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Damages for Mental Distress and Other Intangible Loss in a Commercial Context

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As a general rule, contracts law does not permit an award of general damages for mental distress or other intangible loss. There are several rationales for this, including: plaintiffs are to bear their disappointment or upset with mental fortitude; without the rule, courts would be awash in litigation since every breach of contract brings with it some degree of emotional distress; without the rule, plaintiffs may fabricate or exaggerate the degree of their upset; and the rule simply reflects the lack of foreseeability of such loss under Hadley v. Baxendale.

Notwithstanding the general rule, courts have awarded mental distress in a variety of circumstances by following one of three strategies to do so: permitting recovery when the contract is non-commercial; permitting recovery when the contract fits within a special or established category of exception to the general rule; and permitting recovery on the basis of foreseeability principles alone.

There are a number of reasons to critique the general rule, particularly in light of the House of Lord's much more expansive approach in Farley v. Skinner, [2001] 3 W.L.R. 899. In short, an under-inclusive approach to this question results in contracts only being partially enforceable – a result contrary to the foundational principles that parties should be held to their bargain. Based on Farley, this paper offers a proposed restatement of the general rule. It also offers a way of clearly distinguishing between aggravated damages, on the one hand, and general damages for mental distress, on the other.

En règle générale, le droit des contrats ne permet pas l'adjudication de dommages-intérêts généraux pour la souffrance morale ou autre préjudice moral. Il y a pour cela plusieurs raisons, notamment : les parties demandereses doivent supporter leur déception ou leurs ennuis avec grandeur d'âme; sans cette règle, les tribunaux seraient inondés de réclamations puisque chaque violation de contrat cause une certaine détresse psychologique; sans cette règle, les parties demandereses pourraient inventer des ennuis ou exagérer leur importance; et la règle ne fait que refléter l'imprévisibilité des pertes, comme le tout a été énoncé dans Hadley v. Baxendale.

Par dérogation à la règle générale, les tribunaux ont accordé des dommages-intérêts pour souffrance morale dans diverses circonstances en adoptant l'une des trois stratégies suivantes : ils ont permis le recouvrement lorsqu'il s'agit d'un contrat non commercial; lorsque le contrat s'inscrit dans une catégorie spéciale ou établit des exceptions à la règle générale; et exclusivement sur la base des principes de prévisibilité.

Il y a de nombreuses raisons pour critiquer la règle générale, en particulier à la lumière de l'interprétation beaucoup plus libérale de la House of Lord dans Farley v. Skinner, [2001] 3 W.L.R. 899. En bref, une interprétation trop limitative de la question a pour résultat que les contrats ne sont que partiellement exécutoires, résultat contraire au principe fondamental que les parties sont tenues de respecter leurs engagements. S'appuyant sur l'arrêt Farley, cet article propose une nouvelle formulation de la règle générale. Il présente en outre une méthode pour établir une distinction claire entre, d'une part, les dommages-intérêts majorés et, d'autre part, les dommages pour souffrance morale.

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Introduction

The general rule in contracts is that a plaintiff is not entitled to general damages for mental distress and other intangibles such as annoyance, humiliation, upset, disappointment, frustration, anguish, or anxiety in the

face of breach. There are a number of reasons why this is so – both practical and theory-driven. First, contract law has historically limited recovery for breach of contract to financial loss only. As the House of Lords recently stated in *Johnson v. Gore Wood & Co.*, “[c]ontract-breaking is treated as an incident of commercial life which players in the game are expected to meet with mental fortitude.”¹ For a distinct but related second reason, courts are wary of opening the floodgates of contractual damages tied to the plaintiff’s emotional suffering.² As Justice Newbury of the British Columbia Court of Appeal has observed, given that in almost every contractual scenario, the innocent party will experience some emotional upset in the face of breach, judicial parameters have been erected to limit successful claims in this area.³ Third, there is a concern over problems of proof and claim inflation. According to David Capper, “[t]his reticence about compensating for intangible losses is sensible also because of the risk of claimants who have suffered no real damages harassing defendants by artificially inflating their damages and alleging all kinds of minor losses

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Much of this article is based on a presentation to the National Judicial Institute’s Annual Civil Law Conference, held May 12-14, 2004 in Vancouver, British Columbia, Canada. For application of some of the research in this paper to the franchise contract, see Shannon Kathleen O’Byrne, “Breach of Good Faith in Performance of the Franchise Contract: Punitive Damages and Damages for Intangibles” (2004) 83 Can. Bar. Rev. 431. For expansion of this research to a Canada-United States comparison, see Ronnie Cohen and Shannon O’Byrne, “Cry Me a River: Recovery of Mental Distress Damages in a Breach of Contract Action – A North American Perspective” (2005) 42 Am. Bus. L.J. 97.

1. *Johnson v. Gore Wood & Co.*, [2001] 2 W.L.R. 72 (H.L.) at 108 [*Johnson*]. As Pollock C.B. observed in *Hamlin v. Great Northern Railway Company* (1865), 1 H. & N. 408 (reprinted at 156 E.R. Ex. 1261) at 1262 [*Hamlin*]: “[e]ach case of this description must be decided with reference to the circumstances peculiar to it; but it may be laid down as a rule, that generally in actions upon contracts no damages can be given which cannot be stated specifically, and that the plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but not damages for the disappointment of mind occasioned by the breach of contract.”

2. See E. Veitch, “Sentimental Damages in Contract” (1978) 16 U.W.O.L.Rev. 227 at 231; Andrew Phang, “The Crumbling Edifice? – The Award of Contractual Damages for Mental Distress” (2003) J.Bus.L. 341 at 350.

3. *Warrington v. Great-West Life Assurance Co.* (1996), 139 D.L.R. (4th) 18 (B.C.C.A.) at para. 15 [*Warrington*], citing English authority such as *Hayes v. James & Charles Dodd*, [1990] 2 All E.R. 815 (C.A.). Accord *Watts v. Morrow*, [1991] 1 W.L.R. 1421 at 1445 [*Watts*], where the court notes that the general rule against recovery for intangible loss is *not* founded on the assumption “that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.” But see discussion, *infra*, note 99 and surrounding text where recovery for mental distress was denied on the basis that it was not reasonably foreseeable.

to which they are largely indifferent.”⁴ Fourth, since many plaintiffs in commercial litigation are corporations, they are not capable of suffering mental distress or aggravation and therefore cannot recover same.⁵ Fifth, damages for mental distress in the *commercial* context are reasonably uncommon due to the remoteness principle of *Hadley v. Baxendale*.⁶

This paper explores, from a common law perspective, the complicated question of when the plaintiff is entitled to mental distress damages in a breach of contract action. Part I begins with some definitions and seeks to distinguish mental distress damages from aggravated damages and punitive damages. This section will also account for those occasions when punitive damages and aggravated damages are awarded in the contractual arena. Part II analyses exceptions to the rule of no recovery for mental distress which are based on three approaches: (a) recovery only where the contract in question is non-commercial; (b) on a related front, recovery only if the contract fits within an established category of exceptions to the general rule; or (c) recovery whenever the remoteness test of *Hadley v. Baxendale* is met. Part III identifies some overarching rules governing recovery for mental distress, regardless of the approach followed. Part IV provides a critique of the general rule. Part V offers a proposed restatement of the general rule. Part VI offers a brief set of conclusions.

I. Definitions and distinctions: punitive damages, aggravated damages, and general damages for mental distress in the contractual arena

1. Punitive or exemplary damages

According to the Supreme Court of Canada in *Whiten v. Pilot Insurance Co.*, punitive damages (also called exemplary damages)⁷ are awarded only where there has been “malicious, oppressive and high-handed misconduct that ‘offends the court’s sense of decency.’”⁸ As summarized in a recent

4. David Capper, “Damages for Distress and Disappointment – the Limits of *Watts v. Morrow*” (2000) 116 L.Q.R. 553 at 553.

5. See, for example, *Pinewood Recording Studios Ltd. v. City Tower Dev. Corp.*, [1998] B.C.J. No. 1977 (C.A.) at para. 72 [*Pinewood Recording Studios*] and cases cited therein. See too *Walker v. CFTO Ltd.* (1987), 37 D.L.R. (4th) 224 (Ont. C.A.) [*Walker*] (a defamation case). *Walker* has been followed in non-defamation cases as well, including *Hide-Away Resort Ltd. v. Van der Wal*, [1999] B.C.J. No. 234 (S.C.). For further discussion of this, see *infra* at footnote 30 and accompanying text.

6. *Hadley v. Baxendale*, [1843-60] All E.R. 461 at 465 [*Hadley*].

7. As Bruce Feldthusen notes, the labels “exemplary” and “punitive” damages are used interchangeably in Canada with “punitive” being the more commonly chosen one. Accordingly, this paper will do likewise. See Bruce Feldthusen, “Punitive Damages in Canada: Hard Choices and High Stakes” (1998) N.Z.L. Rev. 741 at 742.

8. *Whiten v. Pilot Insurance Co.* (2002), 209 D.L.R. (4th) 257, [2002] 1 S.C.R. 595 at para. 36 [*Whiten*].

article in the *Advocates' Quarterly*,⁹ the court in *Whiten* provided a set of principles governing the award of punitive damages as follows:

1. The attempt to limit punitive damages to “categories” does not work and “was rightly rejected in Canada in *Vorvis*.”
2. The general objectives of punitive damages are “punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation.”
3. The main venue for punishment is criminal law so that “punitive damages should be resorted to only in exceptional cases and with restraint.”
4. Merely reciting the “time-honoured pejoratives (‘high-handed’, ‘oppressive’, ‘vindictive’, etc.)” does not provide adequate guidance to judges and juries setting quantum.
5. Punitive damages must be awarded rationally. The award must further at least one objective of the law of punitive damages and at the lowest amount that would serve that purpose (“because any higher award would be irrational”).
6. Wrongdoers should be disgorged of profits via punitive damages where compensatory damages would not provide adequate deterrence for “outrageous disregard of the legal or equitable rights of others.”
7. Courts should not engage in a mechanical or formulaic approach – such as a fixed cap – to punitive damages as this does not provide sufficient flexibility. As Justice Binnie admonished: the “proper focus is not on the plaintiff’s loss but on the defendant’s misconduct.”
8. Quantum must be directly tied to proportionality. According to the court, the overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation).
9. Juries should receive considerable guidance from the trial judge, including being told “in some detail” about the function of punitive damages and the factors to assess.

9. See Shannon Kathleen O’Byrne and Evaristus Oshionebo, “Punitive Damages and the Requirement for an Independent Actionable Wrong: *Whiten v. Pilot Insurance Co.*” (2002) 25 *Advocates’ Q.* 496 at 499-501. (footnotes omitted)

10. Punitive damages are not at large and for this reason, appellate courts are entitled to intervene "if the award exceeds the outer boundaries of a rational and measured response to the facts of the case."¹⁰

In addition to establishing that the defendant conducted itself outrageously, the plaintiff must also show that the defendant has committed an independent actionable wrong. Put another way, the defendant must have committed a wrong separate and distinct from the breach being sued upon.¹¹ This independent actionable wrong can be a tort or a breach of contract though the latter circumstance would be admittedly rare.¹²

As for the appeal in *Whiten*, the Supreme Court of Canada affirmed a jury award of \$1 million in punitive damages because the insurer wrongfully and maliciously denied cover under a fire insurance policy, alleging arson when all evidence pointed to the fire being accidental. The breach of contract sued upon was the insurer's refusal to pay out on the policy. The separate actionable wrong was in the insurer's failure to handle the claim according to the standard of good faith. The malicious conduct was in the insurer's unfounded allegation of arson.

More recently, in *Triple 3 Holdings Inc. v. Jan* the court awarded the franchisee \$350,000 in punitive damages due to the defendants' stunningly outrageous behaviour which included: physically pushing around one of the franchisees; demanding rental arrears which did not exist; locking the franchisee out of the premises without justification; and proceeding with sale of the franchise despite the plaintiffs' pending application for

10. *Whiten*, *supra* note 8 at paras. 67-76. There have been a number of other case comments on the *Whiten*. See for example: Stéphane Beaulac, "Les Dommages-intérêts punitifs depuis l'affaire *Whiten* et les leçons à en tirer pour le droit civil québécois" (2002) 36 R.J.T. 637; David Debenham, "Coming armed with Spiers: insuring good faith processing of policy claims in the post-*Whiten* age" (2003) 27 *Advocates' Q.* 5; Craig E. Jones and John C. Kleefeld, "*Whiten v. Pilot*: safe harbour for punitive contract damages?" (2002) 60 *Advocate* (Van.) 507; G.E. (Gerry) Kruk, "The Supreme Court in *Whiten v. Pilot Insurance*: judicial rationality or supreme outrage?" (2002) 35 C.C.L.I. (3d) 112; Rudy V. Buller, "*Whiten v. Pilot*: Controlling jury awards of punitive damages" (2003) 36 U.B.C. L. Rev. 357; Kathryn L. Seely, "Punitive damage awards in Canada: enlarging in scope and size" (2002) *Ann. Rev. Civil Lit.* 147; Stéphane Beaulac, "A Comparative look at punitive damages in Canada" (2002) 17 *Sup. Ct. L. Rev.* (2d) 351.

11. *Whiten*, *supra* note 8 at para. 78. I have argued elsewhere that the requirement for a separate actionable wrong is based on a misreading of *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085. See Shannon O'Byrne and Evaristus Oshionebo, "Punitive Damages and the Requirement of an Independent Actionable Wrong," *supra* note 9.

12. Per Justice Binnie in *Whiten*, *supra* note 8 at para. 81, citing *Royal Bank of Canada v. W. Got & Associates Electric Ltd.*, [1999] 3 S.C.R. 408 [*Got*] at para. 26, as well as *Vorvis*, *supra* note 11.

relief against forfeiture. As Justice Taliano stated: “[c]ommercial activities cannot be conducted like piracy on the high seas.”¹³

Other examples of when punitive damages are awarded in a commercial context include oppression in corporate law,¹⁴ wrongful receiverships,¹⁵

13. *Triple 3 Holdings Inc. v. Jan*, (2004), 48 B.L.R. (3d) 296 (Ont. S.C.J.) at para. 39 [*Triple 3 Holdings Inc.*]. For another example of a court awarding punitive damages in a franchise context, see *Katotikidis v. Mr. Submarine Ltd.* (2002), 26 B.L.R. (3d) 140 and (2002), 29 B.L.R. (3d) 258 (Ont. S.C.J.) [*Mr. Sub.*]. The Ontario Superior Court awarded \$10,000 in punitive damages against the franchisor because it had “betrayed the trust that epitomizes the relationship between a franchisor and franchisee” ((2002), 26 B.L.R. (3d) 140 at para. 75), including abandoning its franchisee at a failing outlet.

14. The law in this area is somewhat unsettled. See, for example, *Waxman v. Waxman* (2002), 25 B.L.R. (3d) 1 (Ont. S.C.J.), varied on other, very minor grounds at (2004), 44 B.L.R. (3d) 165 (C.A.), leave to appeal refused [2004] S.C.C. No. 291. According to Justice Sanderson at trial, punitive damages “may also be awarded under the oppression remedy” See too Justice Dिल्s in *Beck v. Dumais* (2003), 33 B.L.R. (3d) 118 (Ont. Sup. Ct. Jus.) at para. 134 who states: “[p]unitive damages are awarded in the discretion of the court in cases where the conduct of the defendant is so egregious that normal damages will not adequately express society’s disapproval. A large component of the damages in the instant case is as a result of a finding of oppression which requires conduct of almost the same nature. This is not one of those cases where an additional sanction is necessary.” Finally, see *White v. True North Spring Ltd.* (2002), 219 Nfld. & P.E.I.R. 1 (S.C.(T.D)) at para. 66, wherein the trial judge notes that the oppression remedy is corrective, not punitive.

15. *Got*, *supra* note 12, wherein the Supreme Court of Canada affirmed the lower court’s award of \$100,000 punitive damages in a case where the bank appointed a receiver on insufficient notice. From a punitive perspective, of particular concern was that the bank tendered a misleading affidavit to secure the receivership order, including the suggestion that the bank had reason to believe that Got would move inventory. Affirming the award of punitive damages, the Supreme Court of Canada stated at para. 29: “[v]iewing the trial judge’s concerns cumulatively, and giving due weight to the advantage he had to assess the need for deterrence and condemnation of the abuse of the court’s process, as well as the need to maintain proper business practices, we are not prepared to interfere with the award for exemplary damages in this case.”

Note that in *Got*, the Supreme Court of Canada took the very unusual step of permitting punitive damages even absent an independent actionable wrong. For discussion of this point, see Jamie Edelman, “Exemplary Damages for Breach of Contract” (2001) 117 L.Q.R. 539. See too *Ronald Elwyn Lister Ltd v. Dayton Tire Canada Ltd* (1985), 52 O.R. (2d) 88 (C.A.) where the franchisee’s punitive damages award for a wrongful receivership was reduced to \$20,000.

abuse of process,¹⁶ conspiracy,¹⁷ conversion,¹⁸ inducing breach of contract,¹⁹ and fraud (such as representing goods to be new when they are in fact used).²⁰ Punitive damages are also a regular feature of class actions.²¹

These examples notwithstanding, the Supreme Court of Canada has confirmed in *Royal Bank v. Got Electric*, that an award of punitive damages in a commercial dispute “will remain an extraordinary remedy.”²² However – to name a few examples – where one party owes the other a fiduciary duty²³ or a duty of good faith pursuant to a franchise agreement (as in *Triple 3 Holdings*) or pursuant to an insurance contract (as in *Whiten*), the door is wide open for punitives. Indeed, the fact that such duties are owed to begin with signals that the plaintiff is vulnerable to harm, on the one hand, and the defendant has the opportunity to cause that harm, on the other.

16. See *Got*, *supra* note 12.

17. In *Claiborne Industries Ltd. v. National Bank of Canada*, (1989), 59 D.L.R. (4th) 533 (Ont. C.A.), punitive damages were awarded against the individual defendants (in the amounts of \$50,000 and \$200,000) and the bank. The Court of Appeal found that the Bank conspired with the individual defendants and knowingly assisted one of them in his illegal conduct. According to the court, “[t]his conduct cannot be tolerated by the Court. It clearly falls within the type of unconscionable conduct said to deserve punishment...; it requires an award which will stand as an example to others and at the same time assure that the Bank does not unduly profit from its investment” at 565-566. On this footing, the Bank was ordered to pay punitive damages of 70% of all the other awards made against it.

18. In *Predovich v. Armstrong* (1997), 74 C.P.R. (3d) 351 (Ont. Gen. Div.), the defendant wrongfully converted the plaintiff’s property. In response, the court awarded, *inter alia*, punitive or exemplary damages of \$500,000.

19. In *Kaur v. Moore Estate*, [2003] O.J. No. 1588, Justice Ferguson awarded punitive damages of \$10,000 against the estate of the vendor, and \$25,000 against the vendor’s son-in-law. The estate was liable for breach of contract to sell real estate, while the son-in-law was liable for conspiracy and inducing breach of contract for encouraging his father-in-law, Moore, to groundlessly rescind the contract in question.

20. In *473759 Alta. Ltd. v. Heidelberg Can. Graphic Equipment*, [1995] 5 W.W.R. 214 (Alta. Q.B.) \$7,500 in punitive damages was awarded because the defendant fraudulently sold used equipment as new. See too *Brown & Root Services Corp. v. Aerotech Herman Nelson Inc.*, [2003] 10 W.W.R. 339 (Man. Q.B.) where the defendant sold military surplus heaters as being new. Per Justice McKelvey at para. 119: “[i]n this regard, I allow B&R \$50,000.00 punitive damages as ... ‘it is completely appropriate that the thief be punished.’”

21. See, for example, *Peppiat v. Nicol* (2001), 148 O.A.C. 105 (C.A.) where an award of punitive damages for breach of fiduciary duty in a class action law suit was affirmed; *Alie v. Bertrand & Frere Construction Co.* (2000), 11 C.L.R. (3d) 19 (Ont. Sup. Ct. Jus.) (where the claim for punitive damages was dismissed), partially varied on other grounds, (2003), 26 C.L.R. (3d) 78 (Ont. C.A.). See too cases involving pre-trial matters under class action legislation where punitives are sought in the statement of claim, including: *Wilson v. Servier Canada Inc.*, (2000), 50 O.R. 21 (Sup. Ct.) (allegedly defective diet pills); and *Fakhri v. Alfalfa’s Canada Inc. (c.o.b. Capers Community Market)* (2003), 26 B.C.L.R. (4th) 152 (S.C.) (customers infected by hepatitis due to sickness of defendant’s employee). A recent example of a class action seeking punitive damages is *Caputo v. Imperial Tobacco Ltd.*, (2004), 42 B.L.R. (3d) 276 (Ont. Sup. Ct. Jus.) where the test for certification was not met.

22. *Got*, *supra* note 12 at para. 29.

23. *Hardman Group Ltd. v. Alexander* (2003), 215 N.S.R. (2d) 280 (S.C.) and *692331 Ontario Ltd. v. Garay* (1997), 36 B.L.R. (2d) 231 (Ont. Gen. Div.), appeal dismissed [1999] O.J. No. 4008 (C.A.).

2. *Aggravated damage*

When a court awards aggravated damages, it is not punishing the defendant but compensating the plaintiff for “the additional harm caused to the plaintiff’s feelings by reprehensible or outrageous conduct on the part of the defendant.”²⁴ According to Justice Binnie (in dissent) in *Whiten*,

Aggravated damages served the traditional corrective purpose of the common law: to make the plaintiff whole for injuries to interests that are not properly compensable by ordinary damages. Punitive damages target not loss, but conduct.²⁵

Aggravated damages assess non-pecuniary loss and determine whether, *at the time of breach*, the *manner*²⁶ of the defendant’s breach “aggravated” the damages suffered by the plaintiff. As the British Columbia Court of Appeal observes in *Huff v. Price*:

[A]ggravated damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. They are designed to compensate the plaintiff, and they are measured by the plaintiff’s suffering. Such intangible elements as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of the defendant; that are of the type that the defendant should reasonably have foreseen in tort cases or had in contemplation in contract cases; that cannot be said to be fully compensated for in an award for pecuniary losses; and that are sufficiently significant in depth, or duration, or both, that they represent a significant influence on the plaintiff’s life, can properly be the basis for the making of an award for non-pecuniary losses or for the augmentation of such an award. An award of that kind is frequently referred to as aggravated damages. It is, of course, not the damages that are aggravated but the injury. *The damage award is for aggravation of the injury by the defendant’s high-handed conduct* [emphasis added].²⁷

In addition to showing highhanded conduct, the plaintiff must establish that the defendant committed an independent actionable wrong.²⁸ Where a contractual duty of good faith is owed, demonstrating an independent

24. *Whiten*, *supra* note 8 at para. 116. According to S. Waddams, aggravated damages attribute legal significance to “intangible injuries, such as distress and humiliation that may have been caused by the defendant’s insulting behaviour” *The Law of Damages* (Toronto: Canada Law Book, 1983) at 562-63, quoted with approval by the Supreme Court of Canada in *Vorvis*, *supra* note 11 at para. 16. This same passage is found in the 3rd edition as well (Toronto: Canada Law Book, 1997) at 483.

25. *Whiten*, *ibid.* at para. 157.

26. Jamie Cassels, *Remedies: The Law of Damages* (Toronto: Irwin Law, 2000) at 195.

27. *Huff v. Price* (1990), 51 B.C.L.R. (2d) 282 at para. 51 (C.A.) [*Huff*].

28. Per *Whiten*, *supra* note 8 at para. 78. For a recent statement from the Ontario Court of Appeal to this effect, see *Lyons v. Canada Life Assurance Co.* (2002), 42 C.C.L.I. (3d) 164 (Ont. C.A.) at para. 11 [*Lyons*].

actionable wrong is not necessarily onerous given that the Supreme Court of Canada in *Whiten* has confirmed that a good faith obligation is distinct from the obligation to honour the contract.²⁹

Aggravated damages are rare in the commercial arena if only for one simple reason. The bulk of the case law suggests that only individual plaintiffs – as opposed to corporate ones – are entitled to secure such damages. As Justice Edwards notes in *Sunwolf Holdings Ltd. v. Rivers and Oceans Unlimited Expeditions Inc.*:

Since there were no employees of Sunwolf [the plaintiff] present when McCutcheon took the equipment none can be said to have experienced “pain, anguish, grief, humiliation, wounded pride” etc. which the Court of Appeal indicated were factors which might give rise to an award of aggravated damages. Even if Sunwolf employees had been so traumatized they are not plaintiffs. I am unaware of any principle which permits a corporate plaintiff to obtain aggravated damages for indignities its officers or employees suffer as a result of the conduct of a defendant.³⁰

3. *General damages for mental distress*

General damages for mental distress are similar to aggravated damages in that both seek to compensate for non-pecuniary loss rather than punish the defendant. Furthermore, courts sometimes tend to “blend” these terms.³¹ However, there is a good argument that these two forms of damages are distinct because they measure the defendant’s conduct from different perspectives and at different times.³² One head of damages (i.e., aggravated damages) assesses the conduct of defendant *at the time of breach* and compensates the plaintiff for the additional emotional harm caused by the defendant’s outrageous conduct. Aggravated damages also require that

29. *Whiten*, *supra* note 8. See too Craig Brown et al., *Insurance Law in Canada* looseleaf (Scarborough: Thomson Canada Ltd., 2002) at 10-26.

30. *Sunwolf Holdings Ltd. v. Rivers and Oceans Unlimited Expeditions Inc.*, [1998] B.C.J. No. 2881, [1998] G.S.T.C. 127 at para. 42 (S.C.). See too the cases cited in footnote 5. Note that the court in *Corporate Classic Caterers v. Dynapro Systems Inc.* (1997), 33 C.C.E.L. (2d) 58; [1997] B.C.J. No. 2764 observed at para. 55 that “While it is possible that aggravated damages can be awarded to a corporate plaintiff, it is most common to see them awarded to a personal plaintiff in actions such as wrongful dismissal.”

31. Bruce Feldthusen, “Contract – Punitive Damages – Aggravated Damages– Damages for Mental Distress in Contract: *Vorvis v. Insurance Corporation of British Columbia*” (1990) 69 Can. Bar Rev. 169 at 172.

32. For discussion within the context of franchise law, see Shannon O’Byrne, “Breach of Good Faith in Performance of the Franchise Contract: Punitive Damages and Damages for Intangibles” (2004) 83 Can. Bar Rev. 431. See too *Franchising: Latest Legal and Business Strategies* (Toronto: Insight Information Co., 2003).

the defendant commit an independent actionable wrong.³³ The other head of damages (i.e., general damages for mental distress) assesses the matter from the perspective of the parties *at the time of contract*. According to Harvin Pitch and Ronald Synder, general damages for mental distress will only be awarded when such damages pass the test for remoteness stated in *Hadley v. Baxendale*.³⁴ That is, in certain contracts, it is reasonably foreseeable that should one party breach, the other party will suffer mental distress. In this way, general damages for mental distress flow from the *fact* of breach as opposed to outrageous conduct *at the time* of breach. By way of contrast, aggravated damages are appropriate *whether or not* mental distress arising from breach was in the parties' reasonable contemplation at time of contract.³⁵ Remoteness would presumably be assessed taking into account the circumstances present on date of breach only.³⁶ In short, aggravated damages compensate for humiliation and distress derived from the "mode of and motive for the defendant's conduct,"³⁷ while general damages for mental distress are derived from the breach itself. These distinctions are subtle but meaningful.

The approach suggested here – namely, insisting on the conceptual difference between aggravated damages and general damages for mental distress – is not free from controversy. As the British Columbia Court of Appeal notes in *Warrington v. Great-West Life Assurance Co.*:

[i]n Canada, it is problematic to define the relationship between damages for mental distress and so-called "aggravated damages", and to differentiate between those and punitive damages. This difficulty seems to be the result of the intertwining of punitive and aggravated damages in various judicial and academic pronouncements, even after the two were authoritatively severed -- in England by the House of Lords in *Rookes v. Barnard* [1964] A.C. 1129 and in Canada by the Supreme Court in *Vorvis, supra*. Speaking for the majority in *Vorvis*, McIntyre, J. first of all equated damages for mental distress with aggravated damages: see the reference at p. 1092 to "damages for mental distress, properly characterized as aggravated damages". This pronouncement has sometimes been overlooked in subsequent cases....³⁸

33. Per *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at para. 73. Note in this paragraph that the reference to mental distress appears to be treated as synonymous with aggravated damages.

34. Harvin Pitch and Ronald Synder, *Damages for Breach of Contract*, 2d ed., loose-leaf (Scarborough: Thomson-Carswell, 1989) at para. 4.3(a).

35. *Ibid.*

36. This is how aggravated damages are assessed according to employment law, for example. See Geoffrey England and Roderick Wood, updating authors, *Employment Law in Canada*, 3d ed., vol. 2, loose-leaf (Toronto: Butterworths, 1988) at para. 16.51.

37. Bruce Feldthusen and Neil Vidmar, "Recent Developments in the Canadian Law of Punitive Damages" (1990) 16 Can. Bus. L.J. 241 at 256.

38. *Warrington, supra* note 3 at para. 16.

As I have argued elsewhere, while one can understand the appellate court's desire to follow the terminology espoused by the Supreme Court of Canada on point, the move to collapse mental distress into aggravated damages is perhaps problematic since it uses the same term ("aggravated damages") for two different phenomena.³⁹ In *Warrington*, for example, the plaintiff was given aggravated damages for mental distress *not* because he had established a separate actionable wrong but because a disability insurance policy, in the court's words, "is one of the few contracts in which damages for mental distress are recoverable when they are proven to result from the breach of contract."⁴⁰ This suggests that the plaintiff is receiving non-pecuniary damages *not* because of abusive conduct on breach sounding in aggravated damages but because – given the kind of contract at issue – mental distress was a reasonably foreseeable consequence of breach. Put another way, it was the *fact* of breach (which founds general damages for mental distress) not the *manner* of breach (which founds aggravated damages) on which the decision focussed.

In order to keep the distinctions clear between these two forms of non-pecuniary loss, this paper will use "aggravated damages" to refer to distress which arises due to the defendant's behaviour on breach and which must be accompanied by an independent actionable wrong. It will refer to general damages for mental distress as damages which are recoverable because, at the time of contract, they were a reasonably foreseeable consequence of breach. Whether general damages for mental distress has requirements beyond reasonable foreseeability is the subject of the next section of this paper.

II. *Exceptions to the rule of no recovery for mental distress*

Courts have taken three paths to compensate the deserving plaintiff for mental distress flowing from the defendant's breach, notwithstanding the general rule against recovery: determine whether the contract is commercial or non-commercial, permitting recovery only in the latter case; on a related front, determine whether the contract fits within a category of exceptions to the general rule such that mental distress damages would be recoverable; or, thirdly, apply the simple principles of foreseeability without preliminary regard to the type of contract or its classification. These strategies have not yet been reconciled by the courts and therefore make this area of law problematic to summarize.

39. *Supra* note 32.

40. *Warrington*, *supra* note 3 at para. 22.

1. *Recovery when the contract is non-commercial*

One approach to the question of recovery for non-pecuniary loss is to ask whether the contract in question is commercial (in which case there can be no recovery) or non-commercial (in which case there might be).⁴¹ According to Justice Deyell in *Taylor v. Gill*, the rule against recovery for non-pecuniary loss in a *commercial* contract seems to:

originate with McGregor, *McGregor on Damages*, 15th ed. (London: Sweet & Maxwell, 1988) at 54, where the learned author states, consistently with previous editions:

The reason for the general rule is that contracts normally concern commercial matters and that mental suffering on breach is not in the contemplation of the parties as part of the business risk of the transaction. If however the contract is not primarily a commercial one, in the sense that it affects not the plaintiff's business interests but his personal, social and family interests, the door should not be closed to awarding damages for mental suffering if the court thinks that in the particular circumstances the parties to the contract had such damage in their contemplation.⁴²

This distinction between a commercial and a non-commercial contract, however, is arguably a false one. The following analysis of Justice Deyell is quoted at length for its clarity:

Consider an example. A consumer purchases a motor vehicle. It is warranted to be trouble-free, and this is the feature that compels the purchaser to enter the contract for purchase and sale. The cost is more than the consumer can afford unless he attributes the money he had planned to use for repairs toward the purchase price. The salesperson encourages him to do so. He does so, confident that the car will be trouble-free. The car requires repairs daily. The purchaser suffers great emotional distress as a result (assume that the mental distress is not a direct result of any economic factors, but solely attributable to the breach of contract). Should we close the door to a claim for mental distress merely because he purchased the car primarily for employment purposes, a commercial use, rather than for personal use, a non-commercial use. That is, the commercial or non-commercial nature of the contract is not always the deciding factor. On the other hand, where a large corporation buys a motor vehicle which is not sound, it is difficult to say that the corporation suffered from mental distress as a result of the breach of contract. The issue is one of reasonable contemplation and no more. Is

41. See, for example, *Brown v. Waterloo Regional Board of Commissioners of Police* (1983), 43 O.R. (2d) 113 (C.A.) at 118 wherein Weatherston J.A. states: "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."

42. *Taylor v. Gill*, [1991] 3 W.W.R. 727 (Alta.Q.B.) at 745 [*Gill*].

it reasonable to contemplate that the corporation would suffer mental distress as a result of any breach of contract? This must be answered in the negative as corporations are incapable of experiencing anguish or any other sentiment. On the other hand, could it reasonably be contemplated that a person entering a contract to purchase a motor vehicle will suffer mental anguish as a result of a series of disappointments relating to a breach of the contract? I suggest that it can....

Similarly, in the case of real estate contracts which are breached by the proposed purchaser, the character of the vendor would have to be considered in order to determine whether the door is open for a claim of mental suffering. Where the vendor is selling his only home, and the breach of contract in fact causes mental distress, damages for mental distress can be argued. Such a claim may be less credible where the vendor buys and sells a home every few months, making profit as he goes. Clearly the vendor in such a case has put his mind to the risk of having a real estate transaction fall apart. The vendor takes a business risk. The claim would be less credible where a bank is selling homes which were taken in foreclosures. Would one seriously contemplate that the bank or the person who sells a home every few months would suffer emotional distress as a result of the aborted real estate transaction? Probably not. However, it must be emphasized that this is not based upon whether the transaction could be characterized as "commercial" or not.⁴³

Dispensing with the distinction between commercial and non-commercial is probably helpful for two reasons. First, as the court in the above passage demonstrates, the distinction breaks down under scrutiny.⁴⁴ Second, even assuming the distinction has some utility, it does not account for all the current kinds of contracts in which courts *have* awarded mental distress damages including: certain kinds of insurance contracts; employment contracts; and wrongful receiverships. That is, the latter are commercial contracts but ones for which mental distress damages were nonetheless awarded.

A closely related approach to classifying the contract as commercial or non-commercial, is to determine whether the contract in question fits within an established category of exceptions to the general rule. Such an approach is the subject of the next section.

43. *Ibid.* at 745-747.

44. Others have observed the difficulty in distinguishing the commercial from the non-commercial, including Elizabeth MacDonald, "Contractual Damages for Mental Distress" (1994) 7 J. Contracts Law 134 at 153 and Andrew Phang, *supra* note 2 at 353.

2. Recovery based on contract fitting within an established category of exceptions to the general rule

Even the earliest cases which articulate the rule against recovery for mental distress recognize exceptions. In the 1865 decision of *Hamlin*, for example, the court acknowledged that breach of contract to marry is an exception to the general rule and accordingly, “injury to the feelings of the party may be taken into consideration.”⁴⁵ This is because the contract has a personal quality to it, or, in the words of counsel for the plaintiff, “a contract affecting the person.”⁴⁶ Other established exceptions included mental distress consequent on physical inconvenience⁴⁷; actions against a banker for wrongfully refusing to honour a cheque⁴⁸; and contracts where, in the words of Lord Bingham in *Watts v. Morrow*:

the *very object* of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation.... If the law did not cater for this exceptional category of case it would be defective...⁴⁹

Beyond this, it is relevant to note that one of the law lords in *Farley v. Skinner*⁵⁰ has functionally created a new exception to the general rule. According to Lord Steyn, mental distress should be recoverable not only when peace of mind is the *very object* of the contract, as noted by Lord Bingham in *Watts* quoted above, but also when peace of mind is simply an *important* part of the contract.⁵¹ A summary of the case follows because it illustrates an increasing judicial willingness in England’s highest court to enforce the non-pecuniary content of a contract.

In *Farley*, the plaintiff was interested in purchasing a countryside retirement home and therefore hired a surveyor to determine, *inter alia*, whether the property was affected by aircraft noise. Unfortunately, the surveyor conducted himself negligently and in breach of contract when

45. *Supra* note 1 at 1262.

46. *Ibid.*

47. *Hobbs v. London & Southwestern Railway* (1875), 10 L.R. Q.B. 111 [*Hobbs*]. Per Mellor J at 122: “for the mere inconvenience, such as 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” [emphasis added].

48. *Rolin v. Steward* (1854), 14 C.B. 595. As Jamie Cassels points out in *Remedies: The Law of Damages*, *supra* note 26 at 204, however, recovery in such a case could also be justified as pecuniary loss since there is injury to the plaintiff’s business or trade.

49. *Watts*, *supra* note 3 at 1445. *Watts* has been followed in Canada, including by the Supreme Court of Canada which stated in *Wallace*, *supra* note 33 at para. 73, that in the ordinary course, mental distress will only be awarded where “peace of mind is the very matter contracted for.” See too *Turczinski v. Dupont Heating & Air Conditioning*, (2004), 246 D.L.R. (4th) 95 at para. 26, leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 581.

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

51. *Ibid.* at para. 24. For discussion of this, see Andrew Bowen, “*Watts v. Morrow* and the Consumer Surplus: *Farley v. Skinner*” [2003] S.L.T. 1.

he advised the plaintiff that there was no significant aircraft noise. Upon purchasing the home, the plaintiff determined that the property was very noisy due to the nearby airport, particularly because the property was near a navigation beacon.

The House of Lords restored the trial judge's award of general damages for mental distress, with four of the five judges offering separate reasons for that outcome.⁵² Building on *Watts*, Lord Steyn determined that loss of intangibles (such as pleasure, relaxation or peace of mind) are recoverable not just when they are the very object of the contract. It is sufficient if they are a "major or important object of the contract."⁵³ Put another way, the contract at bar fell within the "very object of the contract" exception when an important part of the contract related to pleasure, relaxation or peace of mind.⁵⁴

Lord Steyn's decision was particularly influenced by David Capper's analysis, as follows:

A ruling that intangible interests only qualify for legal protection where they are the 'very object of the contract' [per *Watts*] is tantamount to a ruling that contracts where these interest 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...⁵⁵

Farley is a tremendously important development in the English common law because the House of Lords scrutinized *and enforced* all the promises that were contained in the contract at bar, not just some of them. First and foremost, the defendant's contract was to provide survey services in relation to the residential property, but the contract contained more than just that. Part of what the surveyor promised was an intangible interest – in this case peace of mind that the property in question was suitable to the plaintiff's aesthetic or personal requirements. When that promise was

52. While the other law lords offered separate judgments, all agreed that the case fell within an exception to the general rule such that mental distress damages were recoverable. See Bowen, *ibid.* And as Andrew Bowen also remarks, at 6: "A close examination of all four speeches in *Farley* can make your head spin.....[T]he interplay between the different judicial views could soak up days of debate on the relevancy of any particular claim."

53. *Farley*, *supra* note 50 at para. 24. Note *Farley* has already been noticed, *inter alia*, by the British Columbia Court of Appeal in *Wharton v. Tom Harris Chevrolet Oldsmobile Cadillac Ltd.*, [2002] B.C.J. No. 233, 2002 B.C.C.A. 78 [*Wharton*]. (discussed *infra* at footnote 74 and surrounding text) and by the Ontario Court of Appeal in *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (C.A.) [*Prinzo*].

54. *Farley*, *supra* note 50 at para. 18

55. Lord Steyn, *ibid.* at para. 24, quoting David Capper, "Damages for Distress and Disappointment – The Limits of *Watts v. Morrow*," *supra* note 4 at 556.

breached, and the plaintiff suffered mental distress as a foreseeable result, there is every argument that the plaintiff is entitled to some recovery. Put another way, the defendant made significant, non-pecuniary promises. How can he be taken by surprise when the plaintiff suffers emotional distress when there is a failure to deliver on those promises?

In restoring the trial judge's award for "discomfort" in the amount of £10,000, Lord Steyn did warn that such a sum was on the higher end of what would be appropriate and that awards in this area should be "restrained and modest."⁵⁶

Andrew Bowen is correct to note that Lord Steyn's judgment in *Farley* amounts to a "significant redefining of the exceptional category" articulated in *Watts*, and "gives scope for many more claims which, pre-*Farley*, would have been viewed as insufficiently central to the contract."⁵⁷ Interestingly, however, Lord Steyn couched his analysis in very traditional language, insisting that "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."⁵⁸

What follows is a discussion of the special exceptions to the rule of no recovery for mental distress. It will be seen that through these exceptions, courts refuse to apply the general rule in a blanket fashion because to do so would produce an injustice.

a. *Established categories or exceptions to the general rule*

vacations

One of the most important and well-known decisions in the entire area of recovery for mental distress is *Jarvis v. Swans Tours Ltd.*,⁵⁹ wherein Lord Denning permitted a sorely disappointed vacationer to recover general damages for mental distress. In *Jarvis*, the plaintiff booked his annual holiday with the defendants but the vacation delivered fell well short of what was promised. To set the stage for recovery of mental distress damages, Lord Denning outlined all the problems with the vacation, both large and small.

While acknowledging the general rule against recovery for mental distress set forth in *Hamlin*, Lord Denning also stated that such limitations were out of date and that in the proper case, mental distress damages were

56. *Farley*, *supra* note 50 at para. 28.

57. Andrew Bowen, *supra* note 51 at 4.

58. *Farley*, *supra* note 50 at para. 16.

59. *Jarvis v. Swans Tours Ltd.*, [1973] 2 Q.B. 233 (C.A.) [*Jarvis*].

recoverable. Any contract to provide entertainment and enjoyment would qualify and accordingly, he awarded the plaintiff £125.

Numerous Canadian cases have followed suit, permitting mental distress damages to the disappointed vacationer.⁶⁰ Additionally, in an important decision from Australia, the High Court of Justice in *Baltic Shipping v. Dillon* affirmed the plaintiff's \$5,000 award for mental distress. Here, the plaintiff had been a passenger on a cruise ship which sank on the tenth day of a fourteen day vacation. Not only did she receive general damages for mental distress, she also received, *inter alia*, additional damages for the "emotional scars" and "psychological trauma" endured.⁶¹

weddings

In the leading Scottish decision of *Diesen v. Samson*, the plaintiff bride sought general damages for mental distress because the photographer forgot to attend her wedding and take the photographs for which she had contracted. According to the court, the contract fell into an exceptional category permitting recovery because it was "exclusively concerned with the pursuers personal, social, and family interests and with her feelings.... What both the parties obviously had in their contemplation was that the pursuer would be enable to enjoy such pleasure [from the photographs] in

60. In *Fenton v. Sand and Sea Travel Ltd.* (1992), 134 A.R. 317 (Prov. Ct.), the court awarded \$1,000 for distress and disappointment when the defendant failed to provide facilities that would accommodate scooters; in *Recchia v. P. Lawson Travel*, [1990] O.J. No. 2532 (Gen. Div.), the court awarded \$750 for mental distress, physical illness and frustration because the resort did not have the amenities as promised; in *Smith v. Eaton Travel Ltd.*, [1982] S.J. No. 45 (Q.B.), the court awarded \$1,000 for mental distress, inconvenience, upset, disappointment and frustration because the trip had been a "disaster" due to the defendant's breach; in *Merchant v. Sunquest Vacations Ltd.*, [1990] O.J. No. 2531 (Gen. Div.), the plaintiff received \$1,500 for loss of enjoyment of two days of the vacation and resulting anxiety when the travel agent failed to communicate the change in carrier and flight time; in *Pitzel v. Saskatchewan Motor Club Travel Agency Ltd.*, [1986] S.J. No. 105 (C.A.), the court of appeal reduced the plaintiff's damages for mental distress for a failed vacation from \$5,000 to \$3,000; in *Bratty v. Lloyds World Travel Service of Canada Ltd.*, [1984] B.C.J. No. 1569 (C.A.), the plaintiff received \$3,000 damages for mental distress because, though told by the defendant that he did not need a visa to travel to Czechoslovakia, it turned out that one was required. Upon arriving in Czechoslovakia, he was placed under armed guard. See too *Cameron and Cameron v. Maritime Travel (Halifax) Ltd.*, *Skylark Holidays Ltd. and Flinn* (1983), 58 N.S.R. (2d) 379 (S.C.(T.D.)); *Litner v. Delta Charters Inc.*, [1997] B.C.J. No. 908 (S.C.); *Snucins v. Conquest Tours (Toronto) Ltd.* (1990), 74 O.R. (2d) 781 (Div. Ct.); *Keks v. Esquire Pleasure Tours Ltd. (c.o.b. Pleasure Tours (Canada) Ltd.)*, [1974] 3 W.W.R. 406 (Man. Co. Ct.); and *Sokolosky v. Canada 3000 Airlines Ltd. (c.o.b. Canada 3000 Holidays)*, [2002] O.J. No. 3085 (Sup. Ct.).

61. *Baltic Shipping Co. v. Dillon (The Mikhail Lermontov)* (1993), 176 C.L.R. 344 at 373 (H.C.A.) [*Baltic Shipping*]. For academic commentary on this case, see, for example: C.J.F. Kidd, "The Significance of the High Court Decision in *Baltic Shipping Company v. Dillon*" (1994) 18 U. Queensland L. J. 112; D. Kambovski, "Damages for Mental Distress in Contract" (1994) 1 Deakin L. R. 111; and S. Hetherington, "Passenger's Damages for Disappointment and Distress: *The Mikhail Lermontov*" [1993] L.M.C.L.Q. 289.

the years ahead.”⁶² As for quantum, the court exercised “moderation” and “proportion” in awarding £30 for mental distress.

In *Wilson v. Sooter Studios Ltd.*, the British Columbia Court of Appeal affirmed the trial judge’s award of \$1,000 for mental distress consequent upon the defendant’s failure to take extensive wedding pictures as promised.⁶³ To do so, it relied on Lord Denning’s analysis in *Jarvis Tours and Diesen*, discussed above.

By way of contrast, the plaintiff’s plea for mental distress damages was unsuccessful in *Baid v. Aliments Rinag Foods Inc.* In this case, the plaintiff hired the defendant caterer for his son’s wedding reception. Because the food arrived five hours late, the plaintiff refused to pay. In addition to seeking mental distress damages, the plaintiff sought to recover \$5,924 for the cost of securing alternate food and drink for his guests. According to the court, however, the contract was for catering services only and “not to provide peace of mind or freedom from distress.”⁶⁴ On a related front, mental distress was not in the parties’ contemplation when they entered into the contract, though the defendant did know that the event was an important one. It should be noted, however, that the court was generous on the pecuniary loss side by allowing the plaintiff to recover the full cost of mitigation in seeking a replacement caterer and ruling that the plaintiff should have to pay nothing under the contract with the defendant, even though the defendant did serve some food at 10 pm. In the court’s words, that food should be at the defendant’s cost “as a public relations gesture towards...[the plaintiff].”⁶⁵

It is difficult to reconcile *Baid* with *Wilson* and related cases.

employment (wrongful dismissal)

Historically, the plaintiff in a wrongful dismissal action could not recover general damages for mental distress absent an independent actionable wrong. This is due to how the Supreme Court of Canada’s decision in

62. *Diesen v. Samson*, [1971] S.L.T. 49 at 50 [*Diesen*].

63. *Wilson v. Sooter Studios Ltd.* (1988), 33 B.C.L.R. (2d) 241 (C.A.) [*Wilson*]. In fact, only 10 photographs (out of 120) turned out properly. Note that the court in *Wilson* did not agree, contrary to the plaintiff’s argument, that the cost of reconstituting the entire wedding party should also be borne by the defendant. See too *Booth v. Saint John*, [1988] O.J. No. 2674 (Prov. Ct. (Civ. Div.)) where the court awarded \$750 for mental distress because the photographer failed to attend and *Laarakkers v. Executive House Ltd.*, [1987] B.C.J. No. 2817 (S.C.) in which the plaintiff bride and groom were awarded \$250 in mental distress for being wrongfully denied a room reserved for them on their wedding night.

64. *Baid v. Aliments Rinag Foods Inc.*, (2003), 123 A.C.W.S. (3d) 272 (Sup. Ct.) at para. 25 [*Baid*]. *Quaere* whether *Baid* would have been differently decided in light of *Farley*, *supra* note 50. Other unsuccessful cases include *Olson v. Beaulieu*, [2002] S.J. No. 779 (Prov. Ct.) (defendant altered the bride’s wedding dress in an incompetent manner).

65. *Baid*, *ibid.* at para. 23.

Vorvis v. Insurance Corp. of British Columbia has been interpreted.⁶⁶ Accordingly, at least until the Supreme Court of Canada's more recent decision in *Wallace*,⁶⁷ the plaintiff would not recover any compensation for rough handling by the employer on dismissal when it was less than independently actionable.

Wallace now accords legal significance to the employee's vulnerability at the particular moment of job loss. Though, as Mr. Justice Iacobucci observed, "an employment contract is not one in which peace of mind is the very matter contracted for"⁶⁸ (and therefore mental distress damages could not sound on that basis), there was nonetheless recourse for the employee:

[A]t a minimum, ... in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.⁶⁹

The recovery for mental distress suffered by the plaintiff is accomplished through the remedy of extending the notice period. In this way, the Supreme Court of Canada compensates for non-pecuniary loss but under another guise. While there have been serious objections to this approach,⁷⁰ it does provide some relief to the plaintiff and does effectively cap the size of the award, thereby serving some indirect public policy objectives.⁷¹

insurance

Mental distress damages can be awarded for breach of a disability insurance policy because, as already noted, such a contract "is one of the few contracts in which damages for mental distress are recoverable when

66. *Supra* note 11. See, for example, *Prinzo*, *supra* note 53, and *Wallace*, *supra* note 33 at para. 73.

67. *Supra* note 33.

68. *Ibid.* at para. 73. Whether this characterization will be revisited in light of *Farley*, *supra* note 50, remains an open question. Another ground upon which to revisit *Wallace* concerns whether the employment contract contains a term of good faith and fair dealing. The House of Lords in *Malik v. Bank of Credit Commerce International*, [1997] 3 All E.R. 1 contends that it does. So does the Ontario Court of Appeal in *Prinzo*, *supra* note 53 at para. 34. For a contrary view, see *Babcock v. Canada* (A.G.) (2005), 139 A.C.W.S. (3d) 481 (B.C.S.C.) at para. 210.

69. *Wallace*, *supra* note 33 at para. 98.

70. See, for example, Lee Stuesser, "Wrongful Dismissal – Playing Hardball: *Wallace v. United Grain Growers*" (1997-98) 25 Man. L.J. 547; John Swan, "Damages for Wrongful Dismissal: Lessons from *Wallace v. United Grain Growers Ltd.*" (1998) Can. Lab. & Emp. L.J. 313; Shannon O'Byrne, "Bad Faith – Contexts of Employment – *Wallace v. United Grain Growers Ltd.*" (1998) 77 Can. Bar Rev. 492; and Jamie Cassells, *supra* note 26 at 222.

71. Feldthusen, "Punitive Damages in Canada," *supra* note 7.

they are proven to result from the breach of contract.”⁷² This is because the subject matter of the contract is to provide peace of mind or freedom from distress and therefore falls within an exceptional category.⁷³ A strong argument can be made that mental distress damages should be available in relation to insurance contracts of *all* kinds since peace of mind is their inevitable subject matter.

luxury chattels

In *Wharton v. Tom Harris Chevrolet Oldsmobile Cadillac Ltd.*, the sound system in the appellant’s luxury vehicle failed to function properly for over two and a half years.⁷⁴ At trial, the court awarded \$5,000 in non-pecuniary damages for “loss of enjoyment of their luxury vehicle and for inconvenience.”⁷⁵ According to Justice Levine (Rowles and Smith JJ.A. concurring) the trial judge was correct in doing so. Furthermore, the appellate court adopted the analysis in *Farley*, stating:

where a major or important part of the contract is to give peace of mind, damages will be awarded if the fruit of the contract is not provided or if the contrary is instead procured.⁷⁶

Wharton has recently been followed in *Vavra v. Victoria Ford Alliance Ltd.*, wherein the court awarded \$5,000 to the plaintiff for “frustration, anxiety, and interference with, and loss of amenity, of her leisure lifestyle.”⁷⁷ In this case, the deficiently performing vehicle did not have the towing capacity

72. *Warrington*, *supra* note 3 at para. 22. Note that in *Petersen v. Power*, [1997] B.C.J. No. 2998 (S.C.), the court refused to award mental distress damages absent an independent actionable wrong based on *Wallace*, *supra* note 33, but this is likely a misreading of *Wallace*. In *Wallace*, the Supreme Court of Canada recognized that in certain contracts, peace of mind was the very matter contracted for, at para. 73, but that an employment contract was not one of those contracts. It therefore recognized that mental distress damages were recoverable even absent an independent actionable wrong. It also went on to create a special analysis for employment contracts. For discussion of *Wallace*, see footnote 68 and surrounding text. See too the British Columbia Court of Appeal’s analysis in *Warrington*, in footnote 38 and surrounding text. *Warrington*’s analysis has been followed by a number of courts, including: *Gerber v. Telus Corp.*, [2003] 10 W.W.R. 82 (Alta. Q.B.) at para. 118, affirmed [2004] 6 W.W.R. 205 (C.A.); *McIsaac v. Sun Life Co. of Canada (c.o.b. Sun Life of Canada)* (1999), 173 D.L.R. (4th) 649 (B.C.C.A.) at para. 14; *Wharton*, *supra* note 53 at para. 4; *Anderson v. Peters* (2000), 152 Man. R. (2d) 113 (Man. Q.B.) at paras 32-33; and *Fidler v. Sunlife Assurance Co. of Canada* (2004), 239 D.L.R. (4th) 547 (B.C.C.A.), leave to appeal granted [2004] S.C.C.A. No. 335.

73. *Warrington*, *ibid.* at para. 19 and following. For similar analysis, see *Thompson et al. v. Zurich Insurance Co.* (1984), 7 D.L.R. (4th) 664 (Ont. H.C.J.). See *Whiten*, *supra* note 8 at para. 129 which identifies fire insurance policies as peace of mind contracts.

74. *Supra* note 53.

75. *Ibid.* at para. 15.

76. *Ibid.* at para. 57.

77. *Vavra v. Victoria Ford Alliance Ltd.*, (2003), 124 A.C.W.S. (3d) 924 (B.C.S.C.) at paras. 58. *Wharton* has also recently been followed in a case involving a real estate transaction. See *Bontorin v. Greenway Land Corp.* (2004), 25 R.P.R. (4th) 21 (B.C.S.C.) wherein the court awarded \$35,000 in “aggravated damages” but what this paper would call “general damages for mental distress.”

that it was warranted to have, with the defendant unwilling or unable to remedy the problem over a period of two years.⁷⁸

Wharton and *Vavra* reach the outcomes which are entirely consistent with what Lord Steyn lays down. That is, in both of the contracts at bar, peace of mind was not the *very* thing contracted for but was an important component in them. On this basis, the plaintiff was entitled to some compensation for mental distress suffered.

solicitor-client

There would appear to be only one reported case in Canada which expressly considers whether the solicitor-client contract fits within a special category permitting recovery for mental distress, namely *Maillot v. Murray Lott Law Corp.*⁷⁹ In this case, the plaintiff sued for general damages for mental distress and aggravated damages related to breach of a contingency fee agreement relating to a work-related disability claim against the Workers Compensation Board. The defendant counterclaimed for payment of fees on a *quantum meruit* basis. The court agreed that the defendant had wrongfully repudiated the contingency agreement and that therefore no fees were payable at all by the client. As for intangible damages, the court was left in somewhat of a quandary because the plaintiff abandoned his claim for mental distress at the discovery stage and had only pressed the claim for aggravated damages. In response, the court stated:

While I am not persuaded that a claim for damages for mental distress and a claim for aggravated damages necessarily constitute overlapping claims, it is nevertheless the case that there is no compelling evidence to establish that the specific object of the contingency fee agreement was to ensure Maillot's peace of mind or to free him from mental or financial anxiety. Accordingly, I find there is no foundation for any award of aggravated damages.⁸⁰

In reaching this decision, the court relied on both *Farley* and *Warrington* but it could be argued that the court is asking more of the contract than certainly *Farley* did. Recall that in *Farley*, the contract in question was

78. *Vavra* at para 61. Note in *Chambers v. Ryan Warranty Services*, (2003), A.C.W.S. (3d) 355 (Ont. Sup. Ct.), affirmed [2004] O.J. No. 5360 (Sup. Ct.), the trial judge refused to award mental distress damages on a consumer product warranty contract on the basis that the plaintiff had damaged his own vehicle by driving it when it was overheated, thereby causing his own loss. Furthermore, even if the defendants were liable for the loss, damages for mental distress would not be recoverable because a consumer product warranty "does not fall within the category of cases where 'peace of mind' is the very matter contracted for between the parties" at para. 47. Note, however, that *Farley*, *supra* note 50, is not mentioned in the decision and may not have been argued in that case.

79. *Maillot v. Murray Lott Law Corp.* (2002), 99 B.C.L.R. (3d) 170 [Maillot].

80. *Ibid.* at para. 92.

to provide a survey report. The requested information on aircraft noise and the implied peace of mind the surveyor was implicitly promising in relation to that was merely an “important” part of the contract. In this context, perhaps the plaintiff’s evidence in *Maillot* might have attracted a more sympathetic ear given that the defendant wrongfully terminated the contingency fee agreement in the plaintiff’s moment of need.

Two recent appellate cases have awarded mental distress damages to the disappointed client in similar circumstances. In the 2000 decision of *Boudreau v. Benaiah*,⁸¹ the Ontario Court of Appeal did not disallow – but merely reduced – the plaintiff’s award for mental distress damages arising out of her lawyer’s incompetence in conducting his defense in a criminal matter. The trial judge had awarded \$30,000 under this head but the Court of Appeal lowered the quantum to \$15,000 because not *all* of the distress which the plaintiff endured was caused by the defendant’s negligence. Note that while the plaintiff sued in both contract and tort, the court resolved the dispute on the basis of negligence law alone.

In *Hagblom v. Henderson*,⁸² the Saskatchewan Court of Appeal expanded recovery for mental distress beyond the criminal prosecution in *Benaiah* to a civil matter. In *Hagblom*, the plaintiff (Mr. Hagblom) had originally been sued by a customer for allegedly installing a chimney improperly. Because Hagblom’s counsel put in a negligent defence, Hagblom lost a potentially winnable case, which the Court of Appeal fixed at a 75% chance of success.

As a result of losing his case against the customer, the plaintiff suffered distress because, *inter alia*, people in the community would think he was a poorly skilled mason. In the words of Jackson J.A.,... “it is clear that he [Hagblom] was deeply affected by the loss and by the representation that he had received.”⁸³ Accordingly, the court awarded 75% of his claim of \$15,000 as general damages for mental distress.

Given that defendant’s counsel took no issue with the plaintiff’s right to claim mental distress damages, Jackson J.A. was not required to analyse this area of law, instead referencing in support Professor Waddams’ text *The Law of Damages*.⁸⁴ For this reason, one cannot know the precise grounds upon which the plaintiff was entitled to recover.

81. *Boudreau v. Benaiah* (2000), 46 O.R. (3d) 737 (C.A.) [*Benaiah*]. See too *Tannereye Ltd. v. Hansen* (2001), 201 Nfld. & P.E.I. R. 31, [2001] P.E.I.J. No. 58 at para. 366 where the court awards general damages for stress and anxiety due to the defendants’ negligence in providing an accounting service.

82. *Henderson v. Hagblom*, [2003] 7 W.W.R. 590 (Sask. C.A.) [*Hagblom*]; leave to appeal dismissed.

83. *Ibid.* at para. 235.

84. In her footnote 259, Jackson J.A. cites S.M. Waddams, *The Law of Damages*, *supra* note 24 at 3.130 to 3.1450.

Indeed, Waddams discusses in the pages cited case law based on the special categories approach and cases which permit recovery based on reasonable foreseeability – a competing approach that is discussed *infra*. To the extent that the plaintiff's claim qualified under either approach, there was no need to choose in any event.

b. *Objections to the categories approach*

In deploying the categories approach, courts are consciously erecting barriers to stave off a flood-gate of inflated claims, trivial complaints, and allegations of mental distress that are entirely fictitious.⁸⁵ But as Edward Veitch remarks, "once intangible harm has been accepted as an independent compensable harm there can be no logical restriction on the kind of situations in which it will be recognized."⁸⁶ On a related front, Justice Deyell comments on the conceptual incongruity of asking a plaintiff to show *more* than just that mental distress damages were a reasonably foreseeable consequence of breach:

To the extent that the law requires something more than a result within the reasonable contemplation of the parties, it is inconsistent with the general rule [of contracts]. The general rule is that damages for pecuniary losses are available because they are within the reasonable contemplation of the parties. Damages for mental distress are generally not available because they are not within the reasonable contemplation of the parties. Where it is shown that mental distress was within the reasonable contemplation of the parties, damages should be available.⁸⁷

Cases explored in the following section take the tack advocated by Justice Deyell and simply deploy *Hadley*.⁸⁸

3. *Recovery based on foreseeability alone*

a. *Current law*

One of the most important and earliest instances of a court permitting recovery for mental distress based on foreseeability is the well-known decision of *Newell v. Canadian Airlines Ltd.*⁸⁹ In *Newell*, the plaintiffs' dogs were entrusted to the airline for safe passage to Mexico. Upon arrival, one dog was dead and the other comatose because they had been packed beside dry ice for the whole journey. The plaintiffs were beside themselves. As the court observes, for the next forty-eight hours, "the

85. For an excellent account and rebuttal of the policy objections to awarding damages for mental distress, see Nelson Enonchong, "Breach of Contract and Damages for Mental Distress" (1996) 16 Oxford J. Legal Stud. 617 at 628.

86. Veitch, *supra* note 2 at 236.

87. Gill, *supra* note 42 at para. 42.

88. *Supra* note 6.

89. *Newell et al. v. Canadian Pacific Airlines, Ltd.* (1977), 14 O.R. (2d) 752 (Co. Ct.) [*Newell*].

plaintiffs took turns administering oxygen to Patachou [the dog which arrived alive, but barely] and it would appear that this saved his life.”⁹⁰

Though Judge Borins referred to Lord Denning’s decision in *Jarvis* and related case law, the *ratio* of Borins J.’s decision is based on the principles of foreseeability. The court stated:

To return to the facts of the case before me 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 plaintiff’s 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 the 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 recover general damages in the sum of \$500.⁹¹

Following *Newell*, there have been multiple instances of the courts awarding mental distress damages based on foreseeability alone. See, for example, the Alberta Court of Appeal in *Kempling v. Hearthstone Manor Corp.*⁹² In this case, the husband and wife respondents sought damages – including damages for mental suffering – when the appellants wrongfully terminated their contract for a condominium purchase in Calgary. As was known to the vendors, the condo was to have been a home for the respondents as well as for the wife’s elderly father. Delays in approval, cost-overruns, and construction delays which plagued the project also greatly upset the respondents and the father. The appellant’s wrongful repudiation was simply the ultimate installment.

At trial, the court awarded, *inter alia*, damages for mental distress because the defendant caused the plaintiffs a great deal of upheaval and treated them “very shabbily.”⁹³

A majority of the Court of Appeal affirmed the trial judge’s award not on the basis of a “special categories” analysis but simply on the basis of foreseeability. According to Madam Justice Picard (Harradence J.A. concurring with respect to the matter of damages):

90. *Ibid.* at para. 4. Cases involving animals which have followed *Newell* include *Weinberg v. Connors* (1994), 21 O.R. (3d) 62 (Gen. Div.) (where defendant was in breach of contract for failing to keep plaintiff aware of location of adopted cat. Court awarded \$1,000 in general damages) and *Surette v. Kingsley (c.o.b. Paw for Thoughts!)*, [2000] N.B.J. No. 532. (Sm. Cl. Ct.) (where cat was injured by an incompetent groomer employed by the defendant. Court awarded \$250 general damages).

91. *Newell*, *supra* note 89 at para. 39.

92. *Kempling v. Hearthstone Manor Corp.* (1996), 137 D.L.R. (4th) 12 (Alta. C.A.) [*Kempling*], cited with approval by the Ontario Court of Appeal in *Turczinski*, *supra* note 49.

93. *Kempling v. Hearthstone Manor Corp.* (1992) 136 A.R. 339 (Q.B.).

Justice Wilson [dissenting in *Vorvis v. Insurance Corp. of British Columbia*, [1989] 2 S.C.R. 1085] found a “common denominator” in the cases where damages [for mental distress] were awarded, that being that the parties should reasonably have foreseen mental suffering as a consequence of a breach of contract at the time the contract was entered into. She concluded at p. 301:

“It is my view, that the established principles of contract law set out in *Hadley v. Baxendale* provide the proper test for the recovery of damages for mental suffering. The principles are well-settled and their broad application would appear preferable to decision-making based on a priori and inflexible categories of damage. The issue in assessing damages is not whether the plaintiff got what he bargained for, i.e. pleasure or peace of mind (although this is obviously relevant to whether or not there was a breach), but whether he should be compensated for damage the defendant should reasonably have anticipated that he would suffer as a consequence of the breach.”⁹⁴

Justice Picard went on to observe that there was no need to fear opening of the floodgates because the rule in *Hadley v. Baxendale* “has within it the means to test and limit liability.”⁹⁵ She agreed that there were special circumstances communicated to the respondent (including that the condo was being purchased to house the respondent’s elderly father) and that mental distress damages were reasonably foreseeable.⁹⁶ The judge’s quantum of general damages of \$7,500 was affirmed.

A review of the case law reveals numerous other examples where courts have awarded general damages for mental distress based on simple foreseeability in a failed contract for the purchase and sale of residential real

94. *Supra* note 92 at para. 67.

95. *Ibid.* at para. 69.

96. *Ibid.* at para. 17. While Justice Picard is correct to note that mental suffering is most likely to be established based on the second arm of *Hadley*, it would seem logical that a claim could also be established under the first – as, for example, vacation contracts.

estate or failed home repair.⁹⁷ The foreseeability approach has been applied in other kinds of contracts as well. In the 1996 Ontario Superior Court decision of *Mason v. Westside Cemeteries Ltd.*, for example, the plaintiff sued the defendant for breach of a bailment contract (or alternatively, in negligence) because the defendant lost the ashes of his deceased parents. Not surprisingly, the plaintiff also sought general damages for mental distress. Justice Molloy awarded \$1,000 under this heading because it must have been contemplated that the loss of the ashes would cause the plaintiff mental distress. As the court succinctly summarizes the matter: "If damages are recoverable for upset over the loss of a dog [as in *Newell*] or for the disappointment of a ruined holiday [as in *Jarvis*], surely the distress caused by the loss of the remains of someone's deceased parents is likewise compensable."⁹⁸

Not all claims assessed under the *Hadley* approach are successful, of course. In *Cunningham v. Dowling General Construction Ltd.*, the court agreed that there had been an improvident sale by the mortgagee

97. See, for example: *Stoddard v. Atwil Enterprises Ltd.* (1991), 105 N.S.R. (2d) 315 (S.C.(T.D.)), supplementary reasons for judgment at [1991] N.S.J. No. 686, in which the plaintiff was awarded \$3,000 for mental distress by Justice Saunders; *Shillingford v. Dalbridge Group Inc.*, [1996] A.J. No. 1063 (Q.B.) at para. 33, wherein Justice Perras awarded mental distress damages against some corporate directors in a breach of contract action in the amount of \$6,000; *Cudmore v. Home Chec Canada Ltd.*, [2001] 3 W.W.R. 541 (Man. Q.B.) at para. 50 where Justice Schwartz awarded the plaintiff \$5,000 for "anxiety, stress, emotional disturbance and inconvenience" due to the defendant's abject failure to complete home repairs; *Page v. Russell* (2001), 305 A.R. 352 (Q.B.) at para. 39 wherein Justice Gallant awarded the plaintiffs \$1,000 for their "unhappiness, frustration, inconvenience and anger" as a result of defendant's construction delays; *Gill supra* note 42, wherein Justice Deyell awarded the plaintiffs \$7,500 for mental suffering arising from the breach of contract for the sale of a house and *Gourlay v. Osmond* (1991), 104 N.S.R. (2d) 155 (S.C.(T.D.)) where \$5,000 was awarded for mental distress arising from another failed real estate transaction. Note that in *Gourlay*, the full extent of the male plaintiff's mental distress – including upset at having to miss his brother's wedding in Scotland – was not recoverable because it was too remote.

For a contrary result, see *Turczinski, supra* note 49. At trial, the court awarded the plaintiff \$35,000 for mental distress in a breach of contract action based on foreseeability. That is, Dupont knew that Turczinski suffered from an obvious and long-standing mental disorder and that breach of contract would worsen her condition beyond the extent of the pecuniary loss, at paras. 175-176. On appeal, the court reversed, *inter alia*, based on a lack of foreseeability, at para. 37. The appellate court said that clearer evidence was needed that the contracting parties were specifically aware of the potential for significant mental distress, at para. 40.

Note, finally, that there is a smaller line of authority suggesting that recovery for mental distress related to failed construction contracts and associated matters can proceed by way of the "special categories" approach of *Jarvis, supra* note 59. See *Novak v. Poiler* (1985), 12 C.L.R. 295 (Ont. Dist. Ct.) at para. 10 and following. See too *Tucci v. City Concepts Construction Ltd.* (2000), 2 C.L.R. (3d) 291 (Ont. Sup. Ct. Jus.) which awards \$15,000 in mental distress damages based on *Novak*. As a final example, see *Johnston & Associates Ltd. v. Wade* [1994] O.J. No. 662 (Gen. Div.) at para. 15, which relies on *Novak* to award \$10,000 in mental distress.

98. *Mason v. Westside Cemeteries Ltd.* (1996), 135 D.L.R. (4th) 361 (Ont. Gen. Div.) [*Mason*] at para. 53. See too *McLoughlin v. Arbor Memorial Services Inc.*, (2004), 36 C.C.L.T. (3d) 158 (Ont. Sup. Ct. Jus.).

but disallowed the mortgagor's claim for mental distress based on lack of foreseeability and lack of causation.⁹⁹

The approach in the foregoing cases is persuasive since the courts are able to limit recoverability while doing justice to the deserving plaintiff. Instead of applying "a priori and inflexible categories of damages,"¹⁰⁰ the court taps into the gate-keeping capacity of ordinary remoteness principles. It is an approach which resonates with simplicity particularly when compared to the category-based perspective outlined in the preceding section. As Thomas J. for the New Zealand High Court stated in *Rowlands v. Collow*:

limiting damages for mental distress to certain classes of case when the damages would otherwise come within the general principles applicable to damages in contract is both unnecessary and unwise. Rather, the question of whether or not such damages are recoverable should be resolved in terms of the test of remoteness as it might be articulated at any given time.¹⁰¹

b. Objections to the foreseeability approach

At least one commentator, referenced below, has criticized the foreseeability approach discussed above on the basis that the courts may well end up applying *pro forma* special restrictions under another guise. But this is not so much a critique of the rule as of the court's possible application of it. For example, in *Vorvis*, Wilson J. assessed whether the plaintiff should recover general damages for mental distress because he had received exceedingly poor treatment by the employer in the time leading up to dismissal. Wilson J. applied *Hadley v. Baxendale*, but *still* found against the plaintiff on this point, concluding that mental distress damages were too remote. Had there been facts outside the ordinary circumstances – such as a promise of promotion or special elements of trust – the outcome may have been different, observed Wilson J.¹⁰² In response to this analysis Elizabeth MacDonald observes:

it can be argued that mental distress is unlikely to be too remote in relation to any wrongful dismissal and certainly not in relation to one in which the employee had received the type of criticism which had occurred

99. *Cunningham v. Dowling General Construction Ltd.* (1996), 4 O.T.C. 139.

100. Wilson J. (dissenting) in *Vorvis*, *supra* note 11 at para. 46, quoted with approval in *Kempling*, *supra* note 92 at para. 67.

101. *Rowlands v. Collow*, [1992] 1 N.Z.L.R. 178 at 207. Andrew Phang, *supra* note 2, also supports recovery for mental distress based on foreseeability. He notes at 373: "[w]hilst it is true that damages for mental distress would (as we have already seen) probably be *too remote* in a *purely commercial* context, this does *not* logically entail a *blanket* prohibition against the award of such damages without more."

102. *Vorvis*, *supra* note 11 at para. 49.

in the instant case. In other words, it is arguable that this was not a factual application of the remoteness test.... In effect, Wilson J was not advocating that damages for mental distress should be available without special restriction. Rather it may be that a special restriction was being imposed behind the remoteness rule.¹⁰³

Of course, it is not problematic that courts search out for special features upon which to attach general damages for mental distress. This is nothing more than *Hadley v. Baxendale* instructs us to do under its second arm. Provided that special features are not transformed into absolute pre-conditions (which admittedly, Wilson J. seems to insist upon), the foreseeability approach is distinct from and preferable to the special categories approach already discussed because it is not artificially constrained.

Another concern about the foreseeability approach relates to floodgates – a matter already alluded to in this paper. The worry is that if there is no initial gatekeeper as to what *kind* of contract will sound in general damages for mental distress – if it is all simply a question of reasonably foreseeability – the courts will be over-run.

In fact, the floodgates concern was what prevailed upon Chief Justice Mason of the Australian High Court in the *Baltic Shipping*¹⁰⁴ case. The chief justice did show an initial willingness to reconsider the general rule against recovery from the ground up – as in the following quotation – but he ultimately retreated:

[O]ne might ask why the injured party [to a contract] 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 have taken place. Add to that the fact that anxiety and injured feelings are recognized as heads of compensable damage, at least outside the realm of the law of contract. Add as well the circumstance that the general rule has been undermined by the exceptions which have been engrafted upon it. We are then left with a rule which rests on flimsy policy foundations and conceptually is at odds with the fundamental principle governing the recovery of damages, the more so now that the approaches in tort and contract are converging.¹⁰⁵

103. *Supra* note 44 at 154. Note that in light of the recent decision in *Wallace*, there is no doubt that the plaintiff in *Vorvis* would now be compensated for mental distress by an increase in the notice period.

104. *Supra* note 61.

105. *Ibid.* at 362.

This said, Mason C.J. felt he had no choice in the end but to endorse the traditional categories approach:

as 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 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.¹⁰⁶

As Elizabeth MacDonald points out, however, Justice Mason seems to assume "some underlying reason why it is not better simply to comply with basic principles and allow there to be nominal awards of damages in those cases where the mental distress was not 'significant.'"¹⁰⁷ That is, if the plaintiff's mental distress is minimal, the court can simply award a small amount under this head or no damages at all. On this footing, there is no need for the court to take shelter behind the protection ostensibly afforded by the special categories approach. Ordinary contract law principles will provide the tried and true gate-keeper.

Though the foreseeability approach has the very important strength of avoiding inflexible categories, it arguably presents a potential difficulty of its own. Courts must be careful not to collapse an important first step in contractual analysis – namely, determining what was promised by the contract – into the foreseeability test alone. In *Newell*, for example, the defendant agreed to go ahead and enter into a contract for the transport of the plaintiff's animals knowing full well that the plaintiffs' special circumstances made competent performance absolutely essential. It could be argued that, on this basis, the defendant was implicitly promising peace of mind to the plaintiffs. *Hadley* would *then* assess whether the plaintiff's emotional reaction in face of breach was reasonably foreseeable or not. In short, *Hadley* would not be used to determine the content of the contract but only whether the consequences of breach of that content should be recoverable or not.

While the foregoing analysis is advancing an admittedly subtle distinction (which in many cases may lead to no difference in the outcome of the case), it may be preferable nonetheless. In this case, courts can

106. *Ibid.* at 365.

107. MacDonald, *supra* note 44 at 149. See too K.B. Soh, "Anguish, Foreseeability and Policy" (1989) 105 L.Q.R. 43 at 45 who states: "small claims for mental distress will probably not be made and the ones that are can be dispatched by nominal damages."

systematically revisit contract law's classical presumption that contractual terms relate to pecuniary loss only. By assessing the contract for its non-pecuniary content as an initial step, the court ensures that the defendant is held to his or her full bargain, whatever that might be.

Regardless of the approach a court takes to the question of mental distress recovery, there are some constants as the following section illustrates.

III. *Over-arching rules regardless of approach*

1. *Corporate plaintiffs cannot recover*

As already noted, when a plaintiff is a corporation, it cannot receive damages based on distress and humiliation.¹⁰⁸ A corporation cannot experience human emotions and therefore is not entitled to recovery for damages for non-pecuniary loss.¹⁰⁹

2. *Plaintiff must prove that distress is more than fleeting*

The introduction to this paper referenced David Capper's view that judicial reticence to permit recovery for intangible losses is partly justifiable because claimants may artificially inflate their damages and allege "all kinds of minor losses to which they are largely indifferent."¹¹⁰ This concern, however, goes to the question of proof of damages and can be tackled by the court directly.¹¹¹ In short, the plaintiff must prove his case on the balance of probabilities, including the general damages claim. If the plaintiff fails to do so – or if quantum is negligible – the claim under this head of damages must be denied.

Though medical proof of mental distress would likely function to increase quantum, most courts do not require such evidence before mental distress damages are available in a breach of contract situation. Courts tend to be content to weigh the plaintiff's testimony on the emotional repercussions of breach and set quantum accordingly. In *Stoddard v.*

108. See cases cited in footnotes 5 and 30. For an American case to the contrary, see *Smith v. Hoyer*, 697 P.2d 761 (Colo. 1984) wherein both the individual and corporate plaintiff were awarded damages for mental distress for the bank's conduct in foreclosing on properties after agreeing not to. Note, however, that the determination of mental anguish was based entirely on the individual plaintiff's symptoms, at 765. Note that even corporations can recover for loss of business reputation. See, for example, *Ascot Holdings Ltd. v. Wilkie* (1993), 49 C.P.R. (3d) 188 (B.C.S.C.).

109. It is beyond the scope of this paper to consider whether the principals behind the plaintiff corporation may be so entitled. For a discussion of this possibility in relation to franchise law, see Shannon O'Byrne, "Breach of Good Faith in Performance of the Franchise Contract: Punitive Damages and Damages for Intangibles," *supra* note 32.

110. *Supra* note 4.

111. A.S. Burrows, "Mental Distress Damages in Contract—A Decade of Change" (1984) L.M.C.L.Q. 119 at 133 notes: "as regards the problems of bogus claims, surely the courts are competent to judge whether the plaintiff has satisfied the burden of proving that he has suffered the mental distress alleged."

Atwil Enterprises Ltd., for example, damages were available because the plaintiffs' stress was real and continuous.¹¹² In *Gill*, there was proof of the plaintiff's suffering, in the court's words "as attested to by herself and Mr. Taylor, in that she was too ill to attend work on a number of occasions. She broke out in hives and she experienced facial swelling."¹¹³ In *Page v. Russell*, it was sufficient that the plaintiffs experienced "unhappiness, frustration, inconvenience and anger" to secure general damages for mental distress.¹¹⁴

In *Mason*, the Ontario Superior Court awarded general damages for mental distress based on the plaintiff's testimony that he had experienced considerable emotional upset due to defendant's negligence and breach of contract in losing the parents' ashes. The court noted that evidence of psychiatric illness should not be required to found the claim even if the matter proceeded in tort – an area of law where such a strict form of evidence is classically required. As the court observed:

In tort cases, courts have for the most part refused to award damages for emotional upset unless this has caused physical symptoms or some recognizable psychiatric illness. It has repeatedly been said that grief alone is not compensable in damages.... It is difficult to rationalize awarding damages for physical scratches and bruises of a minor nature but refusing damages for deep emotional distress which falls short of a psychiatric condition. Trivial physical injury attracts trivial damages. It would seem logical to deal with trivial emotional injury on the same basis, rather than by denying the claim altogether. Judges and juries are routinely required to fix monetary damages based on pain and suffering even though it is well known that the degree of pain is a subjective thing incapable of concrete measurement. It is recognized that emotional pain is just as real as physical pain and may, indeed, be more debilitating. I cannot see any reason to deny compensation for the emotional pain of a person who, although suffering, does not degenerate emotionally to the point of actual psychiatric illness. Surely emotional distress is a more foreseeable result from a negligent act than is a psychiatric illness....

But what is the logical difference between a scar on the flesh and a scar on the mind? If a scar on the flesh is compensable although it causes no pecuniary loss why should a scar on the mind be any less compensable?¹¹⁵

Perhaps exceptionally, the Nova Scotia Supreme Court in *Trim v. Beaudet*, required proof of more substantial emotional distress, stating that there must "be compelling evidence of mental suffering having been inflicted

112. *Supra* note 97.

113. *Supra* note 42 at para. 59.

114. *Supra* note 97 at para. 39.

115. *Supra* note 98 at para. 54.

beyond mere upset and frustration, having medical repercussions of some degree.”¹¹⁶

3. *Difficulty in assessing quantum no reason to deny the plaintiff a remedy*

While assessing quantum for mental distress can be challenging, Justice Deyell points out that this is also the case in other more established areas of law.

When a person suffers from a broken arm as a result of another’s conduct, we offer monetary compensation. We do not expect the plaintiff in such a case to go to the market and purchase an arm that is in proper working order. Rather, we place a certain monetary value on a broken arm (general damages) and thereby attempt to compensate the plaintiff with money to the extent that money will compensate for the harm....Similarly, we must put a value on mental health.... As in the case of a broken arm, we must place a value on mental distress where it is found to exist in breach of contract cases and we must compensate the plaintiff to the extent that money could do so. To do otherwise would be inconsistent with the guiding rule that we must compensate the plaintiff to the extent that money could compensate for the plaintiff’s losses resulting from the breach of contract...[T]he mere difficulty of the task is not a reason for the Court to deny justice where it is due.¹¹⁷

4. *Quantum must be restrained and modest*

As Justice Molloy observes in *Mason*, “the general theme is that damages for mental distress, when allowed, have been relatively low.”¹¹⁸ Indeed, in all the Canadian cases surveyed in this paper, the award for intangibles has rarely exceeded \$5,000.¹¹⁹ In *Farley*, a considerable sum was awarded (£10,000) but, as already noted, with the admonition that awards in this

116. *Trim v. Beaudet*, (2003), 127 A.C.W.S. (3d) 1018 (S.C.), 2003 NSSC 216 at para. 40.

117. *Gill*, *supra* note 42 at 748-749. For discussion and rebuttal of problems of proof and assessment in mental distress, see Andrew Phang, “The Crumbling Edifice? – The Award of Contractual Damages for Mental Distress,” *supra* note 2 at 349.

118. *Supra* note 98 at para. 58. Note Phang’s analysis of large quantum concerns: “the legal culture of most Commonwealth jurisdictions is such that the award of excessive damages [for mental distress] is likely to be the exception rather than the rule, if it happens at all.” See Phang, *supra* note 2 at 350, quoting his article “Subjectivity, Objectivity and Policy – Contractual Damages in the House of Lords” (1996) J. Bus. L. 362 at 375.

119. But see for example: *Hagblom*, *supra* note 82 (where the court awarded 75% of the general damages of \$15 000, as additional damages for mental distress); *Bontorin*, *supra* note 77 (where court awarded \$35,000); *Benaiah*, *supra* note 81 (where trial judgment of \$30,000 for mental distress was reduced to \$15,000 upon appeal); *Kempling*, *supra* note 92 (\$7500 awarded for mental distress); *Shillingford*, *supra* note 97 (\$6000 awarded). Note too that awards in cases involving disability insurance policies range from \$10,000 to \$20,000 on average per *Asselstine v. Manufacturers Life Insurance*, [2005] B.C.J. No. 1152, 2005 BCCA 292 (C.A.) at para. 18. The C.A. went on to affirm an award of \$35,000 as it was not inordinately high, at para. 20. As well, *Wallace* damages often exceed \$5,000.

area "should be restrained and modest." According to Lord Steyn, "[i]t is important that logical and beneficial developments in this corner of the law should not contribute to the creation of a society bent on litigation."¹²⁰

Due to the Supreme Court's trilogy of cases on personal injury damages,¹²¹ courts have maintained strict limits on recovery for pain and suffering in torts. This same attitude of restraint is also evident in assessing non-pecuniary damages in the contractual arena, as a review of the case law has shown.¹²² Note too that if recovery under this head of damage remains modest, it is also a reply, as Enonchong points out, to the criticism that permitting mental distress recovery will increase the cost of entering into contracts.¹²³

IV. *Critique of the general rule against recovery for mental distress damages*

It is an informing principle of contract law that the defaulting party is liable for loss within the reasonable contemplation of the parties at time of contract. In addition to serving a gate-keeper function, the general rule against recovery for mental distress damages is consistent with this principle but *only* because it is based on the premise, in Justice Deyell's words, that "contracts normally concern commercial matters and that mental suffering on breach is not in the contemplation of the parties as part of the business risk of the transaction."¹²⁴ In this sense, the general rule against recovery presupposes a certain *kind* of contract as the norm or paradigm. More specifically, the general rule against recovery must assume a contract whose subject matter is fungible, devoid of non-pecuniary content, and the breach of which can be mitigated. In short, if "B" fails to deliver widgets to "A", in breach of her contract to do so, "A" is simply required to secure replacement widgets in the market-place and sue "B" for the difference in price. At this point, "A" has been made whole. The general rule against recovery reflects the fact that in such an example, any disappointment suffered by "A" would be small (and therefore, of no concern to the law under the *de minimis* principle) or, if substantial, then unforeseeable under the *Hadley v. Baxendale* principle. On this basis, and at least at a theoretical level, the general rule has utility and is consistent with overall contract law principles.

120. *Supra* note 50 at para. 28.

121. *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Thornton v. School District No. 57*, [1978] 2 S.C.R. 267; and *Arnold v. Teno*, [1978] 2 S.C.R. 287.

122. Edward Veitch observed this same modesty in quantum in an article published over twenty-five years ago. See Veitch, *supra* note 2 at 240.

123. *Supra* note 85 at 631.

124. McGregor, *McGregor on Damages*, 15th ed. (London: Sweet & Maxwell, 1988) at 54, as quoted in Gill, *supra* note 42 at 745.

But how descriptively robust is the generic “widget” contract outlined above and the conclusions that flow from it? There are many contracts, as discussed in this paper, which contain important, non-pecuniary assurances. And, in further opposition to the assumptions informing the generic contract, these are precisely the kind of contracts which are not subject to mitigation. Mrs. Newell’s little dog is dead and that cannot be changed; Mr. Jarvis’s annual vacation is over and he has to wait another year before he can take a holiday again; the photographer has failed to turn up at Ms. Wilson’s wedding and that moment can never be recaptured; the cemetery has lost the ashes of Mr. Mason’s parents and there is absolutely nothing the plaintiff can do about that now; Mr. Wallace has been humiliated and derided by his employers – the marketplace cannot undo that devastating experience; and Mr. Warrington’s disability insurance policy was not honoured by the insurer at the time he needed it most but he could not mitigate by purchasing a replacement policy – he was already disabled at that point. In such circumstances, as Michael Bridge observes, mental distress is not merely a “possible consequence of a breach of contract by the defendant but the very kind of consequence that a breach of contract was likely to bring about.”¹²⁵

The difficulty with the general rule is that it assumes that the generic contract contains only pecuniary content. It then tautologically declares – as a general rule – that non-pecuniary loss is unforeseeable or not part of the risk assumed by the defendant. As Mr. Justice Weatherston points out in *Brown*, “[t]here may be a measure of policy in denying damages for mental distress in cases when there is nothing more than pecuniary loss. But I think this is not so much an exception to the rule in *Hadley v. Baxendale* as a practical application of it.”¹²⁶

As this paper has illustrated, under the “categories” approach to recovery of mental distress damages, the plaintiff must not only show that non-pecuniary damages are reasonably foreseeable. The plaintiff must show “something more” – namely that the contract fits with an established exception to the general rule. In this way, fear of floodgates is kept in check but in a way that needlessly compromises ordinary contract law principles. As Justice Molloy observes in *Mason*,

It is important in our society that all citizens have access to our courts of civil justice to redress wrongs committed against them. That does not mean that a civil action for damages is the appropriate solution to every instance of emotional upset or hurt feelings caused by somebody else’s

125. Michael Bridge, “Contractual Damages for Intangible Loss: A Comparative Analysis” (1984) 62 Can. Bar Rev. 323 at 370.

126. *Brown*, *supra* note 41 at 118.

civil wrong. While those claims may, on the application of general legal principles, be valid, if the injury suffered is trivial in nature the damages awarded should reflect that fact.¹²⁷

Though ostensibly following a special categories approach, Lord Steyn's analysis in *Farley* is broad and makes room for non-pecuniary claims in a much more generalized way than earlier case law did. It asks the court to scrutinize the contract and measure its non-pecuniary content. Provided that non-pecuniary content is major or important, breach of that content will sound in damages for mental distress. When non-pecuniary content is a significant part of what has been promised, non-pecuniary loss is almost certainly reasonably foreseeable. There is no injustice done to the defendant nor has it been taken by surprise. The defendant is simply being held to its contract. In this way, Lord Steyn's analysis accords with the reasonable foreseeability approach espoused by several courts across Canada.

If the foreseeability approach discussed earlier offers a demonstrably palatable and fair approach to breach of contract claims sounding in non-pecuniary loss, there is no requirement for a general rule against recovery for intangibles. Indeed, the general rule has probably needlessly complicated the common law by spawning a category-based group of exceptions. Though the policy behind such a special category approach helps to provide a buffer against traditional fears that mental distress claims might be fabricated, inflated, vexingly small, or too remote, it is better to deal with such concerns directly and systematically under the ordinary principles of contract law. If the plaintiff cannot prove her mental distress, the claim under that head of damages should be dismissed. If the plaintiff has exaggerated her claim, the court can award a reduced quantum. Where the amount of distress suffered has been small and insignificant, the court can invoke the *de minimis* maxim. And if mental distress is not a

127. *Supra* note 98 at para. 58. Accord Lord Steyn in *Farley*, *supra* note 50, and K.B. Soh in "Anguish, Foreseeability and Policy," *supra* note 107.

reasonably foreseeable consequence of breach, the claim is not sustainable under the *Hadley* principle.

As already noted, however, there is a danger in applying the foreseeability approach alone that the non-pecuniary content of the contract will go undetected and be marginalized in relation to its traditionally-recognized, non-pecuniary content. On the footing that claims for intangibles should be treated like any other claim, the following section provides a proposed restatement of the general rule.

V. Proposed restatement of the general rule

The proposed restatement of the general rule against recovery for mental distress damages is in fact a repeal of it.

Instead of a court invoking the general rule and then determining whether the contract fits within an exceptional category, the court would instead pose the following questions:

1. Did the defendant promise the individual plaintiff important *intangible, non-pecuniary* benefits under the contract? [per *Farley*, was pleasure, relaxation, peace of mind or freedom of molestation an important or significant part of the contract?]
2. If yes, did the defendant fail to deliver those benefits, either in whole or in part?
3. If yes, did the plaintiff suffer any loss, including non-pecuniary loss such as mental suffering?
4. If yes, is there proof that the mental distress is more than simply fleeting? [i.e., was the distress beyond disappointment or hurt feelings?]
5. If yes, did the defendant's breach cause that loss?
6. If yes, was the plaintiff's loss reasonably foreseeable? In the words of Judge Borins in *Newell*, the court would simply ask "[w]as the contract such that the parties must have contemplated that its breach might entail mental distress, such as frustration, annoyance or disappointment?"¹²⁸

If the answer to all these questions is 'yes', then the plaintiff is entitled to general damages for mental distress. The court must then proceed to assess quantum, keeping in mind that recovery for mental distress should, at least in the ordinary case, be restrained.

The above restatement is offered as a replacement for the special categories approach which puts the judiciary in an unnecessary strait-jacket. But this is not to suggest that the foreseeability test deployed by

128. *Supra* note 89 at para. 39.

the Canadian courts in this area should likewise be side-lined. In short, even where the contract is devoid of non-pecuniary promises, recovery for mental distress under the general rules of foreseeability should remain a possibility – albeit a more distant one. To the extent, for example, that special circumstances have been communicated to the defendant such that mental distress would be a reasonably foreseeable consequence of breach, damages for intangibles should be recoverable. There is no need to fear opening of the floodgates which the general rule against recovery purports to forestall. As Justice Picard observes in the context of a mental distress claim, the rule in *Hadley* already “has within it the means to test and limit liability.”¹²⁹

A lingering irony remains, though, regardless of the approach taken to permitting recovery for intangible loss in the commercial arena. As Michael Bridge observes, “a belief that there is more to life than money and property has led to the pecuniary vindication of non-pecuniary interests. This is truly the bottom line.”¹³⁰

Conclusion

Because this paper has covered considerable terrain, it is convenient to set out some brief conclusions.

1. *Punitive damages*

1. Punitive damages punish the defendant for oppressive and high-handed misconduct which offends the courts sense of decency (per *Whiten*).
2. Punitive damages require the plaintiff to show a separate actionable wrong, distinct from the breach being sued upon. The separate actionable wrong may be a tort or another breach of contract (per *Whiten*).
3. An award of punitive damages in a commercial dispute is an extraordinary remedy (per *Got*).

2. *Aggravated damages*

1. Aggravated damages compensate the plaintiff for intangibles such as pain, anguish, humiliation (per *Huff*) due to the defendant’s reprehensible or outrageous conduct (per *Whiten*).
2. Plaintiff must show that the defendant committed an independent actionable wrong (per *Whiten*).

129. *Kempling*, *supra* note 92 at para. 69.

130. *Supra* note 125 at 370.

3. There is controversy as to whether aggravated damages and general distress damages are the same or different. The author takes the position that they are different. Aggravated damages measure the defendant's conduct *at time of breach* and compensate the plaintiff for the additional emotional harm caused. General damages for mental distress assess the matter from the parties' perspective *at the time of contract*.
4. Aggravated damages are rare in the commercial arena for the simple reason that only individuals can experience the pain, anguish or grief generated by the defendant's outrageous conduct. Corporate plaintiffs are therefore not entitled to aggravated damages (per *Pinewood Recording Studios, Walker*).

3. *General damages for mental distress*

1. Assuming there is a distinction between aggravated damages and general damages for mental distress, the distinction is this: general damages for mental distress compensate for intangibles such as pain and anguish resulting from the *fact* of breach (rather than the *manner* of breach).
2. The general rule is that there is no recovery of general damages for mental distress in a breach of contract scenario.
3. There are many rationales for the rule, including: contract-breaking is to be met with mental fortitude (*Johnson*); courts may experience open floodgates but for the rule (*Warrington*); plaintiffs may otherwise fabricate or exaggerate their mental distress; and mental distress may not be reasonably foreseeable in the commercial arena and therefore not recoverable under *Hadley*.
4. Courts have evolved exceptions to the general rule against recovery in order to afford justice to the deserving plaintiff.
5. Exceptions to the general rule against recovery have taken three approaches: determine whether the contract is commercial or non-commercial, permitting recovery only in the latter case; on a related front, determine whether the contract fits within a category of exceptions to the general rule such that mental distress damages would be recoverable; or, thirdly, apply the simple principles of foreseeability without preliminary regard to the type of contract or its classification. These strategies have not yet been reconciled by the courts and therefore make this area of law problematic to summarize.

6. The approach based on the contract being commercial or non-commercial breaks down on analysis (*Gill*).
7. The approach based on the contract fitting within an established categories requires the plaintiff to go beyond demonstrating that general damages for mental distress were reasonably foreseeable. The plaintiff must establish that the contract at bar fits with an exception. Examples of contracts within the exceptions include: vacation contracts (*Jarvis et al*); contracts associated with a wedding (*Diesen et al*); employment contracts (*Wallace*); insurance contracts (*Warrington*); and contracts for luxury chattels (*Wharton et al*). Contracts between solicitor and client may also be a category but this is less certain. The Ontario Court of Appeal in *Benaiah* permitted recovery for mental distress damages due to the solicitor's incompetence, but under the law of negligence. The Saskatchewan Court of Appeal in *Hagblom* permitted recovery but was not required to choose a basis for that determination. In *Maillot*, mental distress damages were disallowed based on the categories approach.
8. This "special categories" approach can be criticized on several grounds:
 - the law of contracts ordinarily permits recovery for reasonably foreseeable loss. Why have a special rule for intangible loss? (*Gill*)
 - once intangible harm is accepted as being compensable, there is no logical reason to artificially restrict it (Professor Veitch)
 - though the categories approach has a gate-keeping function to stave off a floodgate of inflated claims, trivial complaints, and fictitious allegations, this function can be performed by ordinary contract law principles (*i.e.*, the plaintiff must prove her claim and establish quantum; if the quantum is minimal, the court should award only nominal damages or no damages at all)
 - on this basis, the special categories approach needlessly complicates the law
9. The third approach is to permit recovery based on foreseeability alone (*Newell, Gill, Kempling*). Was mental distress a reasonably foreseeable consequence of breach?

10. Instead of gate-keeping through categories of cases, ordinary contract law principles would perform that function, including, of course the principle of *Hadley* but also such doctrines as *de minimis non curat lex*.
 11. No matter what theory the court applies to recovery, the plaintiff seeking general damages or mental distress *does not* have to establish an independent, actionable wrong (*Warrington*).
4. *Over-arching rules regardless of approach to general damages for mental distress*
1. Corporate plaintiffs cannot recover under this head of damage because corporations cannot experience human emotions (*Walker*).
 2. The plaintiff must prove that distress is more than fleeting.
 3. Quantum must be restrained and modest. To reiterate Lord Steyn's warning: "It is important that logical and beneficial developments in this corner of the law should not contribute to the creation of a society bent on litigation."¹³¹

131. *Farley*, *supra* note 50 at para. 28.

