

CRY ME A RIVER: RECOVERY OF MENTAL DISTRESS DAMAGES IN A BREACH OF CONTRACT ACTION  
A U.S./CANADA COMPARISON

by

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## I. Introduction

If someone were to complain of mental distress due to breach of contract, the response might well be “cry me a river.” Put less colloquially, the general rule in contracts in both the United States and Canada is that there is no recovery for mental distress in a breach of contract action.<sup>i</sup> As Brian A. Blum explains:

Because contract damages are geared to economic loss, they do not typically take account of any *mental distress, inconvenience, humiliation, or other psychic harm* caused by the breach. This principle is applied firmly, whether the aggrieved party is a corporation without heart or soul, or some poor individual who really is traumatized and distressed by the breach.<sup>ii</sup>

Courts have indeed invoked the rule on the basis that contract law concerns financial loss only but also out of a fear of opening the floodgates. As the Supreme Court of North Carolina in *Lamm v. Shingleton*<sup>iii</sup> summarizes the matter:

[c]ontracts are usually commercial in nature and relate to property or to services to be rendered in connection with business or professional operations. **Pecuniary interest is dominant.** Therefore, as a general rule, damages for mental anguish suffered by reason of the breach thereof are not recoverable. **Some type of mental anguish, anxiety, or distress is apt to result from the breach of any contract which causes pecuniary loss.**<sup>iv</sup> [emphasis added].

Likewise, Bingham L.J. in *Watts v. Morrow*<sup>v</sup> advances a policy reason in favor of the general rule against recovery:

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, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.**<sup>vi</sup> [emphasis added]

Treatise authors see things similarly. Joseph Perillo, for example, agrees with the assessment in *McCormick on Damages* that the general rule against recovery is the judiciary's way of defining the limits of business risk.<sup>vii</sup> A related policy concern, as articulated by Professor David Capper, is that plaintiffs will exaggerate the true scope of their suffering or, even worse, claim mental distress when they are not emotionally bothered all.<sup>viii</sup> In short, the concern is that permitting recovery for mental distress would amount to an unmerited cash-grab by the plaintiff.

Contrary to *Watts*<sup>ix</sup> and *Lamm*,<sup>x</sup> other American courts have declined to permit recovery of non-pecuniary loss on the basis that intangible loss is too remote.<sup>xi</sup> For example, in *Erlich v. Menezes*<sup>xii</sup> the court refused to award mental distress damages to the plaintiff notwithstanding the defendant's failure to deliver the promised “dream house,”<sup>xiii</sup> stating:

Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. ....This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise. In contrast, tort damages are awarded to [fully] compensate the victim for [all] injury suffered.<sup>xiv</sup>

The general rule against recovery for intangible loss also reflects the court's concern that contract law not lose its tough-mindedness. In the words of Lord Cooke of Thorndon in the House of Lord's 2001 decision of *Johnson v. Gore Wood & Co.*:<sup>xv</sup> “Contract-breaking is treated as an incident of commercial life which players in the game are expected to meet with mental fortitude.”<sup>xvi</sup> In this regard, contract law would appear to reflect the attitudes and expectations of the ‘reasonable

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businessman' who either presumably would not experience distress in face of breach, or if he did, would not regard this as a risk borne by the other side. Such an individual forms the implicit backdrop for the following statement by the court in *Hatfield v. Max Rouse & Sons*.<sup>xvii</sup>

Life in the competitive world has at least equal capacity to bestow ruin as benefit, and it is presumed that those who enter this world do so willingly, accepting the risk of encountering the former as part of the cost of achieving the latter. Absent clear evidence to the contrary we will not presume that the parties to a contract such as the one before us meant to insure each other's emotional tranquillity.<sup>xviii</sup>

Though the exact foundation for the rule against recovery for intangible loss remains controversial, there is no doubt that in both the United States and Canada, courts have fashioned numerous exceptions to the general rule in order to achieve a fair outcome in the dispute at bar. This would suggest that the attitudes and expectations of the reasonable businessman referred to above perhaps lack sufficient scope<sup>xix</sup> – a matter which the paper will return to in its concluding section.

This article explores strategies employed by courts to permit an award of damages for mental distress in a breach of contract action. Part II provides necessary context by assessing this topic in relation to the *Restatement (Second) of Contracts*. Part III details how American and Canadian courts avoid the general rule against recovery in the context of wrongful conduct *at the time* of breach. This Part also assesses the inherent limitations of this approach. Part IV considers the tenuous extent to which courts permit recovery for mental distress due to the *fact* of breach. Part V offers some general conclusions and suggestions for reform. It will be seen that the general rule against recovery for intangible loss has not served the American and Canadian<sup>xx</sup> common law particularly well because it has forced the judiciary to improvise around the general rule in the deserving case instead of directly confronting its frailties. Accordingly, case law in both jurisdictions reflects legal disparateness, incongruity, and needless confusion.<sup>xxi</sup>

## II. Relevant Portions of Restatement (Second) of Contracts

The Restatement's general rule regarding enforcement of a contract by an award of damages is based on the famous English case of *Hadley v. Baxendale*<sup>xxii</sup> which provides

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract.<sup>xxiii</sup>

Since *Hadley*,<sup>xxiv</sup> various terms have been used in the U.S. to describe the two types of damages referred to in the case: general and special, or direct and consequential,<sup>xxv</sup> while in Canada, no such categories have developed. In both countries, the *Hadley* limitation on contract damages is summarized by asking whether or not the damages for which recovery is sought were foreseeable at the time of contracting.

According to the Restatement:

### § 347 Measure of Damages in General

Subject to the limitations stated in §§ 350-53, the injured party has a right to damages based on his expectation interest as measured by

- (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
- (b) any other loss, including incidental or consequential loss, caused by the breach, less
- (c) any cost or other loss that he has avoided by not having to perform.

However, when those damages are for mental distress, an additional limitation is imposed:

### § 353 Loss Due to Emotional Disturbance

Recovery for emotional disturbance will be excluded unless the breach also

caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.

There is no doubt that § 353 amounts to a pronounced tightening of *Hadley v. Baxendale*<sup>xxvi</sup> in the context of mental distress since it requires more than simple foreseeability.

The special limitation on recovery for emotional disturbance in the Restatement asks for the plaintiff to show more than what *Hadley*<sup>xxvii</sup> would require. It is therefore consonant with the general rule stated at the beginning of the article, and supports the current state of the American common law which mandates finding special circumstances – beyond what is required for other types of consequential loss – in order for mental distress damages to be awarded. This is a matter which is explored further in the first section of Part IV.

The comments to the Restatement §§ 353 and 351 give the following examples of when damages for emotional distress are recoverable in breach of contract cases:

- (1) A, a hotel keeper, wrongfully ejects B, a guest, in breach of contract. In doing so, A uses foul language and accuses B of immorality, but commits no assault. In an action by B against A for breach of contract, the element of B's emotional disturbance will be included as loss for which damages may be awarded...<sup>xxviii</sup>
- (2) A makes a contract with B to conduct the funeral for B's husband and to provide a suitable casket and vault for his burial. Shortly thereafter, B discovers that, because A knowingly failed to provide a vault with a suitable lock, water has entered it and reinterment is necessary. B suffers shock, anguish and illness as a result. In an action by B against A for breach of contract, the element of emotional disturbance will be included as loss for which damages may be awarded.<sup>xxix</sup>
- (3) A, a plastic surgeon, makes a contract with B, a professional entertainer, to perform plastic surgery on her face in order to improve her appearance. The result of the surgery is, however, to disfigure her face and to require a second operation. In an action by B against A for breach of contract, ...the element of emotional disturbance resulting from the additional operation will be included as loss for which damages may be awarded.<sup>xxx</sup>

Each of these examples presents a different basis for awarding emotional distress damages. In example (1) the emotional distress damages are awarded but not due to the *fact* of the breach. That is, the plaintiffs are not awarded the damages for emotional harm because they were ejected from the inn in violation of the contract terms. Rather, the example focuses on the *manner* in which they were ejected, i.e. the foul language and accusations. While not stated in the example, it appears that if the defendant politely ejected the plaintiff, no such damages would be awarded, even if the plaintiff has suffered mental anguish as a result of having no place to stay.

Examples (2) and (3) more closely follow the *Hadley* rule, albeit on pronounced facts. In (2), emotional distress is likely to be the natural result of a breach of contract for funeral services. In (3) the illustration presumably is intended to show special circumstances known to the parties at the time of contracting, namely that the plaintiff is a professional entertainer. However, this contract could also fall into the same category as example (2) in that mental anguish is a natural consequence of disfigurement and additional surgery.

It will be noted, in the cases described below, that not all U.S. courts follow the Restatement rule requiring physical injury as a prerequisite to emotional distress damages. As the court in *Volkswagon of America v. Dillard*,<sup>xxxi</sup> states:

although Alabama historically did not allow the recovery of damages for mental distress where there was no accompanying physical injury, we have now adopted the rule that recovery may be had for mental suffering without the presence of physical injury, concluding in 1981 in *Taylor v. Baptist Medical Center, supra*, at 374, that "to continue to require physical injury . . . would be an adherence to procrustean principles which have little or no resemblance to medical realities."<sup>xxxii</sup>

Courts in both the United States and Canada have regularly permitted recovery for mental distress when the *manner* of breach has been outrageous. More sporadically, courts have permitted recovery simply because the *fact* of breach has caused emotional upset – and not just on the basis of specialized foreseeability rules. These matters are explored in the next two parts of this paper.

### **III. Exceptions to the General Rule against Recovery for Mental Distress Damages: Recovery Based on the *Manner* of Breach**

Notwithstanding the general rule, courts have generally been amenable to awarding damages for mental distress based on conduct by the defendant *at the time* of breaching the contract. In this way, the plaintiff sees some recovery for emotional hurt, upset or humiliation. Nonetheless, an underlying judicial recalcitrance shines through. That is, many U.S. courts have required that the defendant's manner of breach meet the requirements of an independent tort – such as the intentional infliction of emotional distress, or tortious breach of the implied covenant of good faith. Canadian courts have also required the plaintiff to show that the defendant had committed an independent actionable wrong though not necessarily through a tort.

While a tort is sufficient in Canada, any additional actionable wrong (including breach of fiduciary duty or another breach of contract) would also meet the requirement.<sup>xxxiii</sup>

## A. United States

### 1. Tortious Breach of Contract

Many states permit damages for mental distress when the defendant's conduct in breaching the contract is outrageous or extreme, or (particularly in the case of a breach of an insurance contract) when the breach is made in bad faith. The most frequently alleged tort in this area is the tort of intentional infliction of emotional distress, defined in § 46 of the *Restatement (Second) of Torts (1965)* as follows:

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

In finding that the elements of this tort are met, a court can then separate the plaintiff's pecuniary loss (which is redressed through contract damages) from the plaintiff's emotional or intangible injuries (which are redressed in tort). Accordingly, courts permit recovery for mental distress in a contractual context, albeit it indirectly, and through the fortuity of a tort also having been committed.

The test for the defendant's conduct in relation the tort of intentional infliction of mental suffering is described in the following comment to § 46 of the *Restatement (Second) of Torts*:

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

The *Restatement* describes an exceedingly high standard indeed.

This is not to suggest, of course, that plaintiffs necessarily fail in establishing such a tort. In *Dependable Life Insurance Company v. Harris*,<sup>xxxiv</sup> for example, the plaintiff had considerable success. In this case, the plaintiff had a credit disability policy with defendant. After initially honoring the policy, the defendant ceased making payments to the bank holding the note on plaintiff's car. As the court summarizes the matter: At least twice, Harris' claims manager called him a cheat and a fraud, in an attempt to frighten him from claiming under the policy. His car was repossessed, he was forced into bankruptcy, and he became severely depressed.<sup>xxxv</sup> On this basis, the court affirmed the lower court judgment which awarded compensatory damages for intentional infliction of mental distress as well as punitive damages, though reversing the award of attorney's fees on other grounds.<sup>xxxvi</sup> The appeals court provided no analysis of why punitive damages were appropriate, given perhaps, because they so obviously were.

Significantly, the court in *Harris*<sup>xxxvii</sup> did not characterize the plaintiff's mental and emotional damages as resulting from the breach of the contract of insurance. In fact, no mention of breach of contract damages is made in the case. Instead, the court examined the *manner* of the breach, and measured the defendant's conduct against the standard of outrageousness required for the tort of intentional infliction of emotional distress. Given the extreme conduct required to meet this element of the tort, many plaintiffs would be left without redress for their upset.

Other tortious forms of conduct which plaintiffs have relied on to secure recovery for mental distress in connection with a breach of contract include assault and battery,<sup>xxxviii</sup> fraud and deceit,<sup>xxxix</sup> defamation,<sup>xl</sup> negligent misrepresentation and false light,<sup>xli</sup> and conversion.<sup>xlii</sup> Put another way some courts take the view that emotional distress damages can *never* be compensatory and could only be secured via punitives.

If this were not enough of a barrier to recovery, some courts have actually *raised* the standard for awarding punitive damages when the plaintiff alleges an independent tort causing emotional injury in a breach of contract scenario. Instead of having to demonstrate that the defendant's conduct in relation to the alleged tort was willful or wanton – the ordinary test for punitives – certain courts have required the plaintiff to prove the outrageousness standard of the tort of infliction of emotional distress, described above. This is a peculiar – even gratuitous – requirement when the plaintiff does not even found his or her case on such a tort. It clearly betrays the deep suspicion with which the judiciary regard mental distress in a contractual context.

In *Brown v. Fritz*,<sup>xliii</sup> for example, the buyer sued the sellers for misrepresentation of title, misrepresentation of the condition of the property, and negligent infliction of emotional distress – all in connection with the parties' contract for the purchase and sale of the sellers' real property.<sup>xliiv</sup> A jury awarded the plaintiff compensatory damages for negligent infliction of emotional distress. On appeal, the court ruled that emotional distress suffered by the plaintiff was the result of the contract breach, not an independent tort. The court then noted "the close parallel between allowable damages for breach of contract under the terminology of "emotional distress" and for punitive damages"<sup>xliv</sup> concluding that a plaintiff could recover only punitive damages in this circumstance, and then only if the sellers' misconduct was sufficiently outrageous<sup>xlvi</sup>. This is perplexing since, ordinarily speaking, an

award of punitive damages would not be appropriate in a contract action, and for an independent tort, such an award would be based on defendant's conduct being merely wilful or wanton.<sup>xlvii</sup>

The *Brown*<sup>xlviii</sup> opinion is also deficient for failing to recognize the different purposes of compensatory and punitive damages. Indeed, it takes the position that a punitive damages award cannot co-exist with a compensatory award for mental distress.<sup>xlix</sup> This deficiency was ably criticized Justice Schroeder in *Walston v. Monumental Life Ins. Co.*,<sup>l</sup> who stated:

While the conduct giving rise to a claim for emotional distress and a claim for punitive damages may be of the same quality, it does not follow that the award of damages is either duplicative or must be co-extensive. The emotional distress damages are awardable for a condition particular to the aggrieved party. Punitive damages are awardable primarily to deter future bad conduct. There need be no overlap between the two.<sup>li</sup>

Though it is certainly helpful to a certain class of plaintiffs that recovery for mental distress can sound in tort, this approach can also be problematic and restrictive. This is because torts – like the most frequently alleged tort of intentional infliction of mental suffering – have a stringent mental requirement going to the defendant's intent. Such a tort-based orientation to the question of mental distress recovery for breach of contract clearly places a higher onus on the plaintiff than contract law would ever demand. That is, instead of simply having to prove breach and its foreseeable consequence (mental distress), the plaintiff has to demonstrate that the defendant also had the requisite mental element to found the necessary tort. To boot, some courts restrict access to punitive damages when the tort occurs in a contractual context. This too unfairly compromises the plaintiff's claim and demonstrates the court's palpable suspicion when it comes to mental distress claims in a contractual arena.

## 2. Tortious breach of an Implied Covenant of Good Faith

UCC § 1-201(19), states that “good faith” means “honesty in fact and the observance of reasonable commercial standards of fair dealing.” Some jurisdictions treat breach of good faith as a contract claim<sup>lii</sup> – meaning that compensatory damages are recoverable but not punitives.<sup>liii</sup> Other times, as Perillo notes, breach of the duty of good faith is treated as a tort, particularly in the area of violations of insurance contracts by insurers.<sup>liv</sup> In such a scenario, punitive damages would be recoverable<sup>lv</sup> and presumably work to increase quantum. Regardless of approach, however, tortious breach of the implied covenant of good faith is another basis for recovery for mental distress.

Some courts have recognized a similar tort remedy for breach of the covenant of good faith in employment contracts.<sup>lvi</sup> Other, however, have declined to do so.<sup>lvii</sup> Moreover, certain jurisdictions have developed specialized rules based, for example, on the contract being one for insurance. As the Supreme Court of California stated in *Cates Construction v. TIG Co.*,<sup>lviii</sup>

In the insurance policy setting, an insured may recover damages not otherwise available in a contract action, such as emotional distress damages resulting from the insurer's bad faith conduct and punitive damages if there has been oppression, fraud, or malice by the insurer. [Citations omitted]

As our decisions acknowledge, tort recovery in this particular context is considered appropriate for a variety of policy reasons. Unlike most other contracts for goods or services, an insurance policy is characterized by elements of adhesion, public interest and fiduciary responsibility.<sup>lix</sup>

This approach of parceling out certain kinds of contracts as meriting special treatment is consistent with the somewhat piecemeal approach that courts have followed in awarding mental distress damages based on loss of expectation. Part IV returns to this point in more detail.

## B. Canada

### 1. Aggravated Damages and the requirement of an independent actionable wrong

In Canada, a plaintiff who has experienced wrongful conduct on breach causing emotional upset can seek compensation via an award of aggravated damages. According to the Supreme Court of Canada in *Whiten v. Pilot Insurance Co.*,<sup>lx</sup> aggravated damages compensate the plaintiff for “additional harm caused to the plaintiff's feelings by reprehensible or outrageous conduct on the part of the defendant.”<sup>lxi</sup> In short, aggravated damages are an augmentation of compensatory damages for intangible loss caused by the defendant's conduct *at time of breach*.<sup>lxii</sup>

The Canadian requirement of “reprehensible or outrageous” conduct as a condition to recovery of aggravated damages bears more than a passing similarity to the American requirement, in the context of the mental infliction of mental suffering, that the defendant's conduct be extreme and outrageous. Also reminiscent of its American counter-part, Canadian law requires the plaintiff to show that the defendant has committed an independent actionable wrong before aggravated damages will lie.<sup>lxiii</sup> As noted above, however, the independent actionable wrong need not be tortious. Another breach of contract or fiduciary breach, for example, over and above the one sued upon, will suffice.<sup>lxiv</sup>

## 2. Punitive Damages

While aggravated damages are intended to compensate the plaintiff, punitive damages are expressly intended to punish. Unlike in the United States,<sup>lxv</sup> punitive damages are now perfectly permissible in Canada in the context of a breach of contract action.<sup>lxvi</sup> In fact, the leading decision of *Whiten*<sup>lxvii</sup> actually involved a particularly egregious breach of a fire insurance policy. The Supreme Court also has confirmed in *Whiten* that an award of punitive damages is available whenever there has been “malicious, oppressive and high-handed misconduct that ‘offends the court’s sense of decency.’”<sup>lxviii</sup> In *Whiten*,<sup>lxix</sup> the defendant insurance company refused to pay out on a fire insurance policy on the fabricated theory that the fire was intentionally started. Indeed, from the earliest investigations, all the evidence pointed to the fire being accidental.<sup>lxx</sup> As the Supreme Court of Canada summarizes the findings at trial:

Matlow J... noted that the defendant continued to deny the claim even after its own adjuster recommended that it be paid. “[T]he defendant relied on a few suspicious circumstances that were later clarified adequately by the plaintiff in order to press on with an ill-founded defence. As a result, the plaintiff, who was already in poor financial condition, was required to endure the indignity of having to make temporary living arrangements without the benefit of the insurance coverage for which she had paid premiums to the defendant” She was also required to undertake litigation to secure the relief to which she was entitled, including a trial which took approximately two months to complete. “In light of the defendant’s admission that its net worth was approximately \$231 million, I cannot take issue with the jury’s conclusion that a very substantial award for punitive damages was required to punish the defendant and to effectively send the implied reminder to the defendant and to other insurers that they owe their insureds a duty of good faith in responding to claims made under policies of insurance issued by them.”<sup>lxxi</sup>

The Supreme Court, in a particularly comprehensive judgment, went on to affirm the jury’s \$1 million punitive damages award, observing that, while high, it was “within the rational limits within which a jury must be allowed to operate.”<sup>lxxii</sup>

Note that, as with aggravated damages, Canadian courts will accept any kind of independent actionable wrong as the basis for the award for punitive damages.<sup>lxxiii</sup> According to Justice Binnie, writing for the majority: “the requirement of an independent *tort* [as a pre-condition to a punitive damages award] would unnecessarily complicate the pleadings, without in most cases adding anything of substance.... To require a plaintiff to formulate a *tort* in a case such as the present is pure formalism [emphasis added].”<sup>lxxiv</sup> On this basis, the court ruled that “An independent actionable wrong is required, but it can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation.”<sup>lxxv</sup>

Punitive damages have been awarded in Canada in a variety of commercial contexts including wrongful receiverships,<sup>lxxvi</sup> conversion,<sup>lxxvii</sup> and inducing breach of contract.<sup>lxxviii</sup>

### C. Conclusion

The courts must necessarily have the ability to compensate the plaintiff and/or punish the defendant for highly improper conduct at the time of breach: the commission of a *tort*, for example, in the *manner* of breach is clearly a wrong over and above the *fact* of any breach. Such behavior accordingly merits separate judicial consideration, treatment, recompense and perhaps denunciation. On the other hand, legal developments in this area are troubling to the extent that American courts limit recovery for mental distress to only those circumstances when the plaintiff is able to establish a relevant *tort* through the backdoor. Even the Canadian relaxation of the requirement to include *any* independent actionable wrong, is open to challenge. Simply put, when the defendant’s conduct on breach is reprehensible and causes mental distress, this arguably should be sufficient to found an award for punitive or aggravated damages even if there is no conduct reaching the standard of a *tort* or other actionable wrong.<sup>lxxix</sup> Equally problematic, some U.S. courts have raised the standard for awarding punitive damages – whenever a plaintiff who suffers emotional injury as a result of the breach also alleges an independent *tort* – from requiring willful or wanton conduct to requiring outrageous conduct on the part of the defendant.

The judiciary’s technical and narrow approach to this area – particularly in the United States – does seem to betray an overarching judicial reluctance to assess mental distress in a squarely contractual context. Later sections of this paper will illustrate that such unwillingness – and the general rule against recovery which fuels it – is without a sound policy foundation. In the meantime, plaintiffs have limited scope for recovery in this area due to the tortious requirements in the US and the, albeit less exacting, requirement in Canada of an independent actionable wrong.

### Part IV. Recovery based on the *fact* of Breach

In order to deal with mental distress based on the *fact* of breach alone, courts in the United States and Canada<sup>lxxx</sup> have traveled similar paths. In the spirit of the Restatement (discussed in Part II) courts have treated recovery for mental distress as an exception to the general rule.

While it is difficult to generalize about the large number of cases where recovery for mental distress has been permitted in

spite of the general rule, there would appear to be two main approaches to this matter. One approach asks “does the contract fit within a special category?” The second approach asks – in bold defiance of the Restatement – “was mental distress foreseeable?”<sup>lxxxix</sup>

#### A. The first approach: Does the contract fit within a special category?

Beginning most famously with Lord Denning’s pronouncements in *Jarvis v. Swan Tours Ltd.*,<sup>lxxxii</sup> Canadian courts slowly began to give judicial significance to contracts containing promises of non-pecuniary benefits. In *Jarvis*,<sup>lxxxiii</sup> the plaintiff had received a decidedly inferior vacation from the one which he had been promised. In awarding damages for mental distress, Lord Denning acknowledged the general rule against recovery but went on to add:

[i]n the 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. If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset and frustration caused by the breach.<sup>lxxxiv</sup>

In this case, Lord Denning focused on the contract’s expectation interest and did not insist that it be pecuniary or economic – in marked contrast to the courts cited in the introduction to this paper. Rather, Lord Denning simply assessed the contract at bar, determined whether it contained promises of intangible benefits and awarded compensatory damages accordingly. For an identical approach in the U.S., see *Taylor v. Burton*<sup>lxxxv</sup> wherein the plaintiffs sued their general contractor for substantial defects in their newly constructed home. In addition to monetary damages, they sought compensation for “aggravation, embarrassment, and mental distress.”<sup>lxxxvi</sup> In response, the court stated:

Damages for nonpecuniary loss may be recovered when the contract, **because of its nature, is intended to gratify a nonpecuniary interest** and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss.<sup>lxxxvii</sup> [emphasis added]

For the kinds of reasons captured in the judicial quotations just above, recovery for mental distress associated with a horrible vacation is a firmly established exception to the general rule both in Canada and the United States.<sup>lxxxviii</sup> Other exceptions to the general rule followed by both jurisdictions include breaches of contract associated with weddings – particularly in the context of the photographer who fails to attend and take the promised photographs.<sup>lxxxix</sup> But even in the context of a wedding-related contract, the outcome is not entirely predictable. For example, in the Canadian case of *Larackkers v. Executive House Ltd.*,<sup>xc</sup> the plaintiff bride and groom were awarded mental distress damages when – in breach of contract – the hotel would not provide them with a room on their wedding night.<sup>xcii</sup> Yet, in a subsequent case, the court denied mental distress recovery when the defendant caterer arrived five hours late for a wedding reception.<sup>xciii</sup> In this latter case, the court found that peace of mind was not part of the catering contract and that therefore, mental distress damages were not recoverable.<sup>xciii</sup> In short, a wedding-related, catering contract did not fall within a special category.

While there is important overlap in the kinds of cases that fit within the special categories exceptions established by American and Canadian courts, the categories are not totally co-extensive. In Canada, for example, other established categories which found exceptions to the general rule include: insurance contracts,<sup>xciv</sup> lawyer-client contracts<sup>xcv</sup> and contracts for luxury goods.<sup>xcvi</sup> American courts have not followed suit in these areas though they do offer a distinct category of their own, namely a contract in relation to a Caesarean section.<sup>xcvii</sup>

In the cases discussed in this portion of the paper thus far, courts were prepared to eschew the classical contract law perspective that contracts go to financial interests only. Instead, the judge scrutinized the contract to see if it contained promises of non-pecuniary benefit and enforced those promises but only provided that the contract at bar could be fit within a special category.

A recent case from England goes beyond these tentative steps taken by North American courts to enforce a contract’s intangible content. Indeed, Lord Steyn in *Farley v. Skinner*<sup>xcviii</sup> embraced a much more expansive view of such matters. Most importantly, Lord Steyn decided against being constrained by *a priori* categories. He also declined to follow a rigid interpretation of the precedent *Watts v. Morrow*<sup>xcix</sup> which provides that recovery for mental distress in England is limited to circumstances when “the **very object** of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation”[emphasis added].<sup>c</sup> Instead, Lord Steyn ruled that a plaintiff could secure mental distress damages if “a major or important object of the contract is to give pleasure, relaxation or peace of mind.”<sup>cci</sup>

What motivated Lord Steyn to interpret the *Watts*<sup>cii</sup> precedent so expansively was to ensure that contracts containing promises of important, non-pecuniary benefits be fully and properly enforceable. Lord Steyn was particularly persuaded by the following analysis by David Capper:

A ruling that intangible interests only qualify for legal protection where they are the “very object of the contract” [per *Watts*<sup>ciii</sup>] is tantamount to a ruling that contracts where these interests are merely important, but not the central object of the contract, are in part unenforceable. It is very difficult to see what policy objection there can be to parties to a contract agreeing that these interests are to be protected via contracts where the central object is something else. If the defendant is unwilling to accept this responsibility he or

she can say so and either no contract will be made or one will be made but including a disclaimer.<sup>civ</sup>

This is precisely the insight that should sideline the classical view that contract law concerns itself with financial loss and pecuniary interests only. It is a reality of the marketplace that defendants *do* make promises which go to non-pecuniary or intangible interests. Why should these kind of promises be less worthy of enforcement than their pecuniary counterparts?

The categories approach to recovery for mental distress is an important development in North American contracts law because it works to avoid application of the general rule in the more extreme cases. Contracts in relation to vacations, weddings, and new homes, to name a few examples, demonstrably relate to the plaintiff's personal interests and emotions.<sup>cv</sup> They cater to inherently non-pecuniary concerns which also form a significant element of the contract's expectancy. Part of what makes recovery of mental distress in such contracts particularly compelling is that, in face of breach, there is little the plaintiff can do to mitigate. For example, while a wedding might be "re-staged" because photos were never delivered as promised, the special quality about the event is lost.<sup>cvi</sup> Likewise, time spent on a vacation, once taken, can never be replaced and a new vacation may be as far as one year away.<sup>cvi</sup> The plaintiff's peculiar vulnerability should the defendant breach the contract signals that the non-pecuniary aspects of the contract are both real and potentially momentous. Put another way, if what has been lost by virtue of breach cannot be replaced in the marketplace, restricting the plaintiff to pecuniary loss only amounts to a grave injustice.

It is also the case that the categories approach is a "hit and miss" effort, with conflicting decisions even within a given category.<sup>cvi</sup> Additionally, it is impeachable for requiring more than simple foreseeability before damages for intangible loss are recoverable.<sup>cix</sup> By way of contrast, Lord Steyn's more expansive, less technical approach in *Farley*<sup>cx</sup> has much to recommend it. Instead of treating contracts with non-pecuniary interests as contractual misfits or pariahs which must fall within an exceptional category, the courts simply scrutinize the plaintiff's expectation interest and award mental distress damages when intangibles are an important part of the contract and have not been delivered.

## **B. The second approach: Is mental distress reasonably foreseeable?**

Courts in both the United States and Canada have sometimes declined to apply the special categories approach to recovery for mental distress, instead calling upon *Hadley* rules of foreseeability to define recovery. Though courts noted in the introduction to this paper have refused to award mental distress damages on the basis that such a loss would almost always be foreseeable and therefore lead to opening the floodgates,<sup>cx</sup> courts discussed in this section of the paper prove to be much less squeamish. Nonetheless, foreseeability is an avenue followed more commonly in Canada than in the United States. American courts are inclined, instead, to establish recovery for mental distress by relocating the question to a tort analysis, rather than pursuing the matter strictly in contract.

The distinction between the foreseeability approach to recovery of mental distress and the special categories approach (discussed in the previous section) is subtle but nonetheless real: under the special categories approach, the courts are awarding mental distress damages because part of the contract's expectation interest relates to a non-pecuniary benefit. The defendant has therefore expressly or by implication *agreed* to be liable for intangible loss. On this basis, and only if the contract fits within an exception, are mental distress damages compensable. Under the foreseeability approach, which relies on *Hadley* test of foreseeability<sup>cxii</sup> no special categories apply. The objective is simply to determine whether mental distress was a reasonably foreseeable consequence of breach, most commonly in relation to the second arm of *Hadley*.

In *Hanumadass v. Coffield, Ungaretti & Harris*,<sup>cxiii</sup> for example, at issue was the conduct of an attorney representing a physician in a malpractice claim. Though the attorney settled the claim on behalf his client, he neglected to advise the physician of this important fact. As a result, the physician needlessly worried about the claim for the 6 years before learning it had been settled. The court stated:

In our view, the case at bar concerns a question of contract law that is characterized by plaintiff as a tort action. While our supreme court has held that "a complaint against a lawyer for professional malpractice may be couched in either contract or tort" (*Collins v. Reynard*, 154 Ill. 2d 48, 50, 607 N.E.2d 1185, 1186, 180 Ill. Dec. 672 (1992)), included within the rubric of legal malpractice are claims grounded in breach of contract, negligence, and breach of fiduciary duty. *Doe*, 289 Ill. App. 3d at 128, 681 N.E.2d at 649. As such:

"In determining the range of compensable damages under the law of contracts, Illinois follows the rule in *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854), that recoverable damages are those which naturally result from the breach, or are the consequence of special or unusual circumstances which are in the reasonable contemplation of the parties when making the contract. [Citation.] Recovery for mental distress is 'excluded unless . . . the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.' [Citations.]"<sup>cxiv</sup>

On this basis, damages for mental distress were recoverable based on foreseeability alone and not in relation to the expectation interest. It is also an outcome entirely consistent with § 353 of the Restatement.<sup>cxv</sup>

In the Canadian decision of *Newell v. Canadian Airlines Ltd.*,<sup>cxvi</sup> the court awarded mental distress damages when the defendant failed to transport the plaintiffs' pets in a safe manner on a flight to Mexico. Indeed, one dog arrived dead and the

other comatose because they had been inadvertently packed beside dry ice.<sup>cxvii</sup> According to Judge Borins: the question that must be asked is this: Was the contract such that the parties must have contemplated that its breach might entail mental distress, such as frustration, annoyance or disappointment? I would answer the question in the affirmative. The contract was to safely carry the plaintiffs' pet dogs from Toronto to Mexico City. On the evidence it is abundantly clear that the defendant was aware of the plaintiffs' concern for the welfare of their pets...I find that the contract was such that the plaintiffs and defendant must have contemplated that if injury or death were to befall the dogs this might result in the plaintiffs' suffering mental distress. The plaintiffs are therefore entitled to recovery general damages....<sup>cxviii</sup>

In Alberta, the Court of Appeal has recently followed an even more generalized foreseeability approach than evidenced in *Newell*.<sup>cxix</sup> In *Kempling v. Hearthstone Manor Corp.*,<sup>cxx</sup> at issue was the plaintiff's mental distress which arose when the defendant wrongfully terminated a contract with the plaintiff for the purchase of a residential condominium. In assessing the claim for mental distress, Justice Picard agreed with the dissent in *Vorvis*<sup>cxxi</sup> because it rejected an "a priori and inflexible categories of damages."<sup>cxxii</sup> Adopting the dissent in *Vorvis*,<sup>cxxiii</sup> Justice Picard ruled that once the plaintiff has established a breach, the only hurdle to recovery of damages should be the one posed by *Hadley v. Baxendale*. No special rules need apply to recovery for mental distress. Furthermore, there is no need to fear an opening of the floodgates by following such an approach. As Justice Picard observes:

My conclusion is that the determination of a claim for mental suffering or distress in a breach of contract suit must begin with the application of the rule in *Hadley v. Baxendale*. The rule has within it the means to test and limit liability where the claim arises through special circumstances, which will be the usual case with mental suffering or distress. The contract must be made on the basis of those special circumstances being known to the parties and the plaintiff having communicated them to the defendant.<sup>cxxiv</sup>

Both Canada and the United States have cases where the plaintiffs suffer mental distress in relation to a botched funeral or related matter. In *Saari v. Jongordon Corp.*,<sup>cxv</sup> the defendant entered into a written agreement with plaintiff's son that upon his death, the defendant would cremate his body, and release his remains to the plaintiff without any religious service. Instead, when the son died, the defendant scattered his ashes at sea, and performed a Christian religious service on his remains. The decedent's longtime companion, his mother and his sister filed suit for breach of contract claiming damages for emotional distress. In refuting the defendant's argument that emotional distress damages are not available for breach of contract actions, the Court explained:

In the typical contract case, it is not foreseeable that breach will cause emotional distress. Thus, a rule has evolved that damages for emotional distress are generally not recoverable in an action for breach of contract. However, some contracts--including mortuary and crematorium contracts--so affect the vital concerns of the contracting parties that severe emotional distress is a foreseeable result of a breach.<sup>cxvii</sup>

In the Canadian case of *Mason v. Westside Cemeteries Ltd.*,<sup>cxviii</sup> the plaintiff sued the cemetery for breach of bailment contract. In short, the defendant had misplaced the cremated remains of the plaintiff's parents. In ordering recovery for mental distress, the Ontario court did not analyze the content of the contract – which is more commensurate with the special categories approach – but rather focused on *Hadley v. Baxendale*, observing that it must have been contemplated that loss of the remains would result in mental distress for the plaintiff.<sup>cxviii</sup>

The foreseeability approach to mental distress damages is an improvement over the special categories approach to the extent that it does not require that the contract in question be mandatorily of a certain type. This is also the approach which Whaley suggests should replace the general rule against recovery altogether. According to Whaley:

Let us state the proposed rule once again, so there is no mistake: courts should have no special rules when it comes to the recovery of emotional distress damage in contract actions. Such damages will only rarely be recovered because they will frequently flunk one or more of the tests traditionally used to measure consequential damages in contract, typically the requirement that such damages be foreseeable at the time of contracting. If the proof of emotional distress damages passes these tests, however, recovery should follow.<sup>cxix</sup>

This is an important contribution to the evolution of contracts law but only takes us half-way there. It is important to remember that *Hadley*<sup>cxix</sup> is a rule about limiting recovery in a breach of contract action. It does not seek to identify the terms of the contract nor determine whether there has been a breach. All this is assumed.<sup>cxix</sup> To be effective, therefore, the *Hadley* approach advanced by Whaley must be coupled with an understanding of contract law which gives legal significance to the contents of a contract – both pecuniary and *non-pecuniary* – and whether expressly stated or implied by the context in which the agreement is reached.

This is something Whaley is not easily prepared to do when he states in the above quotation that mental distress will only "rarely be recovered" and when he earlier observes:

emotional distress damages are not normally awarded in contract actions because, for most kinds of contracts, they are not foreseeable at the time of contracting....<sup>cxix</sup>

Ironically then, while Whaley advances an important and non-traditional conclusion – that the general rule against recovery ought to be ignored – he ultimately bolsters the *status quo* when he concludes that recovery for mental distress will nonetheless remain very much the exception. In short, the problem with drawing upon the foreseeability model at first

instance is that it may lead a court to default back to the perspective of the reasonable business man discussed earlier in this paper, thereby leaving contract law tilted in one direction. This is because the foreseeability model does not pay sufficient attention to the first step in any contractual analysis which is to ask: “what did the contract promise?” In order to enforce the parties’ expectations in a robust way, courts should not come to such a question with presuppositions that promises of intangible benefits will rarely be present.

The palliative is to rely on Lord Steyn’s analysis in *Farley*<sup>cxviii</sup> because in it, Lord Steyn pays careful attention to what promises the contract contains and willingly enforces *all* of them, even those going to intangible interests, provided they are important or significant.<sup>cxix</sup> There is no standing on the principle – invoked by other courts – that contracts go to pecuniary interests only.<sup>cxv</sup> That is, though the centrepiece of the contract in *Farley*<sup>cxvi</sup> was the provision of the survey, Lord Steyn attached legal significance to the contract’s promises going to an intangible, personal interest – namely peace of mind that the property in question was appropriate to the plaintiff’s needs and desires.

## Part V: Conclusions and possible reform

As this paper has illustrated, a plaintiff who has suffered mental distress damages in a breach of contract context faces an uncertain legal horizon due to the general rule at play in both the United States and Canada. He or she can seek to secure damages for the *manner* of breach but success is assured only in the context of extreme behavior by the defendant. The plaintiff can seek recovery of mental distress damages for the *fact* of breach by, first, trying to fit the case within the patchwork of recovery created by the special categories approach. What is objectionable about this solution though, is that the special categories approach must contort itself around the general rule and treat all recovery, by definition, as exceptional.

As an alternative, the plaintiff could argue for recovery under the principles of foreseeability. But this approach is not accepted by all courts – in fact it is expressly rejected by some<sup>cxvii</sup> – and furthermore, may lead to marginalization of a contract’s non-pecuniary content.

The difficulty with the general rule against recovery is that it suppresses the reality of marketplace participants who are not the hypothesized reasonable business man. That is, the rule begins with the tacit assumption that the contract at bar contains only the traditional, pecuniary-based content that the tough-minded business man discussed in the introduction would bargain for. From such a bargainer, one would anticipate no terms going to feelings; no terms related to emotional outcomes; no extracted promises concerning sentimental gratification. Given its implicit perspective, the rule does not facilitate exploration of the whether the plaintiff’s legitimate expectation interest actually relates to the protection or enhancement of an emotional state. In short, the dominating presence of the reasonable businessman who populates contract law – combined with the negative drag of the general rule – belie such an exercise.

Because of its exclusionary foundation, the general rule against recovery may well be the product of “excessive abstraction”<sup>cxviii</sup> since it filters out the non-pecuniary content that a contract might actually contain. In so doing, the general rule violates a central tenet of contract law, namely that courts are to give effect to a contract according to the parties’ intent. Indeed, as this paper has demonstrated, there are many kinds of contracts which contain promises of non-pecuniary benefits – such as peace of mind, enjoyment, relaxation, and freedom from distress. Why not simply enforce these promises according to ordinary contract law principles and not be burdened by the presuppositions that accompany the general rule?

Given the chronic problems associated with the general rule, the best solution is undoubtedly to repeal it. As the Supreme Court of Hawaii in *Francis v. Lee Enterprises, Inc.*,<sup>cxix</sup> explained, in reversing a previous ruling excluding non-economic damages in contract:

...in deciding whether such damages are recoverable, we shift the focus of the inquiry away from the manner of the breach and **to the nature of the contract**. Thus, damages for emotional distress may be recoverable, but only where the parties specifically provide for them in the contract or where the nature of the contract clearly indicates that such damages are within the contemplation or expectation of the parties. Unlike the [previous] rule, the rule we announce today accords with compensatory objectives relevant to contract law and eschews the imposition of damages for emotional distress to vindicate “social policy” in the setting of private contracts.<sup>cxl</sup> [emphasis added]

This case is helpful for two reasons. First, and most importantly, it clearly permits recovery for emotional distress damages in a breach of contract action. Second, it eliminates the need for the plaintiff to conjure up a tort claim when he or she has suffered emotional distress as a result of a breach. That said, *Francis*<sup>cxli</sup> is not a complete repeal of the general law against recovery since one arm of recovery requires that damages for mental distress must be specifically provided for in the contract.<sup>cxlii</sup> For the reasons argued below, this pre-condition is utterly unnecessary and a full repeal of the general rule is in order.

The introduction to this article identified a number of policy objections to setting aside the rule against recovery for mental distress damages in a breach of contract action. If we can agree that some contracts *do* promise non-pecuniary benefits (which surely must be the case), then several policy objections must automatically fail, including the notion that contracts concern economic loss only and that mental distress damages are not foreseeable. This leaves only one serious policy

objection to recovery, namely fear of opening the floodgates to minor claims for mental distress and related concerns that plaintiffs may fabricate or exaggerate their suffering.

Fortunately, there are tried-and-true principles of contract law that answer such apprehensiveness. For example, as Whaley emphasizes, recovery in contract requires certainty.<sup>cxliii</sup> Hence, if the plaintiff cannot prove his or her mental distress or if the claim is too speculative, damages will not be awarded.<sup>cxliv</sup> If the claim concerns a trivial amount of mental distress, the court can award nominal damages or invoke the principle of *de minimus non curat lex*.<sup>cxlv</sup> And while one might anticipate a certain rise in claims should the general rule be judicially repealed, these principles mean it is unlikely that those who have suffered only minor distress would engage the expensive machinery of litigation.

From the perspective of reform, where does the foregoing analysis leave the courts in the United States and Canada? Instead of searching for an exception to the general rule, the court would ignore the rule entirely. The court would simply ask: “What does the contract promise?” and willingly recognize and measure its non-pecuniary content before moving to questions of foreseeability. On the basis of *Farley*,<sup>cxlvi</sup> a plaintiff could secure mental distress damages because the defendant’s failure to deliver the contract’s important, non-pecuniary promises were a breach of contract. In such circumstances, the intangible loss of mental distress is almost certainly to pass the *Hadley*<sup>cxlvii</sup> principle. Alternatively, even if the contract did *not* contain promises of non-pecuniary benefits, it is possible – though less likely – that the plaintiff could still recover mental distress damages based on special circumstances so communicated under the second branch of *Hadley*.<sup>cxlviii</sup>

A cornerstone of contracts law is the protection of the plaintiff’s expectation interest. There has to be strong reason, consonant with reality of *all* market participants – and not just in relation what the imagined businessman would bargain for – to deny that expectation. Instead of requiring the plaintiff in contracts containing non-pecuniary benefits to work around a general rule that *prima facie* denies them recovery for mental distress, contract law would be better advanced by placing such plaintiffs on equal footing with those who pursue exclusively economic interests in their contractual dealings. Put another way, those who bargain for important, non-pecuniary benefits should get what they bargained for and be awarded whatever loss they can prove. There is no sound policy reason why not.

#### Footnotes

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- i. See, for example, E. ALLAN FARNSWORTH, *CONTRACTS* ¶ 12.17 at 840 (Aspen Publishers 3d ed. 1999) and JOSEPH M. PERILLO, *CALAMARI AND PERILLO ON CONTRACTS* 571 (Thomson West 5th ed. 2003). For Canadian authority on point, see JAMIE CASSELS, *REMEDIES: THE LAW OF DAMAGES* 203 (Irwin 2000). There are numerous cases which stand for this proposition, including *Desmarais v. Sciola*, 1998 Me. Super LEXIS 153 (Me. 1998) wherein the plaintiff sued for breach of the implied warranty of merchantability for a chiller purchased for his new lobster business. The chiller was allegedly the cause of death for hundreds of lobsters but no mental distress was recoverable based on the general rule. See too *Hobson v. American Cast Iron Pipe Company*, 579 So. 2d 1301 (Ala. 1991) at 1306. In this case, the court stated the general rule would not permit recovery for mental distress in a breach of an employment contract context.
  - ii. BRIAN A. BLUM, *CONTRACTS: EXAMPLES AND EXPLANATIONS* 631 (Aspen Law & Business 2d ed. 2001).
  - iii. *Lamm v. Shingleton*, 55 S.E.2d 810, 813 (N.C. 1949).
  - iv. *Id.* See too Justice Weatherston’s analysis in *Brown v. Waterloo Regional Board of Commissioners of Police* (1983), 150 D.L.R. (3d) 729 (Ont.C.A.) at 118: “Any breach of contract that results in pecuniary loss to the injured party will inevitably cause some mental distress -- rage and frustration at least. But in the ordinary commercial transaction, the reasonable expectations of the parties are that the disappointed party will bear himself with a measure of fortitude, and be satisfied if he can recoup his financial loss.”
  - v. *Watts v. Morrow*, [1991] 1 W.L.R. 1421.
  - vi. *Id.* at 1445, quoted with approval by the British Columbia Court of Appeal in *Wharton v. Tom Harris Chevrolet Oldsmobile Cadillac Ltd.*, [2002] 3 W.W.R. 629 at para. 48.
  - vii. PERILLO, *supra* note 1 at 571, quoting MCCORMICK ON DAMAGES 593, with approval.
  - viii. David Capper, *Damages for Distress and Disappointment – the Limits of Watts v. Morrow* 116 LAW QUARTERLY REVIEW 553, 553 (2000).
  - ix. *Supra* note 5.
  - x. *Supra* note 3.
  - xi. See, for example, cases cited by PERILLO, *supra* note 1: *Redgrave v. Boston Symphony Orchestra*, 855 F. 2d 888 (1st Cir. 1988); *Erllich v. Menezes*, 21 Cal. 4th 543, 981 P. 2d 978, (Cal. 1999).
  - xii. *Erllich v. Menezes*, 981 P.2d 978 (Cal. 1999).
  - xiii. *Id.* at 982.
  - xiv. *Id.*, quoting *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* 869 P.2d 454. (Cal. 1994).

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xv. *Johnson v. Gore Wood & Co.*, [2001] 2 W.L.R. 72 (H.L.).  
xvi. *Id.* at 108.

xvii. *Hatfield v. Max Rouse & Sons Northwest*, 606 P.2d 944 (Id. 1980)

xviii. *Id.* at 952. This case involved an allegation by the plaintiff of mental distress in light of the auctioneer mistakenly selling his property at below the reserve price, the jury awarded \$10,000. This was reversed on the basis that mental distress was not a foreseeable consequence of breach. For analysis of the reasonable man, see Katherine Hall, *Power and Privilege: Objectivity, Commercial Interests and Standard Form Contracts* 6 GRIFFITH L. REV. 30, 40 (1997): "Drawing from the 19th-century notion of the 'paradigm situation' of contract, the preferred person of contract law has traditionally been the businessman. He has been the man contemplated by the contractual images of negotiation and bargain, by ideas of freedom, assertion and self interest in contract law theory and doctrine. Specifically, the man of contract has been based on the notion of the liberal male."

xix. For a leading discussion of gender and contracts law in the context of a casebook, see Mary Joe Frug, *Symposium of Critical Legal Study: Re-reading Contracts: a Feminist Analysis of a Contracts Casebook* 34 AM. U.L. REV. 1065 (1985).

xx. For a comparison between U.S. and Brazilian law on this subject, see Patricia Maria Basseto Avallone, *The Award of Punitive and Emotional Distress Damages in Breach of Contract Cases: A Comparison Between the American and the Brazilian Legal Systems* 8 NEW ENG. INT'L & COMP. L. ANN. 253 (2002).

xxi. Professor Douglas J. Whaley describes U.S. contract law with regard to emotional distress damages as "in a state of chaos", in his article, *Paying for the Agony: The Recovery of Emotional Distress Damages in Contract Actions* 26 SUFFOLK L. REV. 935, 947 (1992). He proposes the adoption of a foreseeability test, which is discussed in Part IV *infra*.

xxii. *Hadley v. Baxendale* (1854), 156 E.R. 145.

xxiii. *Id.* at 151.

xxiv. *Id.*

xxv. 11-56 CORBIN ON CONTRACTS §1011 (2003).

xxvi. *Supra* note 22.

xxvii. *Id.*

xxviii. RESTATEMENT (SECOND) OF CONTRACTS, Illustrations to § 353.

xxix. *Id.*

xxx. *Supra* note 28, Illustrations to § 351 and § 353.

xxxi. *Volkswagen of America v. Dillard*, 579 So. 2d 1301 (Ala. 1991).

xxxii. *Id.* In this case, the court expanded the exception to the general rule against awarding damages for mental distress to include claims for mental distress as a result of a breach of the warranty provision of a new car contract.

xxxiii. *Whiten v. Pilot Insurance Co.* (2002) 209 D.L.R. (4th) 257, [2002] S.C.J. No. 19 (S.C.C.).

xxxiv. *Dependable Life Insurance Company v. Harris*, 510 So. 2d 985 (Fla. 1987).

xxxv. *Id.* at 987.

xxxvi. *Id.* at 989.

xxxvii. *Id.*

xxxviii. *McFadden v. Tate*, 85 N.W.2d 181 (Mich. 1957).

xxxix. *Johnson v. Gahagan*, 2001 Me. Super LEXIS 53 (2001).

xl. *Id.*

xli. *Id.*

xlii. *Gonzales v. Personal Storage, Inc.* 65 Cal. Rptr. 2d 473 (1997).

xliii. *Brown v. Fritz*, 699 P.2d 1371 (Id. 1985).

xliv. *Id.*

xlv. *Id.* at 1376.

xlvi. *Id.* The court's ruling is based on its erroneous premise that emotional distress damages are not compensatory "There is no significant, if in fact any, difference between conduct by a defendant which may be seen to justify an award of punitive damages, and conduct which may justify an award of damages for emotional distress. Justification for an award of damages for emotional distress seems to lie not in whether emotional distress was actually suffered by a plaintiff, but rather in the quantum of outrageousness of the defendant's conduct. Although a plaintiff may in fact have suffered extreme emotional distress, accompanied by physical manifestation thereof, no damages are awarded in the absence of extreme and outrageous conduct by a defendant." at 1376.

xlvii. The Supreme Court of Oregon addressed this confusion in *Meyer v. 4-D Insulation Co.*, 652 P.2d 852, 854 (Ore. 1982): "Damages for emotional distress are compensatory, not punitive. Thus, the quality of the conduct is per se irrelevant, because negligently caused damage may be as disturbing as that caused by a defendant intentionally. Intentionally caused damage causes an additional emotional impact only when the quality of the conduct becomes known to the victim and adds to his

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remorse or outrage at the destruction of his property. If damages for emotional distress are truly compensatory rather than a disguised form of punitive damages, then the relevance of the quality of the conduct is in its effect on the victim.”  
xlvi.*Supra* note 43.

xlix.*Id.*

l. *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456 (Id. 1996).

li.*Id.* at 464.

lii.*See, e.g.*, *Fette v. Columbia Casualty Co.*, 1993 Minn. App. LEXIS 954 (1993): “[The plaintiff’s] claim arose from a contract. Without the insurance contract, there would be no relationship between the parties, and thus no basis for liability. Therefore, the breach of any duty owed to the insured is not distinct from the breach of contract. In other words, no duty existed independently of the performance of the contract.... Thus, we conclude the trial court did not err in denying Fette’s motion to amend the complaint to include a claim for punitive damages.” at 7.

liii. As FARNSWORTH, *supra* note 1, notes in a more general context:

No matter how reprehensible the breach, damages are generally limited to those required to compensate the injured party for lost expectation, for it is a fundamental tenet of the law of contract remedies that an injured party should not be put in a better position than had the contract been performed.” [footnotes omitted] at 787.

*See too Cates Construction, Inc. v. TIG Insurance Co.*, 980 P.2d 407 (Cal. 1999). *See also Giampapa v. American Family Mutual Insurance Company*, 64 P.3d 230 (Col. 2003) where the Supreme Court of Colorado held that when an insurance company’s refusal to pay contracted for benefits is wilful and wanton, plaintiff need not prove a separate tort, and noneconomic damages are available to compensate for mental distress and other non-pecuniary losses.

liv. PERILLO, *supra* note 1 at 477. *See, e.g.*, *Gibson v. Western Fire Insurance Co.*, 682 P.2d 725 (Mont. 1984): “Although an action against an insurer for a breach of its implied covenant of good faith and fair dealing towards its insured sounds in contract the action is to be regarded as one for tort. The statutory rule for measure of damages in tort cases is the amount which will compensate the injured party for all the detriment proximately caused thereby, whether it could have been anticipated or not.”

lv. *See, for example, Dailey v. Integon General Ins. Corp.*, 331 S.E.2d 148 (N.C. 1985) where the appeals court reinstated a verdict for punitive damages on a bad faith refusal to settle an insurance claim.

lvi. “The special relationships of trust between this employer and this employee under this contract under this type of abusive and arbitrary dismissal cries out for relief and for a remedy beyond that traditionally flowing from breach of contract.” *K Mart Corp. v. Ponsock*, 732 P.2d 1364, 1370 (Nev. 1987). *See also E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436 (De. 1995) where the court held that an employer who manufactured false charges in order to dismiss an at will employee breached the covenant of good faith.

lvii. Explaining the reason for its refusal to extend damages to contracts for employment, one court stated, “It is thus apparent that the torts of wrongful discharge in violation of public policy and bad faith breach of the implied covenant of good faith and fair dealing inherent in insurance contracts are based on administrative or legislative declarations of public policy. As a result, employers and insurers have notice of the scope of their duties to their employees and insureds. No parallel declarations of public policy have been articulated by the General Assembly or other governmental institutions with respect to the employment context. In the absence of such declarations of public policy, there is no appropriate basis upon which to ground a tort of breach of an express covenant of good faith and fair dealing in employment contracts. To the extent the contents of employment contracts and insurance contracts are similar, the tort of wrongful termination of an employment contract in violation of public policy represents an appropriate analog to the tort of bad faith breach of the implied covenant of good faith and fair dealing of an insurance contract.” *Decker v. Browning-Ferris Indus.*, 931 P.2d 436, 446 (Col. 1997).

lviii. *Supra* note 53.

lix. *Id.* at 416.

lx. *Supra* note 33.

lxi. *Id.* at para. 116.

lxii. *Huff v. Price* (1990), 51 B.C.L.R. (2d) 282 (C.A.).

lxiii. *Whiten, supra* note 33 at para. 78.

lxiv. *Id.* at para. 82. In the context of punitive damages, the court observes that to “require a plaintiff to formulate a tort in a case such as the present is pure formalism. An independent actionable wrong is required, but it can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation.” Presumably, this statement applies, *mutatis mutatum*, to aggravated damages as well.

lxv. This rule was plainly stated by the court in *Weber v. Domel*, 48 S.W.3d 435, 437 (Tex. 2001) “[P]unitive damages are not recoverable for breach of contract, no matter how malicious the breach.”

lxvi. S.M WADDAMS notes in *THE LAW OF CONTRACTS* 547 (Canada Law Book 3d ed. 1997) that, until recently, it was

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generally supposed the punitive damages would not generally be available in a breach of contract.  
lxvii.*Supra* note 33.

lxviii.*Id.* at para. 36. Note that in the recent decision of *Waxman v. Waxman* (2002), 25 B.L.R. (3d) 1 (Ont. Sup. Ct.), affirmed [2004] O.J. No. 1765 (C.A.), at para. 1661, the Ontario Superior Court of Justice summarized the factors provided by the Supreme Court in determining the rational limits of a punitive damages award as follows:

1. whether the misconduct was planned and deliberate.
2. the intent and motive of the defendant.
3. whether the defendant persisted in the outrageous conduct over a lengthy period of time.
4. whether the defendant concealed or attempted to cover up its misconduct.
5. the defendant's awareness that what he or she was doing was wrong.
6. whether the defendant profited from its misconduct.
7. whether the interest violated by the misconduct was known to be deeply personal to the plaintiff (e.g. professional reputation) or was a thing that was irreplaceable.

lix.*Supra* note 33.

lxx.*Id.* at paras. 5-6.

lxxi.*Id.* at para. 30

lxxii.*Id.* at para. 128.

lxxiii.*Id.* at para. 82.

lxxiv.*Id.*

lxxv.*Id.*

lxxvi.*Royal Bank of Canada v. W. Got & Associates Electric Ltd.*, [1999] 3 S.C.R. 408.

lxxvii.*Predovich v. Armstrong* (1997), 74 C.P.R. (3d) 351 (Ont. Gen. Div.).

lxxviii.*Kaur v. Moore Estate*, [2003] O.J. No. 1588 (Sup. Ct.).

lxxix.*Accord Wilson J. (dissenting with L'Heureux-Dubé J.) Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, who disagreed with the proposition that punitive damages "can only be awarded when the misconduct is in itself an 'actionable wrong'". She stated:

In my view, the correct approach is to assess the conduct in the context of all the circumstances and determine whether it is deserving of punishment because of its shockingly harsh, vindictive, reprehensible or malicious nature.

Undoubtedly some conduct found to be deserving of punishment will constitute an actionable wrong but other conduct might not." at para. 59.

lxxx.In Canada, there is certain confusion over whether aggravated damages *only* refers to instances where the plaintiff secures recovery based on an independent actionable wrong or whether the same term should be used when the plaintiff is seeking general damages for mental distress. Some cases use the term aggravated damages to refer to aggravated damages properly so called *and* general damages for mental distress, as in *Warrington v. Great-West Life Assurance Co.* (1996), 139 D.L.R. (4th) 18 (B.C.C.A.) at para. 16. Other courts refer to general damages for mental distress as a distinct term. Most of the Canadian cases referred to in this paper follow this latter approach.

lxxxi.A third approach, which is not explored in this paper, asks whether the contract is commercial or non-commercial. This approach has been dismissed as unsound by several courts including *Taylor v. Burton*, 708 So. 2d 531 (La. App. 1998). This same distinction was discarded in Canada by *Gill v. Taylor*, [1991] 3 W.W. R. 727 (Alta. Q.B.). One difficulty is that while certain contracts are clearly non-commercial while others are more ambiguous. That is, when the subject matter of the agreement could fulfill either a personal or a commercial need, the distinction breaks down. A contract for a horse could be for personal pleasure, or for an investment, or for commercial use. In fact the very same animal could find itself contracted for in each of these situations over the course of its life. Furthermore, as the court points out in *Gill*, even if the contract is clearly commercial, should the plaintiff be denied recovery automatically? The court replies to this question in the negative, at 745-747.

lxxxii.*Jarvis v. Swans Tours Ltd.*, [1973] 1 Q.B. 233 (C.A.).

lxxxiii.*Id.*

lxxxiv.*Id.* at 237-238.

lxxxv.*Burton*, *supra* note 81. *But see* *Fiore v. Sears, Roebuck & Co.*, 364 A.2d 572 (N.J.1976) *and* *Erlich v. Menezes*, *supra* note 12.

lxxxvi.*Burton*, *supra* note 81 at 533.

lxxxvii.*Id.* at 535. The court goes on to add another route of recovery which goes to the motivation for the breach: "Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, through his failure, to aggrieve the feelings of the obligee." For a discussion of emotional distress damages in home construction cases that advocates a foreseeability standard see, Jeffrey C. Nickerson, *Note, When That Dream Home Becomes a Nightmare:*

lxxxviii. There are numerous examples of disgruntled vacationers receiving mental distress damages. In the United States, see, for example, *Vick v. National Airlines*, 409 So. 2d 383 (La. 1982). In Canada, see for example: *Smith v. Eaton Travel Ltd.* [1982] S.J. No. 45 (Q.B.) and *Recchia v. P. Lawson Travel*, [1990] O.J. No. 2532 (Gen. Div.).

lxxxix. In the United States, see, for example, *Baillargeon v. Zampano* 1995 Conn. Super. LEXIS 3275. In Canada, see, for example, *Wilson v. Sooter Studios Ltd.* (1988), 33 B.C.L.R. (2d) 241 (C.A.)

xc. *Laarakkers v. Executive House Ltd.*, [1987] B.C.J. No. 2817 (S.C.).

xc. See *Baid v. Aliments Rinag Foods Inc.* [2003] O.J. No. 2153 (Sup. Ct.).

xcii. *Id.*

xciii. *Id.* at para. 25.

xciv. See *Warrington*, *supra* note 80. In the United States, insurance contracts are regarded as specialized but present a more complicated matter to summarize. Peace of mind is considered part of what the insured is contracting for and therefore mental distress damages are recoverable in some jurisdictions when an insurance company breaches the contract by wrongly refusing to settle a claim. See *Tan Jay Internat., Ltd. v. Canadian Indemnity Co.*, 243 Cal. Rptr. 907 (1988). In other states by way of contrast, no damages for mental distress are recoverable in the absence of tortious bad faith breach. See *Vincent v. Blue Cross-Blue Shield of Alabama, Inc.*, 373 So. 2d 1054 (Ala. 1979).

xcv. In *Hagblom v. Henderson*, [2003] 7 W.W.R. 590 (Sask. C.A.), leave to appeal dismissed, S.C.C. Bulletin, 2004 at 20, the Saskatchewan Court of Appeal awarded Mr. Hagblom damages for mental distress in relation to his lawyer [Mr. Henderson] giving poor conduct of civil action in which Hagblom was the defendant. Since Henderson's counsel did not dispute that mental distress damages would be appropriate, the court did not choose between the two grounds that would make them recoverable: either under the special categories approach or by way of simple foreseeability, a matter discussed in the next section of this paper. There is case law to the contrary, including *Maillot v. Murray Lott Law Corp.* (2002), 99 B.C.L.R. (3d) 170 (S.C.) on the basis that the contract contained no terms related to ensuring the client's peace of mind or to free him from mental or financial anxiety" at para. 92.

xcvi. *Wharton*, *supra* note 6, where the plaintiff received mental distress damages for "loss of enjoyment of their luxury vehicle and for inconvenience. at para 15. In this case, the sound system in the vehicle failed to function properly over a period of several years, at para. 2.

xcvii. See the court's analysis in *Stewart v. Rudner*, 84 N.W. 2d 816 (Mich. 1957). In this case, the court affirmed an award of damages for mental anguish caused by the physician's breach of a contract to perform a caesarian section operation, at 824-825:

Where the contract is personal in nature and the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, and it should be known to the parties from the nature of the contract that such suffering will result from its breach, compensatory damages therefor may be recovered.

It is important to note that both factors must be present; a contract that is personal in nature but that promises a commercial undertaking, would not fit within this exception.

xcviii. *Farley v. Skinner*, [2001] 3 W.L.R. 899 (H.L.).

xcix. *Watts v. Morrow*, *supra* note 5.

c. *Ibid.* at 1445.

ci. *Farley*, *supra* note 98 at para. 24. On this basis, Lord Steyn permitted the plaintiff to recovery for mental distress because the defendant surveyor did his job incompetently when stating that the residential, rural property that the plaintiff was proposing to purchase was not affected by aircraft noise. In fact, it was located close to a navigational beacon for the Gatwick airport and was very much affected by aircraft noise.

cii. *Watts*, *supra* note 5.

ciii. *Id.*

civ. *Farley*, *supra* note 98 at para. 24, quoting David Capper, *supra* note 8 at 556.

cv. As the court in *Diesen v. Samson*, [1971] S.L.T. 49 at 50 expresses the matter, the contract at bar was "exclusively concerned with the pursuer's personal, social, and family interests and with her feelings." On this basis, he awarded damages for mental distress when the wedding photographer failed to attend, in breach of contract.

cvi. This is assuming that such a remedy would even be awarded. Note that in *Wilson*, *supra* note 89, the British Columbia Court of Appeal refused to award as damages to the plaintiff the cost of reconstituting the wedding party so that photographs could be taken, at 243.

cvii. Lord Denning recognized this fact in *Jarvis*, *supra* note 82 at 238.

cviii. See discussion of Canadian wedding-related contracts, *supra* note 89 and accompanying text.

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cix. See Gill v. Taylor, *supra* note 81 at 746.  
cx. Farley, *supra* note 98.

cxii. See *infra*, footnote 148 and surrounding text.  
cxiii. For the full *Hadley* test, see footnote 22 and surrounding text.  
cxiii. Manumadass v. Coffield, Ungaretti & Harris, 724 N.E.2d 14 (Ill. 1999).  
cxiv. *Id.* at 10-11.

cxv. According to the Restatement:

**§ 353 Loss Due to Emotional Disturbance**

Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.

cxvi. Newell v. Canadian Airlines Ltd. (1977), 14 O.R. (2d) 752 (Co.Ct.).

cxvii. *Id.*

cxviii. *Id.* at 770-771.

cxix. *Id.*

cxx. Kempling v. Hearthstone Manor Corp. (1996), 137 D.L.R. (4th) 12 (Alta. C.A.).

cxxi. Vorvis, *supra* note 79.

cxxii. *Id.* at 301, cited in *Kempling*, *supra* note 120 at para. 67.

cxxiii. Vorvis, *supra* note 79.

cxxiv. *Kempling*, *supra* note 120 at para. 69.

cxv. Saari v. Jongordon Corp., 7 Cal. Rptr. 2d 82 (1992).

cxv. *Id.* at 85.

cxv. Mason v. Westside Cemeteries Ltd. (1996), 135 D.L.R. (4th) 361 (Ont. Gen.Div.).

cxv. *Id.* at para. 58.

cxv. Whaley, *supra* note 21 at 957-958.

cxv. *Supra* note 22.

cxv. As Whaley, *supra* note 21 at 952, observes: "...under *Hadley*, the breach is taken as a given. The proper question is this: if at the time of contracting the parties had been told what the breach was going to be, would the damages that resulted be foreseeable?"

cxv. *Id.* at 952-953.

cxv. Farley, *supra* note 98.

cxv. *Id.* at para. 24.

cxv. See, e.g., Lamm v. Shingleton, *supra* note 3.

cxv. Farley, *supra* note 98.

cxv. Saari v. Jongordon Corp, *supra* note 125. For a Canadian case which casts doubt on foreseeability as the test for mental distress recovery, see *Warrington*, *supra* note 80 at para. 14 and following.

cxv. This is a phrase that we borrow from ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* (Dordrecht: Kluwer Academic Publishers, 1997) who uses this phrase in relation to the feminist critique of contracts law, at 156 and following.

cxv. Francis v. Lee Enterprises, Inc., 971 P.2d 707 (Haw.1999).

cxv. *Id.* at 713.

cxv. *Id.*

cxv. The court in Francis does not explain why it makes this requirement but one speculates that a concern relates to the time-honored fear of frivolous litigation.

cxv. Whaley, *supra* note 21 at 953.

cxv. *Id.* at 953-954.

cxv. As Justice Molloy states in *Mason*, *supra* note 127, "if the injury suffered is trivial in nature the damages awarded should reflect that fact." at 58. See too Elizabeth MacDonald, *Contractual Damages for Mental Distress*, 7 JOURNAL OF CONTRACT LAW 134, 149 (1994); K.B. Soh, *Anguish, Foreseeability and Policy*, 105 LAW QUARTERLY REVIEW 43, 45 (1989).

cxv. *Supra* note 98.

cxv. *Supra* note 22.

cxv. *Id.*