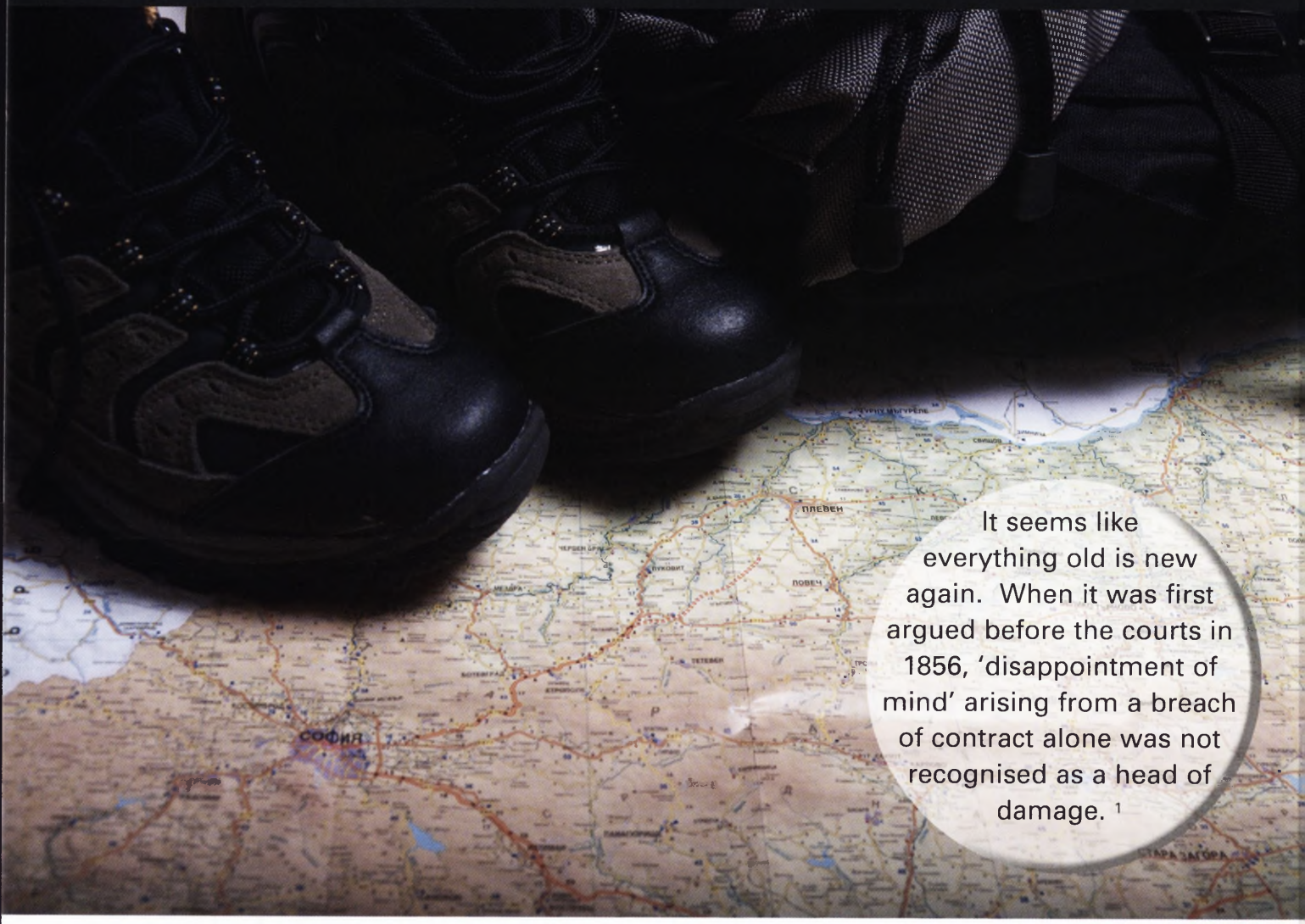
By Trudie Atherton

DAMAGES a disappointment for TRAVELLERS



It seems like everything old is new again. When it was first argued before the courts in 1856, 'disappointment of mind' arising from a breach of contract alone was not recognised as a head of damage. [1]

Then, in 1993, more than a century later, in a landmark decision, the High Court in *Baltic Shipping Co 'Mikhail Lermontov' v Dillon*[2] decided that injured feelings, inconvenience or anxiety – now generally referred to as damages for disappointment – was in fact a legitimate and separate head of civil compensation in Australia.[3]

However, two recent decisions in NSW higher courts appear to have completely undermined the importance of this finding so that it is unlikely that any tourist would ever be awarded damages for disappointment again following a bad holiday experience. According to these recent cases, in order to succeed under this head of damage, a tourist would have to suffer from either a serious physical injury resulting in pain and suffering or a recognisable psychological illness and, further, also meet the threshold requirements of a most extreme case within the meaning of the civil liability legislation.

This article examines some of the reasoning behind these

two recent decisions and compares it with that of the case law which developed this head of damage in the first place.

HISTORY

Originally, the courts did not recognise compensation for such heads of damage as disappointment of mind, except in cases such as breach of promise to marry[4] or where the mental distress was consequential upon the suffering of some physical injury or physical inconvenience.

That situation continued until 1972, when the English Court of Appeal made a landmark decision in *Jarvis v Swan Tours Ltd.*[5] The decision also had particular implications for the tourism and travel industry. The plaintiff, Mr Jarvis, was a 35-year-old bachelor, looking for company and some conviviality on his annual Christmas two-week holiday. He chose a little resort in Switzerland called 'Morialp' because he enjoyed skiing. The defendant tour company's brochure promised a house party, yodelling, evening drinks in the bar and afternoon tea and cakes, among other things.

What did Mr Jarvis get? The skis were the wrong size and by the time the matter was corrected he had sore feet and gave up. The house party which he believed would comprise 30-40 people was made up of 13 people in the first week and none in the second. No one spoke English in that second week. The cakes were potato crisps and little dry nut cakes and the yodelling evening turned out to be a local man in ordinary work clothes yodelling four or five songs before departing quickly! All in all, Mr Jarvis enjoyed a very inferior holiday experience. He sued the defendant for breach of contract and sought compensation on the basis of the wages he had foregone in taking time off for his holiday. He suffered no other physical or economic loss.

In his judgment, Lord Denning MR compared damages for mental distress in contract with damages for nervous shock in tort. His Lordship continued:

> '...One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset and frustration caused by the breach.'

Lord Denning concluded that:

> 'The right measure of damages is to compensate him for *the loss of entertainment and enjoyment* which he was promised, and which he did not get.' [Emphasis added]

He awarded Mr Jarvis compensation in the sum of £125. The total cost of his holiday package had been £63.45.

The decision set a precedent throughout the common law world.[6] In Australia, the matter came to a head in the 1993 High Court case of *Baltic Shipping Co 'Mikhail Lermontov' v Dillon.*[7] In this case, Mrs Dillon, recently widowed, had decided to take a 14-day Pacific cruise on board the defendant's ship to help her overcome her grief. On the tenth day of the cruise, the ship struck a rock in the middle of the night and sank. Mrs Dillon, along with all the other cruise ship guests, was forced to abandon ship and, in the process of jumping to the safety of a lifeboat, she suffered injury. Mrs Dillon claimed damages for breach of contract, including restitution of the balance of her fare, loss of valuables, damages for personal injury and compensation for disappointment and distress.

Ultimately, the High Court found that, by a majority, among other things, there had been no total failure of consideration of the cruise contract because, in fact, Mrs Dillon had received some benefit from it. Further, if she were allowed damages for both the final five days of the cruise that she did not get and claim damages for disappointment, this would be excessive compensation. The Court therefore rejected her claim for a refund of the unused portion of the fare.

In addressing the issue of damages for disappointment, each judge cited with approval the following passage from Bingham LJ in *Wallis v Morrow* (1991) 1 WLR at 1445:

> '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.'

Mrs Dillon's damages for disappointment alone were assessed at $5,000.[8] Her holiday cruise had cost just $2,205. This had been a test case and other cases soon followed, with an average award of $3,000 per passenger being awarded for damages for disappointment.[9]

RECENT CASES

By the beginning of the 21st century, it seemed relatively settled law that courts would award damages for disappointment where the specific purpose of the contract was to provide entertainment, relaxation, enjoyment or peace of mind of the kind so often promised in tours, cruises and other package holidays and where, instead, through breach of that contract, the traveller experienced feelings of distress, upset or frustration.

However, since the introduction of civil liability legislation throughout Australia,[10] and two recent NSW higher court decisions, the award of damages for disappointment for loss of enjoyment and leisure in holiday contracts is fast disappearing.

Insight Vacations Pty Ltd v Young [2010] NSWCA 137 (11 June 2010)

In this first case, the plaintiff, Stephanie Young, purchased a European tour package from the defendant tour operator in February 2005. The tour commenced in October 2005 and, on 14 October 2005, while travelling on a motorcoach in Slovakia, the plaintiff stood up from her seat to extract an item from her baggage in the overhead compartment and was injured when she fell because the motorcoach braked suddenly. As a result of her injury, she was unable to fully enjoy the remainder of her holiday.

Ms Young commenced proceedings in the NSW District Court against the tour wholesaler, alleging that it was liable for the negligence of the motorcoach driver both in contract under the *Trade Practices Act* 1974 (Cth)[11] and in tort. The defendant sought relief in contract and, alternatively, in tort.

At first instance, Rolfe DCJ found the defendant liable in contract for breach of warranty of due care and skill implied by s74(1) of the *Trade Practices Act* 1974[12] and awarded the >>

plaintiff $22,371 in damages, including interest and $8,000 for the 'disappointment' of being unable to enjoy the rest of her tour.[13] His Honour found that 'disappointment' was not non-economic loss[14] within the meaning of ss3 and 16 the *Civil Liability Act* 2002 (NSW) (CLA).[15]

Unfortunately, on the issue of 'disappointment', the Court of Appeal[16] rejected much of Rolfe J's reasoning. It found that the distinction drawn by the trial judge between damages for 'disappointment' and damages for 'distress' was unpersuasive and that an award for disappointment made by the trial judge constituted personal injury damages within the meaning of s11 CLA.[17]

Significantly, in the context of a holiday contract, it ruled that grief, anxiety, distress and disappointment could be elements of pain and suffering and therefore fell within the statutory definition of non-economic loss under the general description of damages for 'loss of amenities' as defined in s3 CLA.[18]

On this point, the Court concluded that s11A(2) CLA[19] contemplated that damages for non-economic loss could be awarded for personal injury in a claim brought in contract rather than tort. It made no difference that the damages were for breach of the statutory warranty rather than breach of a tortious duty.

The Court held that Ms Young's entitlement to damages for disappointment should have been assessed in accordance with the Table in s16(3) CLA[20] and not independently of it, as the trial judge had calculated. Accordingly, the Court lowered her award of damages to $11,500, representing 18 per cent of a most extreme case under s16 CLA and thus eliminated the $8,000 damages for disappointment originally awarded by the trial judge.

Flight Centre v Janice Louw [2011] NSWSC 132 (2 March 2011) Pg 13

In this case, the first and second defendants, Janice Louw and her partner, Francois, purchased a package holiday including travel and accommodation at Le Meridien in Bora Bora, Tahiti, through the plaintiff, Flight Centre (trading as Infinity Holidays). The defendants stayed at the resort from 11 to 22 April 2009. The holiday was a disaster, with construction work being carried out at the hotel during most of their stay causing noise, loss of privacy from workmen and disruption of amenities, especially to the beach. The Louws had been given no notice of these matters when they booked the holiday, which cost a total of $14,696. However, to keep the claim within the jurisdiction of the Small Claims Division of the Local Court, the defendants sued Flight Centre claiming only $10,000 damages for breach of contract resulting in inconvenience, distress and disappointment. The Assessor at first instance awarded $4,898.66 in damages plus costs and interest.

Flight Centre sought relief from this award in the Supreme Court. Barr AJ was satisfied that Flight Centre had breached its obligation to the Louws to provide a tropical holiday destination that was both relaxing and tranquil. The judge went on to say:

> 'The defendant should have been aware of the construction work at the hotel through its subsidiary. It should have known that the construction work had the potential to detract from the aesthetic surroundings and potentially compromise the relaxing experience of the location.'[21]

Unfortunately for the Louws, that is where the good news ended. First, the judge accepted Flight Centre's argument that 'impairment of a person's physical or mental condition' within the meaning of s11 CLA was broad enough to include anxiety and stress and that therefore the mental condition of the defendants was such as to amount to personal injury. That being the case, it followed that the Louws must establish under s16 CLA that the severity of their loss was at least 15 per cent of a most extreme case. Barr AJ was not satisfied that they had exceeded this threshold.

Secondly, the judge went further and found that, in fact, the Louws suffered from no recognised psychiatric illness but suffered pure mental harm, as defined in s27 CLA.[22] Accordingly, there was no liability to pay them damages at all for negligence under s31 CLA.[23] Barr AJ reversed the lower court's assessment of damages for inconvenience and distress, thus denying the Louws any compensation for disappointment.

FALLOUT FROM THE CASES

There are striking similarities in the material fact situations in all of these cases. For example, in both *Dillon*[24] and *Young*,[25] the plaintiffs suffered personal injury as well as failing to enjoy the balance of their prepaid package holiday. In *Jarvis*[26] and *Louw*,[27] the plaintiff and defendants, respectively, suffered no physical injury but endured a most inferior holiday experience, resulting in feelings of frustration, upset, inconvenience and disappointment. Both *Jarvis v Swan Tours Ltd*[28] and *Baltic Shipping Co 'Mikhail Lermontov' v Dillon*[29] were cited in *Insight Vacations Pty Ltd v Young*[30] and *Flight Centre v Janice Louw*.[31] In both *Dillon*[32] and *Young*,[33] the courts accepted that the plaintiffs could have commenced their actions in either contract or tort.

However, in each of the two earlier cases, the courts had awarded damages for disappointment and distress to the plaintiffs on the basis of the breach of contract to provide a holiday of enjoyment, leisure and relaxation of the kind promised in the tour brochure, but not delivered. In neither case did the judges treat damages for disappointment as a subset of personal injury or pain and suffering, as in the latter two cases.

It now seems quite clear that once a court characterises disappointment in this way, it will immediately trigger the civil liability legislation and cast upon the unhappy holidaymaker the onus of proving that the CLA and its draconian provisions do not apply – a difficult task indeed! Of course, both *Jarvis*[34] and *Dillon*[35] were decided before the civil liability legislation came into existence.

So, before damages for disappointment completely disappears into legal oblivion, it might be timely to remind the courts of the special nature of the package holiday contract and what it really means to travellers.[36] A tourist looks forward with excitement and anticipation to an

upcoming holiday. As the holiday unfolds, the tourist experiences feelings of satisfaction which can last far beyond the actual holiday itself as the traveller reviews their photographs and reminisces about their experiences. Conversely, when a holiday does not live up to expectations, these feelings may be just as intense, except that the element of satisfaction is now replaced by one of disappointment.[37]

CONCLUSION

The common law has come a long way since 1972 towards recognising the special characteristics of a package holiday. In both *Jarvis*[38] and *Dillon*[39] the courts identified damages for disappointment as a legitimate and separate head of damage in tourism and travel law. In each case, the measure of that damage was *based solely on the loss of entertainment, amenities for enjoyment, relaxation and pleasure*, which the tour operator had promised but had failed to deliver in their respective travel contracts. The physical condition of the plaintiffs was not called into account in assessing this head of damage.

In the context of the special characteristics of a travel holiday contract, with its potential for great expectations and huge disappointments, it is misguided to categorise damages for disappointment and distress as an assessment of personal injury or non-economic loss. Rather, the true purpose of this head of damage is to compensate the hapless tourist for the loss of enjoyment and pleasure because of an inferior holiday experience in which they have invested so much of their leisure time and money. ■

Notes: **1** See, in particular, *Hamlin v Great Northern Railway Co* (1856) 1 H&N 408; 156 ER 1261. **2** (1993) 176 CLR 344. **3** See TC and TA Atherton, *Tourism, Travel and Hospitality Law*, 2011 (2nd edn: Thomson Reuters) Chapters 2 [214] and following; and 9 [310]. **4** Here the plaintiff would have an expectation of becoming 'established' in society upon her marriage and this expectation would be dashed by the defendant's failure to complete the marriage contract. **5** [1972] WLR 954. **6** See, for example, *Newell v Canadian Pacific Airlines Ltd* [1976] 74 DLR (3rd) 574; *P&O Steam Navigation Co & Ors v Youell & Ors* [1997] 2 Lloyd's Rep 136. **7** (1993) 176 CLR 344. **8** For further discussion, see TA Atherton, 'Damages and Disappointment for Tour Operators: A case note on *Mikhail Lermontov*', *Travel and Tourism Review*, March 1993, p8. **9** See *Baltic Shipping Co v Marchant & Ors Mikhail Lermontov*, (1994) 36 NSWLR 361. **10** *Civil Liability Act* 2002 (NSW); *Civil Liability Act* 2003 (Qld); *Recreational Services (Limitation of Liability) Act* 2002 (SA); *Wrongs and Other Acts (Public Liability Insurance Reform) Act* 2002 (Vic); *Civil Liability Act* 2002 (WA); *Civil Liability Act* 2002 (Tas); *Civil Law (Wrongs) Act* 2002 (ACT); *Consumer Affairs and Fair Trading Amendment Act* 2003 (NT). **11** Now *Australian Consumer Law* 2010 (Cth). **12** See *Australian Consumer Law* 2010 (Cth) ss60, 61. **13** *Young v Insight Vacations Pty Ltd* [2009] NSWDC 122. **14** Section 3 defines 'non-economic loss' as any one of the following: (a) pain and suffering; (b) loss of amenities of life; (c) loss of expectation of life; (d) disfigurement. **15** Section 16(1) states: No damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case. **16** Spigelman CJ, Basten JA and Sackville AJA. **17** Section 11 states: In this Part: 'injury' means personal injury and includes the following: (a) pre-natal injury; (b) impairment of a person's physical or mental condition; (c) disease. 'Personal injury damages' means damages that relate to the death of or injury to a person. **18** See note 14. **19** Section 11A (2) states: This Part applies regardless of whether the claim for the damages is brought in tort, in contract, under statute or otherwise. **20** Section 16(3) provides: If the severity of the non-economic loss is equal to or greater than 15per cent of a most extreme case, the damages for non-economic loss are to be determined in accordance with the following Table. For example, at 15 per cent, damages for non-economic loss (as a proportion of the maximum amount that may be awarded for non-economic loss) is 1 per cent. **21** Para 13. **22** Section 27: 'pure mental harm' means mental harm other than consequential mental harm. **23** Section 31 states: 'There is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.' **24** *Baltic Shipping Co 'Mikhail Lermontov' v Dillon* (1993) 176 CLR 344. **25** *Insight Vacations Pty Ltd v Young* [2010] NSWCA 137. **26** *Jarvis v Swan Tours Ltd* [1972] WLR 954. **27** *Flight Centre v Janice Louw* [2011] NSWSC 132. **28** [1972] WLR 954. **29** (1993) 176 CLR 344. **30** [2010] NSWCA 137 (11 June 2010). **31** [2011] NSWSC 132 (2 March 2011) p13. **32** *Baltic Shipping Co 'Mikhail Lermontov' v Dillon* (1993) 176 CLR 344. **33** *Insight Vacations Pty Ltd v Young* [2010] NSWCA 137). **34** *Jarvis v Swan Tours Ltd* [1972] WLR 954. **35** *Baltic Shipping Co 'Mikhail Lermontov' v Dillon* (1993) 176 CLR 344. **36** See TC and TA Atherton, *Tourism, Travel and Hospitality Law*, 2011 (2ed: Thomson Reuters) Chapter 9 [300] and following. **37** For further discussion, see TC Atherton: 'Package holidays: legal aspects' 1994 15(3) *Tourism Management* 193-9. **38** *Jarvis v Swan Tours Ltd* [1972] WLR 954. **39** *Baltic Shipping Co 'Mikhail Lermontov' v Dillon* (1993) 176 CLR 344.

Trudie-Ann Atherton *is a practising solicitor and partner in the firm Atherton Legal, ans co-authored the book, Tourism, Travel and Hospitality Law. She is also a visiting lecturer at Bond University on the Gold Coast teaching international tourism law.*

EMAIL *trudie@athertonadvisory.com*