distress, disappointment, frustration, anxiety, vexation, or aggravation caused by a breach of contract.<sup>4</sup> A recognised exception to that rule has always been that the plaintiff is allowed to recover damages if he or she has suffered physical discomfort and inconvenience resulting from the breach of contract, such as having to walk five miles home.<sup>5</sup> The English Court of Appeal in the 1970s acceded to arguments that the old authorities excluding damages for mental distress were out of date,<sup>6</sup> and there

<sup>1</sup> *Hardwick v Spence Robinson* [1975] HKLR 425.

<sup>2</sup> Because such consequences flowing from the breach are within the reasonable contemplation of the parties at the time of contracting: *Watts v Morrow* [1991] 4 All ER 937 (CA), 959, per Bingham LJ.

<sup>3</sup> *Robinson v Harman* (1848) 1 Ex 850, 855; 154 ER 363, 365, per Parke B.

<sup>4</sup> *Addis v Gramophone Co* [1909] AC 488 (HL), 491; *Groom v Crocker* [1939] 1 KB 194 (CA), 205; *Chitty on Contracts* (London: Sweet & Maxwell, 27th ed 1994), para 26-041.

<sup>5</sup> *Hobbs v London & South Western Railway Co* (1875) LR 10 QB 111. See also *Bailey v Bullock* [1950] 2 All ER 1167.

<sup>6</sup> *Jarvis v Swans Tours Ltd* [1973] 1 All ER 71, 74.

followed two further exceptions to the rule. First, in *Jarvis v Swans Tours Ltd*,<sup>7</sup> Lord Denning MR<sup>8</sup> stated that 'in a proper case damages for mental distress can be recovered in contract, just as damages for shock can be recovered in tort. One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment.'<sup>9</sup> The second 'proper case' is a contract whose purpose is to provide freedom from annoyance or distress.<sup>10</sup> The liberal approach adopted by the Court of Appeal was reflected in a number of decisions at first instance<sup>11</sup> which expanded the categories of recovery beyond the still relatively narrow exceptions set out above. The most important of these cases was *Cox v Philips Industries Ltd*, an employment case in which the defendant employer breached its contract with the plaintiff by relegating him to a position of lesser responsibility. Mr Justice Lawson awarded the plaintiff £500 damages for mental distress on the basis that there was 'no reason in principle why, if a situation arises which within the contemplation of the parties would have given rise to vexation, distress and general disappointment and frustration, the person who is injured by a contractual breach should not be compensated in damages for that breach.'<sup>12</sup>

It was during this era of reform that the Hong Kong Supreme Court rendered its decision in *Hardwick v Spence Robinson*. There have not been any subsequent reported cases in Hong Kong dealing with this issue.<sup>13</sup>

### The *Hardwick v Spence Robinson* approach

In *Hardwick v Spence Robinson*,<sup>14</sup> the plaintiffs engaged the defendant firm of architects to design and supervise the construction of a house on land that backed onto a steep hill. This work involved the design and construction of a drainage system for the land. The drainage system built by the defendants was found to be inadequate and on four occasions the house flooded during heavy rain, causing damage to the house and its contents. On the second occasion, one of the plaintiffs awoke in the middle of the night 'to find her bed floating

<sup>7</sup> Note 6 above. *Jarvis v Swans Tours Ltd* and *Jackson v Horizon Holidays Ltd* [1975] All ER 92 were approved by the House of Lords in *Ruxley Electronics and Construction Ltd v Forsyth* [1995] 3 All ER 268, 289.

<sup>8</sup> With whom Edmund Davies and Stephenson LJ agreed.

<sup>9</sup> Note 6 above, p 74.

<sup>10</sup> In *Heywood v Wellers* [1976] QB 446 (CA), damages for the plaintiff's distress were awarded against negligent solicitors who, in breach of their contractual duty, failed to obtain an injunction to stop the molestation of the plaintiff by her former boyfriend with the result that she was further molested; *Chitty on Contracts* (note 4 above), para 26-041.

<sup>11</sup> See, eg, *Cox v Philips Industries Ltd* [1976] 1 WLR 638 (QB); *Woodman v Photo Trade Processing Ltd* (unrep, 3 April 1981, Exeter Co Ct); *Warren v Truprint Ltd* [1986] BTLC 344 (Luton Co Ct).

<sup>12</sup> *Cox v Philips Industries Ltd* (note 11 above), p 644.

<sup>13</sup> See also *Khan v A-G* [1990] 1 HKLR 421 (SC) in which Mortimer J, applying *Addis v Gramophone Co* and distinguishing *Cox v Philips Industries Ltd*, refused to award the plaintiff damages for depression, frustration, and loss of reputation caused by an unlawful dismissal from public office.

<sup>14</sup> Note 1 above.

and the house full of water.' Marks on the walls of the house indicated that the water during these floods rose about four feet above ground level. The problem was rectified when the plaintiffs retained a firm of consultant engineers to design and install a new drainage system. The plaintiffs sued the defendants in negligence and breach of contract seeking, inter alia, damages for mental distress.

On this latter issue, Cons J took into account both 'the shock occasioned at the time of the floodings' and 'the fear and natural apprehension at having to live for some time in a house liable to be flooded in heavy rain.'<sup>15</sup> After referring to *Jarvis, Mayne & McGregor on Damages*,<sup>16</sup> and a Scottish decision quoted in that work, *Diesen v Samson*,<sup>17</sup> he concluded that the circumstances of the case justified an award under the head of damages for mental distress in contract. Mr Justice Cons did not refer expressly to the test for the award of damages for mental distress articulated by Lord Denning in *Jarvis* (that is, 'a contract to provide entertainment or enjoyment'<sup>18</sup>). Rather, he reformulated the test utilised in the *Diesen* case: the contract to design the plaintiffs' home was 'not a purely commercial contract, like for example a contract to design a block of flats. It was a contract with a very personal flavour.'<sup>19</sup> He then awarded \$2,500 to each plaintiff under this head.

### The current English approach

The English Court of Appeal has in the last decade resiled from the liberal approach to the award of damages for mental distress in contract.<sup>20</sup> Two cases have led the retreat. In *Bliss v South East Thames Regional Health Authority*,<sup>21</sup> the defendant health authority breached its contract with the plaintiff orthopaedic surgeon by requiring him to undergo a psychiatric examination when he had not demonstrated any mental or pathological illness and by suspending him when he refused to submit to such an examination. The trial judge applied *Cox v Philips Industries Ltd* and awarded the plaintiff £2,000 damages for frustration and mental distress caused by the breach. The Court of Appeal allowed the appeal with respect to this award, overruling *Cox v Philips Industries Ltd* and re-

<sup>15</sup> Ibid, p 435.

<sup>16</sup> London: Sweet & Maxwell, 12th ed 1961.

<sup>17</sup> 1971 SLT 49 (Sh Ct).

<sup>18</sup> Note 6 above, p 74.

<sup>19</sup> Note 1 above, p 436.

<sup>20</sup> The House of Lords in *Ruxley Electronics and Construction Ltd v Forsyth* (note 7 above), p 289, was reluctant to tackle directly the parameters of damages for mental distress on the ground that the correctness of the trial judge's award in that case (£2,500 for 'loss of amenity') was not strictly in issue. The defendant had appealed from the trial judge's decision, but the Court of Appeal had found it unnecessary to deal with the point. The point was abandoned before the House of Lords. Lord Lloyd concluded: 'So your Lordships are placed in something of a difficulty. The House does not have the benefit of the views of the Court of Appeal on the point, and the submissions before your Lordships have been artificially restricted' by the defendant's alternative argument.

<sup>21</sup> [1987] ICR 700.

affirming the validity of the general rule in *Addis v Gramophone Co.* Lord Justice Dillon restricted the scope of the exceptions to the rule in *Addis* as follows: 'There are exceptions now recognized where the contract which has been broken was itself a contract to provide peace of mind or freedom from distress'.<sup>22</sup>

In the second case, *Watts v Morrow*,<sup>23</sup> the plaintiffs purchased a house in reliance on a survey prepared by the defendant surveyor in which he stated that the house was sound and in good repair. Substantial defects which required immediate repair were discovered shortly after the plaintiffs took possession of the house. The plaintiffs suffered physical discomfort and mental distress as a result of the breach and the repairs.

The Court of Appeal held that an ordinary surveyor's contract was not a type of contract in which the subject matter was to provide 'peace of mind or freedom from distress.' Damages for mental distress could therefore only be awarded if they stemmed from the physical inconvenience or discomfort flowing from the breach of contract. Lord Justice Bingham summarised concisely the current approach to damages for mental distress adopted by the Court of Appeal:

A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not ... founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.

But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective ...

In cases not falling within this exceptional category, damages are ... recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort.<sup>24</sup>

The plaintiffs were awarded £750 damages for the physical discomfort they endured as a result of the defendant's breach of contract.

The 'very object/physical inconvenience' test articulated by Bingham LJ was applied by the Court of Appeal in *Knott v Bolton*,<sup>25</sup> the facts of which are

<sup>22</sup> *Ibid*, p 718.

<sup>23</sup> Note 2 above.

<sup>24</sup> *Ibid*, pp 959–60.

<sup>25</sup> Unrep, 24 March 1995, CA.

very similar to those of *Hardwick v Spence Robinson*. In *Knott v Bolton*, the plaintiffs retained the defendant architect to design their 'dream house.' The plaintiffs stipulated that the designs were to provide for 'a wide staircase embracing a gallery and an imposing and impressive entrance hall.' The defendant breached the contract by producing 'a staircase narrower than Mr Knott's specifications and a restricted gallery.' The trial judge found that this defect did not result in a diminution of the value of the property and declined to award the plaintiffs damages for their disappointment and distress at not getting that to which they were entitled under the contract and their lack of pleasure with what was produced. The plaintiffs appealed from that decision.

Lord Justice Russell<sup>26</sup> found that the facts of *Watts v Morrow* were indistinguishable from those of the instant case. After setting out the words of Bingham LJ extracted above,<sup>27</sup> he applied the 'very object' test in the following manner:

The very object of the contract entered into by Mr Bolton was to design for the Knotts their house. As an ancillary of that of course it was in the contemplation of Mr Bolton and of the Knotts that pleasure would be provided, but the provision of pleasure to the occupiers of the house was not the very object of the contract and there was nothing in the contractual relationship between Mr Bolton and the Knotts to indicate that he in any sense warranted or expressed himself to be contractually bound to provide for the Knotts the pleasure of occupation. Of course the pleasure of their occupation was an ancillary of the object of the contract, but it was not the very object of the contract.

Further, on the basis that the plaintiffs had not contended that they had suffered any physical inconvenience or discomfort in consequence of the defective design of their staircase and entrance hall, Russell LJ applied *Watts v Morrow* and dismissed the appeal.<sup>28</sup>

### The application of the English approach to *Hardwick v Spence Robinson*

The relevant tests applied by the courts in *Hardwick v Spence Robinson* and *Knott v Bolton* are significantly different. It is clear, however, that the result in *Hardwick v Spence Robinson* would remain the same if it were decided today under the current English approach. The reason is that, although the plaintiffs in that case would not be able to satisfy the 'very object' branch of the test

<sup>26</sup> With whom Henry and Ward LJJ concurred.

<sup>27</sup> Note 24 above.

<sup>28</sup> The Court of Appeal applied the same reasoning to deny the plaintiff damages for mental distress in *Alexander v Alpe Jack Rolls Royce Motor Cars Ltd* (unrep, 12 April 1995) where the defendant had breached its contract to repair the plaintiff's Rolls Royce causing him disappointment and a loss of pleasure.

articulated in *Watts v Morrow*, they would be able to satisfy the 'physical inconvenience' branch.

The question remains, though: Is it satisfactory for the law to restrict the award of damages for mental distress to two categories of contracts (that is, contracts to provide peace of mind and freedom from distress) and, in the case of all other types of contracts, only to those plaintiffs who have suffered physical inconvenience as a result of the breach of contract?

In order to answer that question, one must examine the reasons for this restrictive rule under the current English approach.

### A critique of the current English approach

The cardinal principle that the plaintiff who has sustained a loss by reason of a breach of contract is to be placed, so far as money can do it, in as good a position as he would have been had the contract been performed ought not to be displaced in the absence of strong reasons.

The retreat of the Court of Appeal from the liberal approach to damages for mental distress has been undertaken without discussion of the aims of or the reasons for the restrictive nature of the current approach. The Court of Appeal has merely justified the general unavailability of damages for mental distress as 'a matter of policy.'<sup>29</sup> It has not elaborated on this policy.

In *Hayes v James & Charles Dodd*, Staughton LJ alluded to the considerations supporting the policy as follows:

like the judge, I consider that the English courts should be wary of adopting what he called 'the United States practice of huge awards.' Damages awarded for negligence or want of skill ... must provide fair compensation, but no more than that. And I would not view with enthusiasm the prospect that every shipowner in the Commercial Court, having successfully claimed for unpaid freight or demurrage, would be able to add a claim for mental distress suffered while he was waiting for his money.<sup>30</sup>

The policy reasons for the Court of Appeal's reluctance to award damages for mental distress appear to be (i) the difficulty of separating legitimate claims from spurious ones and the fear of a flood of litigation; (ii) the difficulty of quantifying the loss; and (iii) the fear of awarding to the plaintiff a gratuitous benefit<sup>31</sup> and the concomitant (a) fear that damages for mental distress will be

<sup>29</sup> *Watts v Morrow* (note 2 above), p 959, per Bingham LJ; *Hayes v James & Charles Dodd* [1990] 2 All ER 815, 824, per Staughton LJ.

<sup>30</sup> *Ibid*, p 823.

<sup>31</sup> *Ruxley Electronics and Construction Ltd v Forsyth* (note 7 above), pp 274-5.

used, not to compensate the plaintiff, but to punish the defendant<sup>32</sup> and (b) desire to maintain monetary awards within modest bounds.<sup>33</sup>

There are, however, very strong reasons against the displacement of the cardinal principle of full compensation and the rejection of the current English approach to damages for mental distress. The strongest is that the current approach does not protect the plaintiff's 'consumer surplus,' that is, the subjective value of the contract to the plaintiff, which may differ from its value as represented by the market price.<sup>34</sup> This is so especially with respect to consumer contracts which are entered into with a view, not to profit as in commercial contracts, but to the pleasure or utility that the consumer will obtain from the use or possession of the subject matter of the contract. As stated by Harris, 'the purpose of this type of contract is to give one party a benefit which, from his point of view, is not measured by the price he paid for it.'<sup>35</sup> The concept of the consumer surplus has received recognition by Lord Mustill<sup>36</sup> in *Ruxley Electronics and Construction Ltd v Forsyth*:<sup>37</sup>

the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure. This excess, often referred to in the literature as the 'consumer surplus' ... is usually incapable of precise valuation in terms of money, exactly because it represents a personal, subjective and non-monetary gain. Nevertheless, where it exists the law should recognize it and compensate the promisee if the misperformance takes it away.

It is for this reason that the decision in *Knott v Bolton* appears harsh: the plaintiffs did not enter into the contract for the design of their 'dream house' with a view to profit. Rather, they wanted the house tailor-made to their specifications for their maximal enjoyment. The defendant's breach of contract caused them loss of this mental satisfaction, but the Court of Appeal's decision rendered them unable to recover compensation for that loss.

Second, although the 'very object' test as set out in *Watts v Morrow* is easy to state, its application in practice is difficult. This test involves the identification of the 'very object' of the contract and necessitates a distinction between the direct and the incidental consequences of the breach of contract. In *Heywood v Wellers*, Bridge LJ said:

<sup>32</sup> *Addis v Gramophone Co* (note 4 above), pp 493 and 498.

<sup>33</sup> See further E Macdonald, 'Contractual Damages for Mental Distress' (1994) 7 *Journal of Contract Law* 134, 138-9; TA Downes, *Textbook on Contract Law* (London: Blackstone Press Ltd, 3rd ed 1993), p 326.

<sup>34</sup> D Harris, *Remedies in Contract and Tort* (London: Weidenfeld and Nicolson, 1988), pp 44-5. See also A Burrows, *Remedies for Torts and Breach of Contract* (London: Butterworths, 2nd ed 1994), p 237.

<sup>35</sup> *Ibid*, p 45.

<sup>36</sup> With whom Lords Keith and Bridge agreed.

<sup>37</sup> Note 7 above, p 277.

There is ... a clear distinction to be drawn between mental distress which is an incidental consequence to the client of the misconduct of litigation by his solicitor, on the one hand, and mental distress on the other hand which is the direct and inevitable consequence of the solicitor's negligent failure to obtain the very relief which it was the sole purpose of the litigation to secure. The first does not sound in damages; the second does.<sup>38</sup>

It is submitted that this search for the direct and the incidental consequences of the breach has led the Court of Appeal into error. In order to determine the 'very object' of a given contract, the Court of Appeal has asked whether relief from mental distress was expressly or impliedly promised by the defendant. Thus, in *Watts v Morrow*, Ralph Gibson LJ stated:

No doubt house buyers hope to enjoy peace of mind and freedom from distress as a consequence of the proper performance by a surveyor of his contractual obligation to provide a careful report, but there was no express promise for the provision of peace of mind or freedom from distress and no such implied promise was alleged.<sup>39</sup>

The fallacy of this reasoning can be demonstrated by reference to general principles. Upon breach of a contract the plaintiff is entitled in general to be compensated for those losses that may be considered to arise naturally from the breach or that may reasonably have been in the contemplation of the parties at the time the contract was entered into.<sup>40</sup> There is no requirement that the defendant must have promised, either expressly or impliedly, the benefit of any precise head of damage claimed.

Further, it is impossible to determine precisely the 'very object' of a contract.<sup>41</sup> Consider, for example, the contract for a holiday package, a contract that clearly falls within the exception to the general exclusionary rule. The 'very object' of the contract from the travel agent's perspective is to earn a profit; only from the customer's perspective would it be enjoyment or relaxation. Assuming that the 'very object' of the contract may be gleaned from the perspective of only one party, the courts have been unable, or unwilling, to disentangle multiple aims or purposes of the contract. In *Watts v Morrow*, for example, one of the purposes, if not the dominant purpose, of entering into the contract to survey the house before its purchase must surely have been to obtain

<sup>38</sup> Note 10 above, p 463. Russell LJ in *Knott v Bolton* (note 25 above) utilised precisely the same language.

<sup>39</sup> Note 2 above, p 956.

<sup>40</sup> *Hadley v Baxendale* (1854) 9 Ex 341, 354; 156 ER 145, 151.

<sup>41</sup> The same difficulty applies to distinguishing direct consequences from incidental consequences and incidental consequences from secondary consequences: see further Macdonald (note 33 above), pp 142–5.



peace of mind.<sup>42</sup> Nonetheless, the Court of Appeal in that case held that the 'very object' test had not been satisfied. It appears, therefore, that in cases where there are multiple aims or purposes of the contract (none of which relates to the provision of a mental benefit) recovery of damages for mental distress will be denied.

Third, difficulties in the quantification of the award of damages for mental distress are not insurmountable and ought not to restrict recovery under this head in the appropriate case. Lord Denning expressly confronted this concern in *Jarvis v Swans Tours Ltd* where he said: 'I know that it [the distress caused by the breach] is difficult to assess in terms of money, but it is no more difficult than the assessment which the courts have to make every day in personal injury cases for loss of amenities.'<sup>43</sup> Lord Mustill made the same point in *Ruxley Electronics and Construction Ltd v Forsyth*<sup>44</sup> where, in the context of the award of damages for 'loss of amenity' in contract, he stated that 'in several fields the judges are well accustomed to putting figures to intangibles, and I see no reason why the imprecision of the exercise should be a barrier, if that is what fairness demands.'

Finally, there are a number of limiting factors inherent in the head of damage of mental distress which address the policy reasons set out above and obviate the need for artificial restrictions on the award of damages under this head. The burden of proving that he suffered mental distress as a result of the breach of contract will be borne, of course, by the plaintiff and the evidence adduced of such mental distress must be more than *de minimis*.<sup>45</sup> Further, it is clear that any damages awarded under this head are referable to losses that are mental, the subjective benefit of the contract, and not financial, an objective benefit. Approached correctly, there is thus no scope for double compensation. Lastly, the amounts awarded for mental distress damages have been low. The Court of Appeal has reiterated that such awards must be kept within 'modest' bounds.<sup>46</sup> The rejection of 'the United States practice of huge awards'<sup>47</sup> ought to ease the concerns of a flood of litigation and damages for mental distress being used in a punitive manner.

### A return to *Diesen v Samson*

It is submitted that, instead of the current English paradigm, the better approach to damages for mental distress in contract is that adopted by the court

<sup>42</sup> Ralph Gibson LJ stated as much in *Watts v Morrow* (note 2 above), p 956. See also Macdonald (note 33 above), p 145.

<sup>43</sup> Note 6 above, p 74.

<sup>44</sup> Note 7 above, pp 277-8.

<sup>45</sup> Burrows (note 34 above), p 237.

<sup>46</sup> In *Perry v Sydney Phillips & Son* [1982] 1 WLR 1297 (CA), 1303, Lord Denning said: 'All this anxiety, worry and distress may nowadays be the subject of compensation. Not excessive, but modest compensation.' See also the judgment of Ralph Gibson LJ in *Watts v Morrow* (note 2 above), p 958 and that of Lord Lloyd in *Ruxley Electronics and Construction Ltd v Forsyth* (note 7 above), p 289.

<sup>47</sup> Note 30 above.

in *Diesen v Samson*,<sup>48</sup> a Scottish case decided in 1970. The defender, a professional photographer, had agreed to take photographs at the pursuer's wedding but he breached the contract by forgetting about the appointment and failing to appear at the church on the wedding day. As a result, the pursuer had no photographs of her wedding and she sued the defender for the resulting injury to her feelings. The test utilised by the court for determining whether damages for mental distress ought to be awarded was based on the contemplation of the parties. Sheriff-Substitute Peterson held:

Wedding photographs generally are of no interest to anyone except the bride and bridegroom and their relatives and friends, and then only because they serve to stimulate recollection of a happy occasion and so give pleasure. What both the parties obviously had in their contemplation was that the pursuer would be enabled to enjoy such pleasure in the years ahead. This has been permanently denied by the defender's breach of contract and ... it is [a] fitting ... case for the award of damages.<sup>49</sup>

The court awarded the pursuer £30 damages for mental distress.

It is important to note at this point that, had *Watts v Morrow* been applied to these facts, the court would probably have held that the 'very object' of the contract was the provision of photographic services by the defender and that an ancillary object was the pleasure that the photographs would have provided to the pursuer. Further, since the pursuer had not suffered any physical inconvenience or discomfort as a result of the defender's breach, damages for mental distress would have been denied.

The test applied in *Diesen v Samson* is based on the contemplation of the parties, but is tempered by the policy considerations set out above. Accordingly, under the test, the court first determines whether the contract is primarily concerned with the plaintiff's commercial interests or with his or her personal, social, or family interests. Damages for mental distress will generally be unavailable in commercial contracts as a matter of policy on the grounds that mental suffering resulting from the breach will be held not to be in the contemplation of the parties as part of the business risk of the transaction.<sup>50</sup> In contracts involving the plaintiff's personal, social, or family interests, the usual test of contemplation of the parties is applied. The court then ascertains the loss, including the loss of pleasure and amenity,<sup>51</sup> that the plaintiff has in fact

<sup>48</sup> Note 17 above. Sheriff-Substitute Peterson in *Diesen v Samson* based his decision on the view expressed in the 12th edition of *Mayne & McGregor on Damages* (note 16 above), p 43, which view is now reflected in *McGregor on Damages* (London: Sweet & Maxwell, 15th ed 1988), para 97.

<sup>49</sup> Note 17 above, p 50.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ruxley Electronics and Construction Ltd v Forsyth* (note 7 above), p 280.

suffered by reason of the breach, and finally awards damages to compensate the plaintiff for that loss.

The benefits of this more flexible approach to damages for mental distress are the adherence to the cardinal principle of full compensation in contract law and the protection of the plaintiff's consumer surplus, particularly in consumer contracts which are entered into without a view to profit.

This, in essence, was the approach adopted by Cons J in *Hardwick v Spence Robinson*, wherein the contract to design the plaintiffs' home was described as 'not a purely commercial contract' but rather 'a contract with a very personal flavour.' It is submitted that, for the reasons set out above, the development of the law of contract in Hong Kong would be better served by a refusal to follow the paradigm currently adopted by the English Court of Appeal and the maintenance of the liberal approach to the award of damages for mental distress.

Shane Nossal\*

### Amending Charges in Hong Kong's Criminal Courts: Complex or Non-existent Powers? A Case for Legislative Amendment

Amendment of charges, informations, and indictments in Hong Kong criminal courts is more complicated than it seems, and various legal principles and practices apply in different courts. In practice, applications for amendment are often resolved with the consent of the defendant and counsel may not always be very familiar with the details of applicable laws. This tends to camouflage not only an array of unanswered questions but also considerable conflict of legal principles.

This note is mainly concerned with the possibly minimal amendment powers the District Court, though problems involving amendment powers exist in other jurisdictions. There is no question that amendment powers do exist in magistracies and in the High Court, even though their precise nature and scope are far from certain. The problems are more clearly understood if seen against the backdrop of the amendment powers existing in the three Hong Kong criminal court jurisdictions.

\* Lecturer, Department of Law, University of Hong Kong.