Mechanisms for Restricting Recovery for Emotional Distress in Contracts

John D. McCamus

Follow this and additional works at: https://digitalcommons.lmu.edu/llr

Part of the Law Commons

Recommended Citation
Available at: https://digitalcommons.lmu.edu/llr/vol42/iss1/4
MECHANISMS FOR RESTRICTING RECOVERY FOR EMOTIONAL DISTRESS IN CONTRACT

John D. McCamus*

While the expectancy principle is widely embraced across common law jurisdictions as a foundational doctrine of remedies law, damages for mental distress related to breach of contract have either been rejected outright or limited to variously constructed exceptions in most jurisdictions. This Article focuses on the policies underlying the rules and exceptions applied to contractually related mental distress claims in England, Australia, Canada and the United States. In reviewing the approaches across these jurisdictions, there does not appear to be a convincing policy rationale behind limiting the expectancy principle for emotional distress claims. Indeed, this Article argues that the existing limitations on the availability for mental distress damages recognized in the various common law jurisdictions should be abandoned as artificial attempts to restrict liability and that the traditional common law principles of causation, mitigation and remoteness are sufficient to preclude liability in cases where such claims lack merit.

I. INTRODUCTION

The basic principles pertaining to the calculation of damages for breach of contract enjoy a very substantial consensus across the common law world. It is generally accepted that the basic objective of the calculation of damages, or the basic measure of relief, is expressed in the expectancy principle—the plaintiff should be placed, so far as money can do so, in the position the plaintiff would have been in if the contract had been performed.1 As is often said, the plaintiff is entitled to the “benefit of the bargain,” a measure of relief that may reasonably be distinguished from what is often referred to as the “reliance” measure. The “reliance” measure indemnifies the plaintiff for out-of-pocket losses occasioned by the

* Professor of Law and University Professor, Osgoode Hall Law School, York University.
breach but not the positive benefits of the bargain of which the plaintiff has been denied. Further, it is accepted as implicit in the general principle that the losses for which compensation is to be granted must be caused by the breach, a principle that is easily stated but occasionally rather difficult to apply.²

It is also recognized that there are certain principles establishing limitations on the availability of damages. First, the plaintiff cannot successfully seek compensation for losses that the plaintiff could have avoided by making reasonable efforts to curtail the losses that would otherwise be sustained from the breach.³ For example, a purchaser of defective goods who intended to use the goods for profit-making purposes must take reasonable steps to obtain a substitute rather than continue to run up losses.⁴ Losses that could have been prevented by such action are not recoverable. The causation and mitigation principles may be interrelated. When a plaintiff could have prevented losses through reasonable conduct, the losses resulting from that failure may be considered to have been caused by the plaintiff.

The doctrine of "remoteness" also provides an important limitation on the availability of relief. In the classic English formulation of the rule, the plaintiff is entitled to recover losses that are foreseeable at the time the agreement is entered, either because they arise naturally or with sufficient likelihood that the loss can reasonably be within the contemplation of the parties at the time of contracting.⁵ Or, where such foresight is dependent on the defendant being aware of special circumstances under which the agreement was made, the plaintiff can recover if those circumstances were communicated to the defendant at that time.⁶ The requirement that the potential losses be within the contemplation of the parties either on the basis of presumed knowledge or knowledge of actual circumstances communicated to the defendant is often referred to as the rule in Hadley v. Baxendale.⁷ Foresight based on presumed

---

⁶ Id.
⁷ Id.
knowledge is known as the first branch of the rule, and foresight based on circumstances actually communicated is known as the second branch. Expectancy, causation, mitigation and remoteness are concepts that are familiar to every common lawyer, and they are applied with relative uniformity from one common law jurisdiction to the next.

When one turns to the subject of the present Article, however, this consensus appears to break down to some degree. To what extent should the victim of a breach of contract be able to recover compensation for anxiety, mental distress, annoyance, vexation, disappointment or emotional disturbance caused by the breach? There does appear to be an international consensus that such "injuries," if they are properly described as such, are different and should be treated differently than the economic losses that more typically flow from a breach of contract. Thus, it is commonly accepted as a general rule that injuries in the form of mental distress or emotional disturbance resulting from a breach of contract are not compensable.

Broadly speaking, the reasons for a general principle of this kind also appear to be the subject of consensus from one jurisdiction to the next. Such losses are difficult to calculate in monetary terms. Exposing parties who are negotiating agreements to liabilities of such uncertain amplitude will unattractively complicate the pricing and allocation of risks under agreements in ways that may discourage or increase the cost of commercial activities. Further, parties are expected to face the disappointment of breach with a certain measure of equanimity and, accordingly, should accept the risk of such injuries. For the same reason, some argue that the inability of a party to handle the disappointment resulting from contractual breach is not a foreseeable loss.

At the same time, the common law jurisdictions under review here all appear to accept that there are cases where the application of a general principle absolutely precluding compensation for mental

distress leads to results that are unacceptably harsh. For example, consider the following: the claim of a recently married couple against the wedding photographer who failed to attend the event (the case of the "Absentee Wedding Photographer"); the claim of a grieving family against the undertaker who botched the internment (the case of the "Incompetent Undertaker"); the claim of a passenger whose fourteen day cruise is interrupted by the sinking of the tour boat (the case of the "Sunken Cruise Ship"); the claim of a client whose lawyer fails to seek appropriate remedies against a third party engaged in a course of harassment or molestation of the client (the case of the "Incompetent Solicitor"); and the claim against a carrier whose breach of contract led to the demise of the plaintiff’s cherished pet (the case of the "Grieving Pet Owner"). Such cases may be considered to "cry out for relief," and in one or more of the jurisdictions under review, relief for mental distress was awarded. Once the law starts down this path, however, satisfactory line drawing between the cases in which relief should be awarded and cases where it should not may prove to be difficult. For example, should such relief be awarded to the purchaser of a luxury vehicle who suffers annoyance because of a seemingly incurable and very annoying buzzing sound emanating from the vehicle’s high-end audio system? Should an employee who has suffered mental distress as a result of the manner in which the employer treats the employee at the time of a wrongful termination of the employment contract recover damages for mental anguish? The manner in which various jurisdictions have drawn the line between losses that are compensable and those that are not has varied over time and, in recent years, has been subject to some adjustment. After brief accounts of the current position in England, Australia, Canada and

the United States, this Article considers the merits of various possible solutions to this problem.

II. ENGLAND

Evidence of the traditional rule barring recovery for non-pecuniary loss in contract cases can be found in the absence of cases awarding such relief in earlier English authorities. However, the origin of the rule is often traced to a clear statement in the late nineteenth century decision in *Hobbs v. London & South Western Railway Co.*

In *Hobbs*, the plaintiff, his wife and two young children had taken the midnight train operated by the defendant from Wimbledon to Hampton Court. The train was rerouted to Esher station where the plaintiff and his family were left to fend for themselves. There was no other means of carriage available. There was no room at a nearby inn. The family was forced to walk two or three additional miles to their home from Esher station. It was a cold and drizzling night. The plaintiff's wife caught a nasty cold. The jury awarded £28, consisting of £8 for the inconvenience of being forced to walk home in these circumstances and £20 for the subsequent illness suffered by the wife. The Court of Queen's Bench held that the £8 award for inconvenience could be sustained but that the wife's illness was too remote to justify recovery.

The court drew a distinction between physical inconvenience and mere anxiety or distress, the latter being non-compensable. Judge Mellor observed that "for the mere inconvenience, such as

---
19. (1875) 10 L.R.Q.B. 111, 114 (U.K.); see also Hamlin v. Great N. Ry. Co., (1856) 156 Eng. Rep. 1261 (Q.B.) (stating that in actions for breach of contract, damages must be pecuniary such that they are capable of being appreciated and estimated).
20. 10 L.R.Q.B. at 112.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 111.
28. *Id.* at 113
29. *Id.* at 115.
annoyance and loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages." The award of £8 was supported on the basis of the physical inconvenience suffered by the couple.

Credit for the general rule (the "Addis principle") is commonly attributed to the decision of the House of Lords in Addis v. Gramophone Co. The Addis principle states that in a claim for wrongful dismissal, damages for the plaintiff's injured feelings resulting from the harsh and humiliating way in which he was dismissed are not recoverable in English law.

Over time, exceptions to the "Addis principle" emerged. By 1991, Lord Justice Bingham, in Watts v. Morrow, was able to summarize the then current status of the two well-recognized exceptions to the general rule in the following terms:

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.

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

In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and

30. Id. at 122 (Mellor, J.).
31. Id. at 111.
33. As others have observed, it is doubtful that the opinions rendered in this case plainly stand for a broad proposition of this kind. See Nelson Enonchong, Breach of Contract and Damages for Mental Distress, 16 O.J.L.S. 617, 620 (1996), available at http://ojls.oxfordjournals.org/cgi/reprint/16/4/617.
34. (1991) 1 W.L.R. 1421 (A.C.) (Eng.).
mental suffering directly related to that inconvenience and discomfort . . . .

The second of these two exceptions was held to be applicable to the facts of Watts. The plaintiffs purchased a home in reliance on the defendant building surveyor’s report indicating that the home should be in reasonably good condition and in need of only minor repairs. The need for more extensive repairs caused the plaintiffs physical inconvenience and some consequential mental distress. In such circumstances, a modest award for the resulting mental distress could be sustained.

Apart from Watts itself, however, very little authority exists that supports this exception. However, similar results were achieved in cases where a tenant suffered distress from living in defective premises and where a surveyor’s defective report led the plaintiff to reside in damp premises.

The first exception is more important in terms of the frequency with which it has been applied. The exception was developed, predictably perhaps, by Lord Denning in the well-known decision of the English Court of Appeal in Jarvis v. Swans Tours Ltd., the case of the Ruined Holiday. The plaintiff solicitor purchased a Christmas holiday package from the defendant to go skiing in Switzerland. The holiday fell dismally short of the grand claims made in the defendant’s brochure, which the court held to be of contractual force and effect. The court awarded damages for the mental distress and vexation resulting from the disastrous holiday. Lord Denning observed that the traditional limitations on granting such awards “are out of date.” He asserted that “damages for mental distress can be recovered in contract, just as damages for shock can be recovered in

35. Id. at 1445 (Bingham, L.J.).
36. Id. at 1422.
37. Id. at 1424–25.
38. Id. at 1427.
39. Id. at 1422.
43. Id. at 235–36.
44. Id. at 237.
45. Id. at 233.
46. Id. at 237.
Although Lord Denning noted that such awards were particularly appropriate in the context of "a contract for a holiday, or any other contract to provide entertainment and enjoyment," it was not his view that such awards would be narrowly restricted to this class of cases.

In Heywood v. Wellers, the case of the Incompetent Solicitor, a plaintiff client recovered mental distress damages from a solicitor who negligently failed to enjoin a third party from molesting her. The defendant failed to institute the proper proceedings, and the molestation of the client continued. The court held that the injury was reasonably foreseeable. According to Lord Denning, damages for distress could be awarded if, on remoteness grounds, the loss was within the contemplation of the parties at the time of contracting. Indeed, in Cox v. Philips Industries Ltd., the trial judge awarded damages for the mental distress to a plaintiff employee resulting from an improper demotion. Again, it appeared to be sufficient that the loss was foreseeable. In due course, however, the ambit of Lord Denning's innovation was curtailed. Cox was overruled. By 1991 it was generally accepted that Lord Justice Bingham's statement in Watts accurately stated English law. That is, damages for mental distress are restricted to cases where: (a) the very object of a contract is to provide a pleasurable experience or peace of mind; or (b) where the mental distress is coupled with and flows from physical inconvenience.

Two recent decisions of the House of Lords appear to be capable of unsettling this consensus on the shape of the modern English tort.
doctrine. The first of the two, *Ruxley Electronics & Construction Ltd. v. Forsyth*, the owner stipulated for a maximum depth for the pool of seven feet, six inches, apparently concerned that such a depth would ensure the safety of the pool with respect to diving. Upon completion, the owner discovered that the contractor constructed a pool with a maximum depth of merely six feet, nine inches. The owner sought to recover against the contractor for substantial damages in the amount of the cost of demolition and reconstruction of the pool. The court was satisfied that the pool, as constructed, was perfectly safe to dive into, that the deficiency in the depth of the pool did not decrease its value and that if such an award were made, it was unlikely that the owner would demolish and reconstruct the pool. In such circumstances, their Lordships were unanimously of the view that awarding damages to cover the cost of reinstatement was disproportionate to the injury sustained by the owner, and such an award would amount to a substantial gratuitous windfall. Moreover, if the plaintiff actually intended to reconstruct the pool, it would be unreasonable for him to do so. On the other hand, dismissing the claim in its entirety on the basis that the owner suffered no diminution in the value of the constructed pool as a result of the defect was also considered unappealing. Accordingly, the House of Lords upheld the trial judge’s decision to award a sum of £2,500 general damages for the loss of what the trial judge referred to as a “pleasurable amenity.” Of the five judges on the panel, only Lord Lloyd explained the basis for such an award at any length. As Lord Lloyd

61. *Id.* at 344.
62. *Id.* at 354.
63. *Id.* at 362.
64. *Id.* at 353–54 (Lord Bridge).
65. *Id.* at 354, 359 (Lord Jauncey).
66. *Id.* at 362–63 (Lord Lloyd).
67. *Id.* at 363.
68. *See id.* at 351, 361 (stating that the diminution in value theory was incorrectly applied by the trial judge and finding that denial of all recovery for such a loss was equally unreasonable).
69. *Id.* at 363, 374.
70. Lord Mustill, with whom Lord Bridge agreed, simply stated that it was inappropriate to restrict the options for calculating damages to either the diminution in value or the cost of reinstatement, a seeming “contest of absurdities,” and that the trial judge’s award accurately
noted, the trial judge, in making the initial award, considered himself to be applying the well-established exception to the general rule permitting such awards in cases where the object of the contract at issue is one of affording pleasure. The owner's "pleasure was not so great as it would have been if the swimming pool had been 7 feet 6 inches deep."72

Lord Lloyd further observed, however, that application of the exception of the present facts should not constitute "a further inroad on the rule in Addis v. Gramophone Co. Ltd." but rather "a logical application or adaptation of the existing exception to a new situation."73 The precise nature of the extension of the rule intended here is not abundantly clear. Certainly, nothing turns on the fact that a swimming pool is obviously an item constructed for the purpose of providing a form of pleasure. Lord Lloyd indicated that a similar award should be possible in a case of residential construction where "the building does not conform in some minor respect to the contract, as, for example, where there is a difference in level between two rooms, necessitating a step."74 Of course, one can say that a contract to build a home in precise accordance with the specifications is a contract to provide a pleasurable experience for the client in the form of a home in the precise condition desired. If Lord Lloyd is correct that an award of compensation for non-pecuniary losses is appropriate in these circumstances, it would appear that the breach of virtually any consumer services contract is vulnerable to a similar analysis.

In the typical case, consumers enter into contracts to acquire goods and services in order to enjoy the emotional satisfaction of giving effect to their preferences. On this view, the Ruxley decision might be thought to create a rather substantial inroad on the Addis principle in the context of agreements to supply goods and services to consumers. A more restrictive reading of Ruxley might be that it applies to the particular problem of resolving conflicts between

71. Id. at 361 (Lord Jauncey).
72. Id. at 359. Lord Keith agreed with Lords Jauncey, Mustill and Lloyd. Id. at 353.
73. Id. at 374 (Lord Lloyd).
74. Id.
competing expectancy measures in the form of diminution of value and cost of reinstatement where neither alternative appears apposite. Nothing in the various judgments rendered in Ruxley, however, suggests such a limitation on its scope. Indeed, it is difficult to articulate a principled basis for restricting awards for the loss of pleasurable amenities to that context.

The second of the recent decisions, Farley v. Skinner, returns us to the familiar context of a surveyor’s defective report provided to an intending home purchaser. In Farley, the plaintiff retained the defendant to provide a report concerning a substantial country home located some fifteen miles from Gatwick International Airport. Plaintiff specifically mentioned to the defendant his concern about the possibility of aircraft noise and, given the location of the property, asked that this matter be investigated. On the basis of a deficient investigation, the defendant advised the plaintiff that the property would not “suffer greatly” from such aircraft noise in this particular location. So advised, the plaintiff purchased the property and, upon moving in, became aware that at certain times of the day the property was substantially affected by aircraft noise. The plaintiff’s claim for damages for loss of the pleasurable amenity of a home free of such noise was successful in a trial decision ultimately upheld by the House of Lords.

Applying the two traditional exceptions to the Addis principle, however, appears problematic in this context. First, could it be said that the “very object” of the surveyor’s contract was one of providing pleasure, relaxation or peace of mind? Certainly, the Court of Appeal in Farley found that the instruction concerning aircraft noise was “one relatively minor aspect of the overall instructions.” With respect to the second exception—emotional distress resulting from physical inconvenience caused by the breach of contract—it

76. Id. at [6] (Lord Steyn).
77. Id. at [2]–[3].
78. Id. at [3].
79. Id. at [4].
80. Id. at [6].
81. Id. at [8], [17].
82. See id. at [13].
83. Id.
may be objectionable that the inconvenience suffered as a result of the property being affected by such noise is not "physical" in the requisite sense. However, the House of Lords found neither of these objections compelling.84

With respect to the first point, the exception could be applied if "a major or important object of the contract was to give pleasure, relaxation or peace of mind."85 It is not necessary that this objective be the only—or indeed even the principal—obligation of the contract. Lord Hutton stated that this should be a point considered to be settled by the Ruxley decision, as it could not be seriously maintained that the precise depth of the pool was the principal obligation or very object of the contract.86 In his view, it was sufficient that the object in question, "whilst not the principal obligation of the contract, is nevertheless one which he has made clear to the other party is of importance to him."87 Lord Scott, however, was of the view that it was important to the application of the Ruxley analysis to a case of this kind that there is "no other way" of compensating the injured party for the deficient performance other than making an award for the non-pecuniary loss.88

The result in Farley could also be justified, in their Lordships' view, on the basis that aircraft noise is capable of causing "physical" inconvenience in the requisite sense, thus engaging the second exception to the Addis principle.89 Lord Scott observed that the distinction between physical and non-physical inconvenience was perhaps an elusive one.90 In his view, it was critical to distinguish between inconvenience resulting merely from disappointment that the contractual obligation has been broken and inconvenience or discomfort to one's senses, the latter being compensable.91

In sum, the decision in Farley preserves the traditional Addis principle and the basic structure of its two well-recognized

---

84. Id. at [16].
85. Id. at [22].
86. Id. at [48]-[50] (Lord Hutton).
87. Id. at [51].
88. Id. at [79] (Lord Scott of Foscote).
89. Id. at [57] (Lord Hutton).
90. Id. at [85] (Lord Scott of Foscote) ("The distinction between the 'physical' and the 'non-physical' is not always clear and may depend on the context.").
91. Id. (explaining that if the cause of the inconvenience or discomfort affects the senses, for example, sight, touch, hearing or smell, damages can be recovered).
exceptions. Thus, Lord Steyn observed that “[i]t is . . . correct . . . that the entitlement to damages for mental distress caused by a breach of contract is not established by mere foreseeability: the right to recovery is dependent on the case falling fairly within the principles governing the special exceptions.”

In two respects, however, the “very object of the contract” exception appears to have been expanded in at least two ways. First, Farley clearly establishes the proposition that it is sufficient to ground relief if the objective of pleasure or peace of mind is either a significant object of the agreement—if not the very object of the agreement—or it is one in which the object was clearly communicated to the other party. On this view, any type of contract could engage the exception if it contained a provision having such an object and the provision was either an important one or the importance of the particular object was clearly communicated. Surely, it can then no longer be accurately stated that this exception applies only to certain categories or types of contracts. Second, by reaffirming the soundness of the Ruxley analysis in this rather different context, the Farley decision suggests that in the context of the provision of consumer goods and services, mental distress suffered by the consumer as a result of the loss of a “pleasurable amenity” will be compensable, provided that the distress is more than mere disappointment resulting from the non-performance of the agreement.

III. AUSTRALIA

Australian courts have essentially followed the English approach to awarding compensation for non-pecuniary breach of contract losses. The basic Addis principle is recognized and is considered to be subject to the exceptions recognized in English law. This general approach was confirmed by the High Court of Australia as recently as 1993 in the important and leading decision in Baltic Shipping Co. v. Dillon, the case of the Sunken Cruise Ship. On its facts, this was a case in which an award for damages for emotional distress could easily be justified on the basis of the exceptions to the traditional

92. *Id.* at [16] (Lord Steyn).
93. *Id.* at [25].
Addis principle. In their various judgments, however, members of the High Court indicated both considerable scepticism with respect to the foundations of the traditional rule and a variety of views with respect to the rationales for the traditional exceptions. These views are of interest in the present context and may be of use when briefly described.

The plaintiff purchased a fourteen day holiday cruise from the defendant shipping company. On the tenth day of the cruise, the ship foundered and sank. As result, the plaintiff lost her possessions and suffered certain injuries. She claimed for damages under various theories, including $5,000 "as [c]ompensation for disappointment and distress at the loss of entertainment . . ." With respect to this particular aspect of her claim, success on the basis of the traditional principles is easily predicted. This was a contract to provide a pleasurable vacation, and the sinking of the vessel is surely to cause a high degree of emotional distress. This is indeed the conclusion the court reached on this issue. In reaching that conclusion, however, various members of the court expressed sharp criticism of the traditional approach.

In the leading opinion, Chief Justice Mason suggested that the traditional rule "rests on flimsy policy foundations." In his view, the traditional Addis principle is based on a concern that "compensation for injured feelings will lead to inflated awards of damages in commercial contract cases, if not contract cases generally." As anxiety is a normal concomitant of contractual

95. See id. at 362 ("[D]amages for injured feelings were recoverable in the action for damages for breach of promise of marriage.").
96. Id. at 361–63 (Mason, C.J.); id. at 395, 405 (McHugh, J.).
97. Id. at 387–88.
98. Id. at 388.
99. Id. at 347.
100. Id.
101. Id. at 370–71 (Brennan, J.).
102. Id. at 369–70 (stating that the principle has "no application when . . . the 'disappointment of mind' is itself the 'direct consequence of the breach of contract'"; id. at 379–80 (Deane & Dawson, JJ.) (stating that the rule is "essentially pragmatic" but should not be applied to the present case because it falls within an exception to the rule, where distress has been caused by breach of a contract under which the party allegedly in breach is shown expressly or impliedly to have agreed to provide entertainment or pleasure); id. at 395–96 (McHugh, J.) (stating that although no rationales for the general rule are satisfactory, it should not be rejected by the court).
103. Id. at 362 (Mason, C.J.).
104. Id.
breach, a contracting party should be deemed, or so it is argued, to assume the risk of such injuries.\textsuperscript{105} However, Chief Justice Mason queried:

\begin{quote}
[W]hy the injured party should be deemed to take the risk of damage of a particular kind when the fundamental principle on which damages are awarded at common law is that the injured party is to be restored to the position (not merely the financial position) in which the party would have been had the actionable wrong not taken place.\textsuperscript{106}
\end{quote}

Turning to a consideration of the exceptions to the general principle, Chief Justice Mason observed that in recent English cases, the results were justified on the basis of the concept of reasonable foreseeability.\textsuperscript{107} In his view, however, the then current English position could not be explained on that ground.\textsuperscript{108} If the results could be so explained, he suggested, there would be no need for a general rule denying relief and a series of exceptions thereto.\textsuperscript{109} Perhaps surprisingly, however, Chief Justice Mason concluded that the restriction of relief to disappointment and distress resulting from physical inconvenience could be defended on the following basis:

\begin{quote}
[A]s a matter of ordinary experience, it is evident that, while the innocent party to a contract will generally be disappointed if the defendant does not perform the contract, the innocent party's disappointment and distress are seldom so significant as to attract an award of damages on that score. For that reason, if for no other, it is preferable to adopt the rule that damages for disappointment and distress are not recoverable unless they proceed from physical inconvenience caused by the breach or unless the contract is one the object of which is to provide enjoyment, relaxation or freedom from molestation.\textsuperscript{110}
\end{quote}

\begin{enumerate}
\item[105.] \textit{ld.}
\item[106.] \textit{ld.}
\item[107.] \textit{ld. at} 364.
\item[108.] \textit{ld.}
\item[109.] \textit{ld.}
\item[110.] \textit{ld. at} 365.
\end{enumerate}
He went on to hold that the latter principle was applicable to the present fact situation. Surely it is difficult, however, to defend the traditional principles on the basis that they afford needed protection against the phenomenon of damage awards for insignificant disappointment and distress. A satisfactory response to that problem would be to adopt a principle simply denying recovery for insignificant, non-pecuniary loss.

More searching criticism of the traditional rules was offered by Justice McHugh. He examined the various justifications for the traditional Addis principle and concluded that "[n]one of them is satisfactory." Justice McHugh also traced the rise and fall of remoteness as a justification for the exceptions to the general principle in English law and appeared unconvinced that the rejection of what was essentially Lord Denning's view was defensible in principle. Justice McHugh concluded his analysis in the following terms:

If the matter were free from authority, the object of an award of damages for breach of contract [i.e. the expectancy principle] and the principles of causation and remoteness would require the conclusion that damage for disappointment or distress, resulting from breach of contract, was compensable if it was within the reasonable contemplation of the parties when the contract was made. No doubt in most cases, the disappointment would be so negligible that the damage suffered could be regarded as de minimis and ignored. But in other cases, it seems unreasonable that the party in breach should escape liability even though, at the time of making the contract, that person knew that breach might result in the other party suffering disappointment.

Justice McHugh went on to illustrate the deficiencies of the traditional approach by hypothesizing a case in which "an agent had agreed to purchase land on behalf of a principal knowing that, for

111. Id. at 366 ("In the present case, the contract, which was for what in essence was a 'pleasure cruise,' must be characterized as a contract the object of which was to provide for enjoyment and relaxation.").
112. Id. at 395 (McHugh, J.).
113. Id. at 396.
114. Id. at 404.
many years, the principal had desired to purchase the land for the purpose of expanding his or her business."\textsuperscript{115} In such a case, where the breach deprived the principal of the property, a claim for damages for mental distress would be, according to Justice McHugh, a compelling one that would be precluded by the traditional principles.\textsuperscript{116} Nonetheless, he concluded that in the present case where the traditional principles provided a basis for relief, it would be inappropriate to consider overruling the traditional doctrine.\textsuperscript{117}

A minority of the panel appeared less offended by the deficiencies in the traditional English rules. Indeed, Justice Brennan was of the view that the \textit{Addis} principle and its exceptions could be defended.\textsuperscript{118} According to Justice Brennan, in terms of the general principle, awarding damages for what amounts to the "subjective mental reaction of an innocent party to a breach" would add an element of uncertainty to the projection of potential liability, thereby complicating the negotiation of agreements and, in the end, seriously impeding trade and commerce.\textsuperscript{119} In his view, these considerations were peculiar to the institution of contracting and inapplicable to measuring damages in a tort claim, thus justifying a difference in the approach to compensation for emotional distress in contract and tort.\textsuperscript{120} However, this rationale for the traditional \textit{Addis} principle was inapplicable for Justice Brennan in a case where the mental distress was a "direct consequence of the breach of contract."\textsuperscript{121} In his view, a "direct consequence" was to be distinguished from cases "where disappointment of mind is no more than a mental reaction to a breach of contract and damage flowing therefrom . . . ."\textsuperscript{122} In such a case, he continued, "the law has treated such a mental reaction as too remote."\textsuperscript{123} On the other hand, he notes that where the disappointment directly results from the breach of contract, the disappointment of mind cannot be considered to be too remote.\textsuperscript{124}

\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id. at 405.
\textsuperscript{118} See id. at 369–70 (Brennan, J.).
\textsuperscript{119} Id. at 369.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 368.
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 370.
Justice Brennan illustrated the point with a reference to *Heywood v. Wellers,* the case of the Incompetent Solicitor, and a distinction drawn therein by Lord Justice Bridge between the following:

"[M]ental distress which is an incidental consequence to the client of the misconduct of litigation by his solicitor, on the one hand, and mental distress on the other hand which is the direct and inevitable consequence of the solicitor's negligent failure to obtain the very relief which it was the sole purpose of the litigation to secure." Damages would be available in the second case but not in the first. Hence, in *Heywood* itself, the mental distress was compensable because it resulted from the defendant solicitor's failure to obtain an order that was intended to preserve the plaintiff client's peace of mind. Accordingly, the traditional exception to the *Addis* principle for cases concerning agreements whose object it is to provide a pleasurable experience or preserve peace of mind could be supported. On its facts, *Baltic Shipping Co.* was such a case and a favourable result for this aspect of the plaintiff's claim was therefore clearly warranted.

Justices Dean and Dawson exhibited less enthusiasm for the traditional principles and suggested the following about the *Addis* principle:

[W]here applicable, [the *Addis* principle] represents an essentially pragmatic and judicially imposed assumption which is to be made for the purposes of the application of the second limb of the rule in *Hadley v. Baxendale,* that is to say, it is to be assumed that disappointment or distress flowing from the breach of contract would not have been in the contemplation of the parties, at the time they made the contract, as a likely result of breach.

Notwithstanding the fact that the rule was thus seen to be based on "pragmatism rather than logic," Justices Dean and Dawson

---

126. *Baltic Shipping Co.,* 176 C.L.R. at 380–81 (Dean & Dawson, JJ.) (citation omitted).
128. *Id.* at 459–60.
130. *Id.* at 381.
asserted that it was inappropriate to overrule the traditional doctrine by judicial decision.\textsuperscript{131} Accordingly, the only appropriate question to consider was whether or not existing exemptions covered the present fact situation. In their view, of course, recovery for mental distress was justifiable on this basis.\textsuperscript{132}

In this rather interesting decision, then, the various opinions filed by members of the Australian High Court indicate the fragile nature of the rationales underlying the traditional \textit{Addis} principle and its exceptions. Further, the opinions collectively offer some support for the view that the traditional rule and its exceptions can be grounded, with varying degrees of success, on the remoteness principle. The interesting suggestion made by Justice Brennan, to which we will return, was that the distinction between the general principle and the pleasure principle rests on a distinction between directly caused emotional distress and distress which merely constitutes a consequential reaction to the defendant’s breach of contract.\textsuperscript{133}

\section*{IV. Canada}

Canadian courts in the common law provinces welcomed Lord Denning’s innovation in \textit{Jarvis v. Swans Tours Ltd.}\textsuperscript{134} with some enthusiasm and created the impression, over the years, that they were persuaded that favourable awards in such cases could be justified simply on the basis of the remoteness principle.\textsuperscript{135} In a very recent Supreme Court of Canada decision, however, some lack of clarity was created with respect to the question of whether this truly does represent the position under Canadian law.

In the years following \textit{Jarvis}, Canadian courts often applied the new doctrine on the explicit basis of the remoteness principle and often did so in a context where it would be difficult to characterize the contract in question as one providing for pleasure or peace of mind. Thus, damages for mental distress were awarded in cases

\textsuperscript{131} \textit{Id.} ("[W]e are unable to agree with the suggestion to be found in some recent judgments that it should now be effectively abolished by judicial decision.").

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} \textit{Id.} at 367–68.


involving breach of warranty of title to an automobile, non-completion of the sale of residential premises, and non-completion of a sale of a condominium unit. In *Newell v. Canadian Pacific Airlines Ltd.*, the case of the Grieving Pet Owner, damages for mental distress resulting from the loss of one pet and the injury to another through the negligence of the defendant carrier were awarded on the basis that the defendant was in a position to foresee such consequences of a breach of this kind.

Although some support was found at an early stage for an award of damages for mental distress resulting from the manner of dismissal in wrongful dismissal cases, this topic was much complicated by subsequent Supreme Court of Canada decisions. In *Vorvis v. Insurance Corp. of British Columbia*, the Supreme Court held that conduct that produces mental distress must itself constitute a breach of duty, thus precluding relief in the typical case where mental distress results from collateral conduct rather than the failure to give timely notice of termination. Liability for mental distress caused by collateral conduct—harassment, imputations, etc.—is imposed only if the collateral conduct itself constituted either a tort or a breach of contract. However, this is often not the case. On the other hand, in a later decision in *Wallace v. United Grain Growers Ltd.*, the court held that although an employer’s bad faith behavior at the time of a wrongful dismissal did not constitute a breach of duty, it may nonetheless result in the enhancement of damages awarded for failure to give reasonable notice. In *Vorvis*, Judge Wilson, who in dissent was prepared to award damages for mental distress resulting from the manner of dismissal, clearly grounded the


139. [1976] 14 O.R.2d 752 (Can.).

140. *Id.*


142. [1989] 1 S.C.R. 1085 (Can.).

143. *Id.*

144. [1997] 3 S.C.R. 701 (Can.).

145. *Id.*
Jarvis line of authority on the remoteness principle. The trial judge held that the plaintiff was merely entitled to damages sufficient to place him in the financial position he would have been in if he had received timely notice of the dismissal. Judge Wilson observed:

With respect, I think this is no longer the law. The absolute rule has been whittled away by the numerous English and Canadian authorities referred to by my colleague in which damages have been awarded for mental suffering in a variety of different contractual situations. It is my view, however, that what binds all these cases together, their common denominator so to speak, is the notion that the parties should reasonably have foreseen mental suffering as a consequence of a breach of the contract at the time the contract was entered into.

Judge Wilson drew support for this position from Lord Denning’s judgment in Jarvis and from a similar pronouncement by the Ontario Court of Appeal. Subject to the occasional suggestion of a more conservative approach from some Canadian courts, this was more or less the stage of Canadian law prior to the very recent decision of the Supreme Court of Canada in Fidler v. Sun Life Assurance Co. of Canada.

In Fidler, the plaintiff was receiving long-term disability benefits from the defendant insurer due to fibromyalgia and chronic fatigue syndrome. The defendant terminated the benefits after an initial two years of coverage, notwithstanding the plaintiff’s provision of medical evidence concerning her continuing incapacities. In making the decision to terminate, the defendant relied on covert video surveillance but did not have substantial medical evidence upon which to rely. The plaintiff’s claim for

147. Id. ¶ 36.
148. Id. ¶ 39.
149. Id. (citing Brown v. Waterloo Reg’l Bd. of Comm’rs of Police, [1983] 43 O.R.2d 113 (Can.)).
152. Id. ¶¶ 4–5, 7–8.
153. Id. ¶¶ 8–10.
154. Id. ¶¶ 9–18.
damages for breach of the covenant to furnish coverage included a claim for the mental distress suffered as a result of the termination of coverage.\textsuperscript{155}

On this particular issue, Chief Justice McLachlin and Justice Abella, writing for a unanimous court, held that this aspect of the claim should enjoy success.\textsuperscript{156} They offered considerable support for the view that claims for damages for mental distress were simply subject to the normal principles applicable to contract damages claims more generally and, in particular, would enjoy success if the injury was one that would have been within the reasonable contemplation of the parties at the time of contracting.\textsuperscript{157} As Chief Justice McLachlin and Justice Abella wrote:

The aim of compensatory damages is to restore the wronged party to the position he or she would have been in had the contract not been broken. . . . "[T]he party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed." The measure of these damages is, of course, subject to remoteness principles. There is no reason why this should not include damages for mental distress, where such damages were in the reasonable contemplation of the parties at the time the contract was made. This conclusion follows from the basic principle of compensatory contractual damages: that the parties are to be restored to the position they contracted for, whether tangible or intangible. The law's task is simply to provide the benefits contracted for, whatever their nature, if they were in the reasonable contemplation of the parties.\textsuperscript{158}

In reaching this conclusion, the court noted the similar views it expressed in Vorvis\textsuperscript{159} and observed that the granting of damages for mental distress in so-called "peace of mind" contracts "should be seen as an expression of the general principle of compensatory damages of Hadley v. Baxendale, rather than as an exception to that

\textsuperscript{155} Id. \S 1.
\textsuperscript{156} Id. \S 2.
\textsuperscript{157} Id. \S 44.
\textsuperscript{158} Id.
\textsuperscript{159} Id. \S 42 (citing Vorvis v. Ins. Corp. of B.C., [1989] 1 S.C.R. 1085 (Can.)).
principle . . .”160 On this view, damages for mental distress, like other damages for breach of contract, are warranted by application of the expectancy principle and are subject to the limitation placed thereon by the principle of remoteness. Damages for mental distress suffered in the context of vacation contracts and other “peace of mind” contracts are recoverable because of the application of those principles and not simply because of the nature of the contract in question.

However, this rather clear and straightforward position is complicated by a further element in Fidler that suggests an additional element is required if a claim for damages for mental distress is to enjoy success. Chief Justice McLachlin and Justice Abella considered why not all mental distress associated with a breach of contract is compensable and observed:

In normal commercial contracts, the likelihood of a breach of contract causing mental distress is not ordinarily within the reasonable contemplation of the parties. It is not unusual that a breach of contract will leave the wronged party feeling frustrated or angry. The law does not award damages for such incidental frustration. The matter is otherwise, however, when the parties enter into a contract, an object of which is to secure a particular psychological benefit. In such a case, damages arising from such mental distress should in principle be recoverable where they are established on the evidence and shown to have been within the reasonable contemplation of the parties at the time the contract was made. The basic principles of contract damages do not cease to operate merely because what is promised is an intangible, like mental security.161

Of course, one possible reading of this passage is that mental distress damages will be available in a contract case only where “an object of [the contract] is to secure a particular psychological benefit.”162 This is reminiscent of the distinction drawn by Justice Brennan in Baltic Shipping Co. between direct and consequential mental distress.163 If the contract imposes an affirmative obligation

160. Id. ¶43.
161. Id. ¶45.
162. Id.
163. See supra note 133 and accompanying text.
to secure a psychological benefit, the failure to provide it leads to compensable injury. If, on the other hand, the mental distress is simply a mental reaction to the breach of a covenant that does not promise a psychological benefit, Justice Brennan would hold that the mental distress is not compensable. It is not at all clear that Chief Justice McLachlin and Justice Abella had a similar proposition in mind when authoring the passage set out above. The ultimate significance of this passage may not become clear until Canadian jurisprudence on the point further develops.\footnote{164}{The view that the Supreme Court of Canada now simply applies the rule in \textit{Hadley v. Baxendale} to contract claims for mental distress may now draw support from the recent decision where the Court simply applied a reasonable foreseeability test. \textit{See} Mustapha v. Culligan of Can. Ltd., [2008] 293 D.L.R.4th 29, 2008 SCC 27 (Can.) (dismissing a claim for damages where plaintiff alleged that finding a dead fly in bottled water led to a major depressive disorder, though it was not consumed); \textit{see also} Keays v. Honda Can. Inc., [2008] 294 D.L.R.4th 577, 2008 SCC 39 (Can.) (applying a straightforward remoteness test in allowing a claim for mental distress caused by the manner of a wrongful dismissal).}

In light of the strong assertions made by Chief Justice McLachlin and Justice Abella that the general principles of contract damages apply to claims for damages for mental distress, it is perhaps more likely that the apparent requirement that the contract be one to "secure a particular psychological benefit" will be somewhat loosely applied. Thus, in many cases where mental distress beyond mere "incidental frustration" is a foreseeable consequence of the breach, a court may determine that at least one of the objects of such an agreement is to secure the "particular psychological benefit" of not suffering such distress. This loose application of the standard somewhat destabilizes the clear view of assimilating mental distress damages to the general principles of expectancy and remoteness expressed by Chief Justice McLachlin and Justice Abella in other passages in \textit{Fidler}.\footnote{165}{\textit{ RESTATEMENT (SECOND) OF CONTRACTS} § 353 cmt. a (1981).}

\section{V. United States}

American law more firmly rejects the possibility of damages for emotional distress in contract cases than England and other common law jurisdictions of the British Commonwealth. Thus, the general rule appears to be that "[d]amages for emotional disturbance are not ordinarily allowed."\footnote{165}{\textit{ RESTATEMENT (SECOND) OF CONTRACTS} § 353 cmt. a (1981).} Corbin justifies this traditional American approach in the following manner:
In most actions for breach of contract, the damages recoverable are restricted to compensation for pecuniary harm . . . . The breach of a contract practically always causes mental vexation and feelings of disappointment by the plaintiff, who seldom thinks of asking for a money payment therefor. It is believed that an equivalent pecuniary satisfaction for his pecuniary injury will sufficiently restore the plaintiff's satisfaction, and the intervening vexation is disregarded.\textsuperscript{166}

In justifying the traditional American reluctance to award such relief, both Corbin and the \textit{Restatement (Second) of Contracts} emphasize the difficulty of measuring such injuries in monetary terms.\textsuperscript{167} Others have placed emphasis on the "potential for fabricated claims"\textsuperscript{168} as a justification for strictly limiting recovery for mental distress. A substantial body of American case law has awarded compensation for mental distress arising from contractual breach. For example, courts awarded compensation in cases where plaintiffs were wrongfully ejected from a hotel\textsuperscript{169} or by a carrier,\textsuperscript{170} in cases where undertakers provided defective services\textsuperscript{171} and in cases against the suppliers of defective caskets.\textsuperscript{172} If it is well accepted that such awards may be made in exceptional circumstances, the nature and scope of the exceptions to the general rule denying recovery remain unclear. However, the general themes emerging from such cases appear more restrictive than the generalizations made regarding cases awarding relief in other common law jurisdictions. Accordingly, Corbin indicates that such relief is available in two kinds of

\textsuperscript{166} 11 \textsc{Arthur Linton Corbin, Corbin on Contracts} § 59.1, at 539 (Joseph M. Perillo ed., rev. ed. 2005).

\textsuperscript{167} Id. ("[I]t can scarcely be said to be measurable at all in terms of money."); \textit{Restatement (Second) of Contracts} § 353 cmt. a (1981) ("Even if they are foreseeable, they are often particularly difficult to establish and to measure.").


\textsuperscript{169} Emmke v. De Silva, 293 F. 17 (8th Cir. 1923).

\textsuperscript{170} Austro-Am. S.S. Co. v. Thomas, 248 F. 231 (2d Cir. 1917).

\textsuperscript{171} Lamm v. Shingleton, 55 S.E.2d 810 (N.C. 1949).

\textsuperscript{172} Hirst v. Elgin Metal Casket Co., 438 F. Supp. 906 (D. Mont. 1977); \textit{see also} Chelini v. Nieri, 196 P.2d 915, 916 (Cal. 1948) ("The award of so-called 'general damages' is predicated on defendant mortician's breach of a contract to preserve the body of plaintiff's mother and on plaintiff's physical illness, suffering and disability resulting from his discovery that because of such breach of contract the body became a 'rotted, decomposed and insect and worm infested mass.'").
situations: "(1) cases where such suffering accompanies a bodily injury; and (2) where it was caused intentionally or in a manner that is wanton or reckless."\(^{173}\) Certainly, modern authority can be advanced to support the proposition that relief should be limited to such cases.

A minority of courts limit recovery to the first situation, where mental distress accompanies physical injury. In *Keltner v. Washington County*,\(^{174}\) for example, a teenage girl with knowledge concerning the tragic details of the murder of a nine-year-old brought a sympathetic claim.\(^{175}\) The plaintiff provided the relevant information to the police on the faith of their oral promise not to reveal her identity to the perpetrator of the crime.\(^{176}\) In breach of the promise, the police revealed the plaintiff's identity to the perpetrator's attorney and, in due course, to the perpetrator, thereby causing the plaintiff much mental distress and anguish.\(^{177}\) However, the Supreme Court of Oregon denied relief on the basis that the distress was unaccompanied by physical injury to the plaintiff.\(^{178}\) Other courts award recovery pursuant to the second situation, justifying departures from the traditional rule where the defendant's breach was wilful or wanton. In a recent bad faith insurer case, *Giampapa v. American Family Mutual Insurance Co.*,\(^{179}\) the Colorado Supreme Court awarded damages to a policyholder against an insurer whose maltreatment of the insured constituted a wilful and wanton breach of the insurer's duty to pay benefits to the insured.\(^{180}\)

Clearly, if recovery for mental distress were limited to these two categories—accompanying physical injury, and wanton and wilful breach—the exceptions to the traditional rule would be quite limited. Further, cases in both of these categories are also likely to constitute tortious misconduct in addition to the breach of contract, thus it is not surprising that damages for mental distress would be provided in such circumstances.

---

173. CORBIN, *supra* note 166, at 539.
174. 800 P.2d 752 (Or. 1990).
175. *id*.
176. *id* at 753.
177. *id*.
178. *id* at 755 (citing Adams v. Brosius, 139 P. 729, 731 (Or. 1914)).
179. 64 P.3d 230 (Colo. 2003).
180. *id* at 245.
However, there are some reported cases that extend recovery even though they fall outside two such narrowly conceived exceptions. The cases referred to above allowing relief in the context of defective services provided by undertakers offer an obvious illustration. Similarly, awarding relief where a gambling establishment breached an undertaking not to permit entry to the plaintiff's spouse cannot be explained by the traditional narrow view. A further illustration includes the line of cases in which defendant telegraph companies failed to make timely delivery of messages concerning illness, death or funeral arrangements. Such claims have been brought by both the senders of such messages and their intended recipients. Although they have enjoyed success, Corbin reports that two-thirds of the jurisdictions that have considered the point have denied relief for mental suffering caused in such circumstances. Nonetheless, there are undeniably cases where plaintiffs are granted relief. How are these decisions to be explained? One suggestion is that the cases have a personal rather than commercial character. As John Sebert demonstrated, however, it is difficult to justify differential treatment on this basis. The division between the two categories is unclear, and it is plainly the case that such awards are not invariably made in all cases of contracts involving a personal element.

The distinction between personal and commercial arrangements, however, bears a strong resemblance to the English restriction of recovery to cases where a principal object of the agreement is to provide pleasure, relaxation or peace of mind. More promising is the suggestion that these are cases in which there is a high degree of probability that mental distress will be occasioned by breach. An explanation of this kind appears in the Restatement (Second) of Contracts. Section 353 states the rule in the following terms:

181. See Chelini, 196 P.2d at 916; Hirst, 438 F. Supp. at 908; Lamm, 55 S.E.2d at 813–14.
183. See, e.g., id.
184. CORBIN, supra note 166, at 547.
186. Id. at 1589.
“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.”

In that Restatement version, then, damages for mental distress can be awarded, even in the absence of physical injury or wilful breach of contract, where the contract or breach is of such a nature that serious emotional disturbance is a "particularly likely result." As others have indicated, however, it may be seriously questioned whether a high degree of foreseeability is manifest in such cases. Arguably, what is unusual about such cases is that a high degree of mental distress is a foreseeable consequence of breach and that the cases can be explained, therefore, upon a simple application of the rule in Hadley v. Baxendale. Although there is much persuasive force in this opinion, straightforward judicial statements of this approach are not easily found.

In sum, the traditional thrust of the American contract cases awarding damages for mental distress do not appear to stray very far from circumstances in which either physical injury was caused or the defendant intentionally breached an agreement in circumstances where the plaintiff's emotional disturbance was a foreseeable consequence of that breach. In effect, the circumstances in which American law permits such awards are cases in which concurrent liability in tort often lies in the background. The American rules thus appear to be much more narrowly circumscribed than the current rules of, for example, English law.

As we have seen, English law permits recovery in cases where "physical inconvenience," a much broader concept than physical

---

188. Restatement (Second) of Contract § 353 cmt. a (1981).
189. Tomain, supra note 187, at 903.
190. See, e.g., Kent, supra note 9, at 503; Whaley, supra note 10, at 949–51 (suggesting the adoption of two basic rules to control the recovery of emotional distress damages in contract; no damages should be recoverable in contract actions unless they are foreseeable and "contractual recovery requires certainty" (emphasis omitted)).
injury, has produced mental distress. Further, the English exception permitting recovery in circumstances where the nature of the contract is such that one of the important objectives is to give pleasure, relaxation or peace of mind—or where such an object has been clearly brought to the attention of the other party—appears potentially broader than the American rule, as it does not require wilful or intentional breach of contract as a condition of the imposition of liability.

On the other hand, the American rule is potentially more inclusive as it appears to cover all cases of intentional or wilful breach bringing about foreseeable mental distress, regardless of the type of contract in issue. To be sure, American law on this topic appears to be evolving, and more specifically, significant support exists for the view that damages for mental distress are recoverable where such an injury is “particularly likely” or foreseeable. To the extent that this proposition may be considered to accurately represent American law, the American rule may be converging with the English doctrine that such awards are permissible only in cases where a principal object of the contract is to provide pleasure, relaxation or peace of mind.

VI. ANALYSIS

A threshold issue when considering the merits of the possible approaches under the common law regarding the question of compensation for mental distress injuries resulting from breach of contract is whether the case can be made for a rule denying such relief across the board. On this approach, the expectancy principle would stand for the proposition that the victim of a breach of contract is entitled to be placed, so far as money can do so, in the financial position the plaintiff would have been in if the contract had been performed. As we have seen, the traditional approach in common law jurisdictions has been to adopt a general principle against relief

193. See supra notes 28–31 and accompanying text.
194. See supra notes 34–35 and accompanying text.
195. See, e.g., Tomain, supra note 187, at 903.
196. See supra notes 34–35 and accompanying text.
of this kind. The justifications offered for the general principle, however, do not appear to be compelling.

Perhaps the two most frequently made arguments are that damages for mental distress are difficult to measure and, second, that the introduction of such uncertainty in the calculation of damages inhibits the ability of negotiating parties to estimate future liability, which in turn inhibits contractual activity. With respect to the first point, as many observers have pointed out, placing a monetary value on mental distress is not obviously more difficult than placing a monetary value on the pain and suffering that may accompany a physical injury. Damages for a physical injury caused by a breach of contract are plainly compensable. Further, whatever difficulties may be entailed in placing a monetary value on mental distress, it is an issue that courts face on a routine basis in tort claims. With respect to the second point, in a complex contractual relationship of any kind, the calculation of potential liabilities is often a complex and difficult matter. Adding the potential possibility of an award of damages for mental distress caused by breach is not likely to significantly add to such difficulties. Such awards are likely to be rare, and as experience in the Commonwealth jurisdictions has suggested to date, the awards are likely to be quite modest in nature.

On an empirical basis, there appears to be little evidence to suggest that awarding such damages in the context of ruined vacations, for example, has had any impact on the willingness of vacation service providers to enter into contracts with potential customers. It is also occasionally objected that proving such claims is inherently difficult and that granting such awards may provide an opportunity to make spurious claims. Again, experience in the Commonwealth jurisdictions suggests that the ordinary burden of

197. See supra note 9 and accompanying text.
199. See, e.g., Kent, supra note 9, at 493.
200. See, e.g., Whaley, supra note 10, at 953.
201. See, e.g., supra note 39 and accompanying text.
202. See, e.g., Whaley, supra note 10, at 942–43.
proof on the plaintiff to establish such a claim and the rigours of the trial process are likely to weed out unmeritorious claims.\textsuperscript{203}

The strongest argument in favour of granting at least some relief in cases where mental distress has been caused by breach of contract is that, otherwise, such plaintiffs are not adequately compensated for a breach of contract. As we have seen, this is an argument that appealed to a number of Commonwealth and American judges.\textsuperscript{204} On this view, the expectancy principle should not be restricted to financial expectancy. Failure to award compensation for mental distress caused by a breach under-compensates the plaintiff in cases such as the Absentee Wedding Photographer, the Sunken Cruise Ship, the Incompetent Undertaker or the Grieving Pet Owner.\textsuperscript{205} In such cases, the mere return of the monies paid by the plaintiff will very likely be perceived by the victim as under-compensation for the breach.

Significantly, many judges appear to agree.\textsuperscript{206} Supporters of the principle against recovery sometimes argue that the mental distress resulting from a breach of contract is simply a risk of contractual behaviour that is so pervasive that its risk ought to be borne by the victim of the breach.\textsuperscript{207} Again, it is not at all clear why the victim should be deemed to accept the risk in cases such as these where the mental distress is likely to be quite severe and is reasonably foreseeable by the perpetrator of the breach.

On the assumption that some cases of mental distress caused by contractual breach should be compensable, one must turn to the task of devising an appropriate line of demarcation between cases where relief should be awarded and those where it should not. The foregoing survey suggests a number of possibilities. A dividing line might be based on the severity of the distress in question. Alternatively, one might restrict liability to cases where some other type of more easily provable injury is present, such as a physical

\textsuperscript{203} See, e.g., id. at 954.
\textsuperscript{204} See supra notes 111–114, 151–160 and accompanying text.
\textsuperscript{207} See, e.g., Baltic Shipping Co., 176 C.L.R. at 362 (Mason, C.J.).
injury, or to situations involving the commission of a tort. Alternatively, one might limit relief to cases where particular types of contracts have been entered into, such as those in which providing a pleasurable experience or peace of mind are important objectives. A further and related possibility would be to draw a distinction between cases where the mental distress is a direct result of contractual breach as opposed to merely an indirect consequence. As envisaged by Justice Brennan in *Baltic Shipping Co.*, this distinction would allow recovery in cases where the mental distress is the "direct and inevitable consequence" of the contractual breach rather than a merely incidental consequence. This distinction may be coextensive with, or at least parallel to, the distinction between contracts to provide a pleasurable experience of some kind, as opposed to cases in which the victim suffers the disappointment because of the defendant's failure to perform a different kind of contractual obligation.

Finally, one may consider, as Commonwealth Courts have done in recent years, the possibility that it is sufficient simply to rely on the traditional common law concepts of causation, mitigation and remoteness and to allow recovery where the mental distress was caused by the breach, was not amenable to reasonable efforts of mitigation and could reasonably be considered to have been within the contemplation of the parties at the time of contracting.

A distinction based on severity of mental distress suffered is likely to be an inevitable component of a rule distinguishing between compensable and non-compensable loss. Virtually all judges and legal scholars who have analyzed the problem of compensation for mental distress in contract cases indicate that damages should not be allowed in cases of "ordinary" or "normal" disappointment or frustration suffered by the victim of a breach of contract. As Chief Judge McLachlin observed in *Fidler*, "[i]t is not unusual that a breach of contract will leave the wronged party feeling frustrated or angry. The law does not award damages for such incidental frustration."

---

208. *Id.* at 400.
Although there is widespread consensus in favour of the proposition that normal disappointment, frustration or distress resulting from a breach of contract should not be compensable, there is less agreement on the reason for excluding compensation in such cases. Surely, Chief Judge McLachlin is incorrect in suggesting that such losses are irrecoverable because they are not within the reasonable contemplation of the parties. There must be very few commercial actors who do not appreciate that breaching a contract is likely to cause disappointment, frustration or annoyance on the part of the other party to the agreement. Perhaps Corbin comes closer to the mark in suggesting that the victim seldom thinks of asking for a monetary payment with respect to such feelings of disappointment on the ground that pecuniary satisfaction will sufficiently restore the plaintiff's equilibrium. It might be said that ordinary frustration and disappointment upon breach is not really an injury in the requisite sense. Rather, it is only if the injury is severe or out of the ordinary that the victim’s mental state is characterized as one which has suffered an injury. Although this dividing line between ordinary and non-compensable disappointment and frustration and compensable mental distress may appear to be difficult to draw, Commonwealth courts, at least, do not appear to have encountered much difficulty in doing so. In sum, one limitation on compensation for mental distress is likely to be that the distress must be serious or severe in character and for that reason considered to be a loss sustained by the victim as a result of a breach of contract.

212. See supra 91 and accompanying text.
214. See CORBIN, supra note 166.
216. To the extent that American tort law may draw a distinction between compensable “severe” emotional distress (for purposes of the tort of intentional infliction of emotional injury) and the lower standard of compensable “serious” distress (for purposes of the tort of negligent infliction of emotional distress), the appropriate standard for contracts cases would be “serious” emotional distress. See, e.g., RESTATEMENT (SECOND) TORTS: PHYSICAL HARM RESULTING FROM EMOTIONAL DISTURBANCE § 436 cmt. f, illus. 3. The higher threshold of “severe” is imposed in the former context to restrict the potentially open-ended and excessive liability that would otherwise be created by the tort. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 45, cmt. i (2007); see also id. §§ 45–47. This is not a concern in the contracts context where the perpetrator is exposed only to claims by the other contracting party. Similarly, Commonwealth courts that apply a “recognized psychiatric illness”
A number of possible limitations on the recovery of mental distress damages might be characterized as "parasitic" in nature. One could consider restricting liability for mental distress for contractual breach to cases where the breach also constitutes a tort. Arguably, American law has not strayed terribly far from such a principle. However, to the extent that damages for mental distress are restricted to cases involving physical injury, it is difficult to articulate a convincing rationale for excluding liability in all other cases. A rule of this kind might be intended to identify cases of severe mental distress. Of course, a more direct way of doing so would be simply to allow relief only in cases of severe mental distress, regardless of the cause.

Indeed, it is difficult to avoid the conclusion that a rule parasitic on physical injury is simply designed to find a convenient and reasonably predictable basis on which to exclude general liability for mental distress caused by contractual breach. Nor is there any obvious policy reason for restricting compensation for mental distress to cases in which other kinds of compensable injuries have occurred. Moreover, Commonwealth precedent illustrates that there are likely to be numerous cases of severe distress, quite foreseeable at the time of contracting, that are not linked to a physical injury. Such a rule excluding compensation therefore appears to lack a rational foundation. A similar critique can be offered of the English rule that permits recovery in cases where the plaintiff has suffered "physical inconvenience" in addition to mental distress. It is difficult to articulate a policy basis for treating mental distress compensable only where it is parasitic on "physical inconvenience," especially given the rather wide definition that concept has acquired in recent English cases.

Similarly, restriction of mental distress damages to cases where the breach of contract in question is intentional, wanton or reckless,

---

217. See supra notes 168–186 and accompanying text.
218. See supra notes 29–31 and accompanying text.
also appears difficult to defend. Liability in contract is normally strict and not contingent upon a finding of wrongful intent. In contract law, the emphasis is placed on the injury foreseeably sustained rather than on the *mens rea* of the party in breach.\(^{219}\) If the reason for granting damages for mental distress is to give full expression to the expectancy principle, it is difficult to fashion a rationale for doing so only in the context of intentional breach of contract. The plaintiff’s injury in the Absentee Wedding Photographer case is arguably as worthy of compensation as in a case where the photographer’s absence is spiteful, rather than the result of a careless overbooking of appointments or, indeed, of a car accident sustained by the photographer on the way to the wedding.\(^{220}\)

Again, a rule restricting relief to intentional breach appears to arise from a desire to impose a limit on recovery of damages for mental distress. The resulting rule, however, appears unconnected with the objectives for granting such relief. The tour packager should be liable for the mental distress resulting from the Ruined Holiday, whether or not the packager is in some sense personally responsible for the failure of the holiday to live up to its advertised virtues.\(^{221}\) The objective, presumably, is to effect true compensation rather than to punish the defendant for intentional breaches of contract.

The proposal to draw a line between mental distress caused by direct breach of contract and distress that is merely consequential to a breach of contract is also vulnerable to criticism.\(^{222}\) The proposed distinction appears to run parallel to, if not coextensively with, the English rule permitting recovery only where the contract breached is one which has as a major objective the provision of a pleasurable experience, such as a vacation, or the preservation of one’s peace of mind. It may also be coextensive with the requirement that the contract breached must be one that has as an objective the securing of a particular psychological benefit, which the Supreme Court of Canada hinted at in *Fidler*.\(^{223}\)

\(^{219}\) See *supra* notes 1–8 and accompanying text.

\(^{220}\) See *supra* note 10 and accompanying text.

\(^{221}\) See *supra* notes 42–49 and accompanying text.

\(^{222}\) See *supra* note 205 and accompanying text.

Four objections to this requirement may be noted. First, the
distinction does not plainly distinguish between meritorious and
unmeritorious cases. Presumably, the mental distress caused in the
case of the Sunken Cruise Ship, the Incompetent Solicitor, and the
Ruined Holiday is direct and compensable. It is less obvious that
the case of the Grieving Pet Owner falls on the "direct" side of the
line. Is the object of a contract of carriage to transport a pet from
A to B to please the owner by not killing or seriously injuring the
pet? While it is perfectly obvious that the accidental killing of
another's pet is likely to cause severe emotional distress, this is only
to say that the injury is foreseeable but not necessarily that the
avoidance of such distress is an explicit object of the agreement.

Second, the hesitation one might feel over the proper
characterization of the Grieving Pet Owner case suggests that the
distinction between direct and indirect loss is likely a manipulatable
one. One could say that there is an implicit obligation in the contract
of carriage relating to pets that the carrier should perform the
contract in such a way as to avoid causing the mental distress that
predictably would result from the killing or harming of the carried
pet. Accordingly, when the predictable mental distress occurs, one
could characterize the loss as direct. Perhaps it is true, however, that
in many cases—and possibly any case where mental distress
resulting from breach is foreseeable—one could characterize the
contract as one in which there is an implicit obligation not to cause
such foreseeable distress.

A third and related point is that the distinction between direct
and indirect loss appears to be merely a surrogate for the application
of the remoteness test. Losses which are directly caused by breach
may be considered obviously foreseeable, whereas those which are
indirect may not be obviously so. If this is the concern underlying
the direct versus indirect distinction, however, the problem is surely
more easily and plainly addressed by simply applying the remoteness
test itself.

(U.K.).


226. Id.
Fourth, the restriction of liability to direct losses—and similarly, to losses occasioned by breaches of peace of mind contracts—are intended to restrict recovery to cases where the injury is likely to be severe. The Incompetent Undertaker and the Absentee Wedding Photographer would likely cause severe disappointment and distress to a person of ordinary sensibilities. Perhaps it is this factor that renders these cases attractive for relief as a matter of judicial intuition. In this context we are less concerned about the potentially spurious claim. The claim that severe distress has been caused is, in the circumstances, credible. In other words, it may be that the restriction to recovery in the context of this type of contract has become a surrogate for identifying credible claims of severe distress. If so, surely the more direct and better method of doing so is the traditional device of imposing the burden on the plaintiff to establish, on the basis of credible evidence, that severe distress has been foreseeably sustained. The fact that the contract requires the defendant to directly confer a psychological benefit or pleasurable experience may assist the plaintiff in discharging that burden but ought not be a requirement of doing so. Equally important, for example, might be the communication of special circumstances to the defendant at the time of contracting.

Finally, then, it may be considered whether it is sufficient to simply rely upon the standard common law rules relating to causation, mitigation and remoteness in awarding recovery for mental distress caused by breach of contract. In assessing this possibility, it is important to keep in mind the proposition set out above to the effect that mental distress should be considered to be compensable only in cases of severe and unusual distress. Where such distress was caused by the breach of contract, the victim was unable to mitigate the injury by taking reasonable measures and the loss was so foreseeable as to be within the contemplation of the parties at the time of contracting, the foregoing analysis suggests that

---

227. See supra notes 11–15 and accompanying text.

it is difficult to formulate a convincing reason for denying recovery for the mental distress suffered. The Commonwealth and American cases in which such relief is awarded appear to meet these criteria. In the cases where relief seems inappropriate, it appears likely that relief would be precluded by the application of these criteria.

Thus, the case that troubled Lord Justice Staughton—the ship owner who combined a claim for unpaid freight with a claim for mental distress resulting from non-payment—is not one in which recovery will be granted.\textsuperscript{229} The distress is unlikely to be severe or unusual. If it is, the severe overreaction is not likely to be foreseeable and may well be caused by circumstances not disclosed to the defendant. Reliance on these traditional and well understood rules may, therefore, be the most straightforward and satisfactory means for distinguishing between cases where mental distress damages should be compensable and those where it should not be.

A further advantage of simply grounding the relevant analysis on the traditional principles—and the principle of remoteness in particular—is that the significance of a disclosure of one party to another at the time of contract formation, concerning the particular circumstances of the potential severe mental distress of one of the parties, becomes quite clear.

None of the potential limiting principles considered above clearly indicates whether a defendant who has caused such distress by a breach of contract would be liable. Arguably, such a disclosure might persuade an English court that a major object of the agreement is to avoid mental distress of that particular kind. Certainly, there is language in Lord Hutton's judgment in\textit{Farley} that is supportive of an analysis of this kind.\textsuperscript{230} Simple reliance on the remoteness principle, however, would make it clear that the communication of special circumstances relating to mental distress would engage branch two of the rule in\textit{Hadley v. Baxendale}\textsuperscript{231} and expose the contract-breaker to potential liability.

\textsuperscript{229} See Hayes v. James & Charles Dodd, (1990) 2 All E.R. 815, 823 (Eng.).
\textsuperscript{230} See [2001] UKHL at [54].
\textsuperscript{231} See Eisenberg, supra note 8, at 565 (discussing the second branch of the rule regarding foresight based on circumstances actually communicated); Turczinski Estate v. Dupont Heating & Air Conditioning Co., [2004] 191 O.A.C. 350, ¶¶ 21–44 (Can.) (suggesting that special circumstances may include an awareness of the plaintiff’s fragile mental condition).
VII. CONCLUSION

Briefly stated, the foregoing analysis of the limiting mechanisms, developed by common law courts in various jurisdictions for restricting the availability of damages for non-pecuniary loss in the form of mental distress, suggests that each are vulnerable to many criticisms. The principal rationale for granting relief for mental distress is to give full effect to the expectancy principle and not restrict the calculation of damages in contract claims to awards which are designed to place the plaintiff merely in the financial position that he or she would have been in if the contract had been performed. This broader view of the scope of the expectancy principle appears to enjoy fairly widespread support in common law jurisdictions, other than those of the United States.

If one accepts this proposition, it then becomes difficult, though not impossible, to explain why ordinary frustration or disappointment resulting from breach of contract is not compensable. Arguably, such feelings do not in any meaningful sense constitute injuries that require compensation. Further, the existing limitations on the availability for mental distress and damages recognized in the various common law jurisdictions appear to lack a convincing policy rationale. Indeed, in most instances, they appear either as artificial attempts to simply restrict the scope of liability or as proxies for the remoteness principle. A more satisfactory solution to the problem of designing limits on recovery of damages for mental distress in contract cases appears to be achieved by simply relying on the traditional common law principles of causation, mitigation and remoteness to preclude liability in cases where such claims lack merit.