

WHAT'S THE DEAL WITH GENERAL AND SPECIAL DAMAGES?

By William E. McNally and Barbara E. Cotton¹

There are times in a civil trial lawyer's life when he or she must know the difference between general and special damages - usually when either making an application for particulars or responding to one. As a general rule, special damages must be particularized; general damages need not be. So what's the deal with general and special damages?

It seems that, bottom line, there are three indicia of whether damages are general or special:

- (1) Do the damages arise naturally and in the normal course of events, in which case they are general, or do they not arise naturally and are recoverable only when they are not beyond the reasonable contemplation of the parties, in which case they are special
- (2) As a matter of proof, can the damages be precisely quantified, in which case they are special, or are there various unknown and uncertain factors such that the damages have to be calculated at large, in which case they are general?
- (3) As a matter of pleading, are the damages presumed to be the direct natural or probable consequence of the act complained of, in which case they will be general, or will the law not infer the damages from the nature of the act and they must be proven, in which case they are special?

These three indicia are well stated in *Halsbury's*² as follows:

"812. "General", "special" and "consequential" damages. A distinction is frequently drawn between the terms "general" and "special" damages, which terms have different meanings according to the context in which they are used. In the context of liability for loss (usually in contract), **general damages are those which arise naturally and in the normal course of events, whereas special damages are those which do not arise naturally out of the defendant's breach and are recoverable only where they are not**

beyond the reasonable contemplation of the parties (for example, where the plaintiff communicated to the defendant prior to the breach the likely consequences of the breach). The distinction between the two terms is also drawn in relation to proof of loss: here, **general damages are those losses, usually but not exclusively non pecuniary, which are not capable of precise quantification in monetary terms, whereas special damages, in this context, are those losses which can be calculated in financial terms.** A third distinction between the two terms is in relation to pleading: here, **special damage refers to those losses which must be proved, whereas general damages are those which will be presumed to be the natural or probable consequence of the wrong complained of, which the result that the plaintiff is required only to assert that such damage has been suffered . . .**" (Emphasis added.)

Odgers'³ makes a distinction as follows:

"As to the allegation of damage, the distinction between special and general damage must be carefully observed. General damage such as the law will presume to be the natural or probable consequence of the defendant's act need not be specifically pleaded. It arises by inference of law, and need not, therefore, be proved by evidence, and may be averred generally. In some cases however, part of the general damages which it is sought to recover may have resulted from the wrong complained of in an unexpected though foreseeable way, in which case particulars should be given so as to avoid surprise at the trial and to enable your opponent to consider making a payment into court.

Special damage, on the other hand, is such a loss as the law will not *presume* to be the consequence of the defendant's act, but which depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings, and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant's conduct. A mere expectation or apprehension of loss is not sufficient. And no damages can be recovered for a loss actually sustained, unless it is either the natural or probable consequences of the defendant's act, or such a consequence as he in fact contemplated or could reasonably have foreseen when he so acted. All other damage is held "remote."

The leading case on the distinction between general and special damages appears to be *Stroms Bruks Aktie Bolag v. Hutchison*, [1905] A.C. 515, a decision of the House of Lords. In this case the plaintiffs, who were manufacturers of wood pulp in Sweden, entered into a charter party with the defendant ship owners of Glasgow by which the ship owners agreed to carry wood pulp to Cardiff in two shipments. The secondary contract was not fulfilled and the plaintiff sued the ship owners for breach of contract of carriage. It was argued that the plaintiffs had claimed special damages only, and not general damages, and that they had failed to prove the special damages. Lord Macnaghtn stated the following oft-applied passage⁴:

“It seems to me that this argument is founded on an inaccurate use, or perhaps I should say a less accurate application, of the terms “special damage” and “general damage.” That division of damages is more appropriate, I think, in cases of tort than in cases of contract. “General damages”, as I understand the term, are such as the law will presume to be the direct natural or probable consequence of the act complained of. “Special damages”, on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, and, therefore, they must be claimed specifically and proved strictly. In cases of contract, special or exceptional damages could not be claimed unless such damages were within the contemplation of both parties at the time of the contract.”

This definition of general and special damages is adopted in the *Canadian Encyclopedic Digest* (3d) title “Damages”⁵. It has been adopted in Alberta by Wachowich J. of the Alberta Court of Queen’s Bench in *Canadian Commercial v. McLaughlan* (1988), 92 A.R. 105.

In another early English case, *Ratcliffe v. Evans*, [1892] 2 Q.B. 524, it was stated that special damage was damage arising out of the special circumstances of the case which, if properly pleaded, could be super-added to the general damage which the law implies in every breach of contract and every infringement of an absolute right. In all such cases the law presumes that some damage will flow in the ordinary course of things from the mere invasion of plaintiff’s rights, and calls it general damage. Special damage in such a context means the particular damage, beyond the general

damage, which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial.

A leading English case, *Perestrello e Companhia Ltda v. United Paint Co. Ltd.*, [1969] 3 All E.R. 479⁶ states per Lord Donovan of the English Court of Appeal:

“Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into court. The limits of this requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular case. “The question to be decided does not depend upon words, but is one of substance” (per Bowen L.J., in *Ratcliffe v. Evans* ([1892] 2 Q.B. 524 at 529)). The same principle gives rise to a plaintiff's undoubted obligation to plead and particularize any item of damage which represents out-of-pocket expenses, or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as . . . “special” in the sense that fairness to the defendant requires that it be pleaded. The obligation to particularize in this latter case arises not because the nature of the loss is necessarily unusual, but because a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible.”

The Auckland High Court has given an interesting illustration of these principles in *Daniels v. Chief Executive Department of Work and Income*, 2002 NZAR LEXIS 10. From 1985 the plaintiff Elizabeth Daniels received “Domestic Purposes Benefits” from the New Zealand government agency responsible for administering payment of the benefit. The agency claimed in 1997 that Mrs. Daniels had been overpaid by \$59,302. 88. Mrs. Daniels then sued for a judicial review of the conduct of the agency in establishing and reviewing her indebtedness and she sought general damages for breach of the New Zealand *Bill of Rights Act*, *inter alia*. She alleged that the agency had reinstated her

indebtedness without a hearing and had failed to convene a hearing into the amount of her indebtedness. She deposed that she had suffered anxiety as a result of the debt demands of the agency. Harrison J. held that she had not proved any losses suffered as a result of the acts of the agency, however, stating⁷:

“This is a claim for general damages. They are what the law presumes to be the direct, natural or probable consequence of the conduct complained of. They are to be contrasted with special damages which the law does not infer from the nature of the act and which must be claimed specially and proved strictly.

Here Ms. Daniels has specifically deposed to suffering anxiety as a result of (the agency's) debt demand. She has said nothing about suffering the same state of mind as a consequence of any delays by the committees. In the absence of evidence the law does not presume that anxiety is a direct, natural or probable consequence of a breach of natural justice in the form of delay. The law could properly presume that frustration or annoyance would be such a consequence. But it does not compensate by way of general damages for frustration or annoyance. Accordingly, Ms. Daniels' claim must fail for want of proof.”

Endnotes

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 2. Fourth Edition at para. 812.
 3. D.B. Casson and I.H. Dennis, *Odgers' Principals of Pleading and Practice in Civil Actions in the High Court of Justice* (22d) (London, Stevens & Sons 1981) at pp. 170, 171.
 4. At pp. 525, 526.
 5. At para. 4-6.
 6. At pp. 485-486.
 7. At paras. 29, 30.