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Research dissertation/research paper presented for the approval of Senate in fulfilment of part of the requirements for the Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Dedication

To the glory of God and for the honour of my father and mother

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CHAPTER ONE—INTRODUCTION

A Tale of Two Trials

*Addis v Gramophone Co Ltd*¹

The question which I desired time to consider...²

In 1909, these words were spoken by the lone dissenting voice in the House of Lords on the most dismal Monday the year had yet to offer Mr Addis. The words referred to an intervention previously made to forestall summary dismissal of the appeal. The majority had regarded the question as too trite to merit further deliberation.³

The dissent that followed was a harbinger of the controversy that would surround that day's decision—and continue into the next century.⁴ It is hard to find a case that has drawn as much criticism,⁵ even in the House that decided it,⁶ a case that has few champions⁷ and yet has endured this battering with an astonishing resilience.

The case itself was a matter simple enough. Mr Addis managed the business interests of Gramophone Co Ltd in Calcutta, India. He served under an employment contract terminable on six months notice. Although Gramophone Co purported to give him notice, it immediately appointed a successor and took

¹ [1909] AC 488 (HL) [*Addis*].

² *Ibid* 497 (per Lord Collins).

³ See comment in *Malik v BCCI* [1997] 3 All ER 1 (HL) at 19j-20a (per Lord Steyn).

⁴ *Eastwood v Magnox Electric plc* [2004] 3 All ER 991 (HL) at 994j.

⁵ F Pollock (1910) *LQR* 1; HR Hahlo 'Sentimental damages' (1972) 50 *Can Bar Rev* 304; D Newell (1976) 92 *LQR* 328; FD Rose 'Injured feelings and disappointment' (1977) 55 *Can Bar Rev* 333; E Veitch 'Sentimental damages in contract' (1977) 16 *UWOLR* 227; AS Burrows 'Mental distress in a contract—a decade of change (1984) *Lloyd's Maritime and Commercial L* 119; MG Bridge 'Contractual damages for intangible loss' (1984) 62 *Can Bar Rev* 323; H Carty 'Contract theory and employment reality' (1986) 49 *MLR* 240; E Macdonald 'Contractual damages for mental distress (1994) 7 *JCL* 134; N Enonchong 'Breach of contract and damages for mental distress' (1996) 16 *OJLS* 617; D Capper 'Damages for distress and disappointment—the limits of *Watts v Morrow* (2000) *LQR* 553; A Tettenborn 'Nonpecuniary loss: the right answer, but bad reasoning?' (2003) *JOR* 94; S OByrne 'Damages for mental distress and other intangible loss in a breach of contract action' (2005) 28 *Dalhousie LJ* 311; A Phang 'The crumbling edifice?—the award of contractual damages for mental distress' (2003) *JBL* 341.

⁶ See comment in *Johnson v Gore Wood and Co (a firm)* [2001] 1 All ER 481 (HL) at 517f (per Lord Cooke).

⁷ F Dawson 'General damages in contract for non-pecuniary loss' (1983) 10 *NZULR* 232 at 260.

rather unsavoury steps to ensure Addis was unable to discharge his managerial duties.

The judgment does not detail the ill treatment, but two months of it was enough to make Addis quit both job and country. Returning to England, he sued for his terminal benefits and claimed additional compensation for the oppressive manner of his dismissal. He won the sympathy of judge and jury at trial. The Court of Appeal reversed the decision. It fell to the House of Lords to hear his final appeal.

The issue

The question before the House was a short one. Could damages be awarded for the mental distress caused by a breach of contract?

The resolution

The answer was even shorter. No.

*Farley v Skinner*⁸

It is highly desirable that your Lordships resolve the angst on this subject...⁹

In 1990, Graham Farley had come to the end of a successful career in business. The plan was to now find a home to retire to in the serenely beautiful English countryside. He identified a lush property in Blackboys village Sussex and asked his surveyor, Skinner, to inspect it. Gatwick International Airport was 15 miles away, so one matter he particularly wanted information on was whether the home was affected by aircraft noise. Skinner's survey report was encouraging, but ultimately misleading. Farley bought the house, spending three months and over £100,000 renovating it prior to occupation. When he finally moved in, he discovered that aircraft waiting for landing clearance would stack up quite close to his new home. They made noise. Farley sued Skinner.

The issue

There was an obvious breach of contract, but the difficulty the case presented was that the noise did not diminish the property's value below the price paid. Financially speaking, Farley had suffered no loss. The case confronted the prohibition *Addis* had placed on mental distress damages. Would their Lordships deny Farley a remedy or was the prohibition's 'reign of terror' finally at an end?

The resolution

Paradoxically, the House of Lords unanimously reaffirmed the prohibition and then granted Farley a remedy as an exceptional measure.

⁸ *Farley v Skinner* [2001] 4 All ER 801 (HL) [*Farley*].

⁹ *Ibid* 826g (per Lord Scott).

Problem

What happened to Addis and Farley could happen to anyone. Everyone contracts. At one point or another each one of us has entered into an agreement with another person intending to create a legally binding obligation. These instances are accompanied by the hope that our contracting counterpart will fulfil their promise by diligently performing the obligation. Life being what it is this is not always the case. Breach brings an element of loss into the contracting dynamic.

Hypothesis

This dissertation's primary hypothesis is that the angst-spawning confusion plaguing this area of law stems from a feckless amalgamation of parallel, if not competing, notions of loss. Let me explain. When a promisee seeks judicial relief for breach, the court habitually applies two deeply-ingrained *presumptions of fact* whose status has been unconsciously elevated to *rules of law*.¹⁰ These judicial presumptions are that:

1. The promisee's concern is loss of performance and not loss of promise; and (After confining the matter to loss of performance)
2. The promisee's performance interest is essentially pecuniary value (profit) and not non-pecuniary value (utility).

The *Addis* case illustrates the sad result of focusing on performance in a situation where the predominant loss caused by breach is promissory in character (*Presumption 1*). *Farley*, on the other hand, promotes the commercial agenda by perpetuating the notion that financial loss is the premier interest of contract as law (*Presumption 2*).

Scope

This dissertation tests the above hypothesis by evaluating the prohibition on mental distress damages. The main subject of study is English law, but pertinent decisions from jurisdictions with a shared legal heritage are referenced. While the focus is on conceptual validity, critical analysis is merged with a tracking of the historical unfolding of the principles at play. The prohibition, exceptions and underpinning rationales are duly assessed. There is also an attempt to

¹⁰ Newell (note 5) 330.

demonstrate the validity of sentimental loss as a legitimate interest of contract law.

Recommendations

In the discussion that follows, this paper argues for:

1. Judicial impartiality in the enforcement of contracts.

The position taken is that contractors ought to retain the prerogative of prescribing the normative values of their agreement (*promissory vs. performance*) as well as determining its premier interest (*pecuniary vs. non-pecuniary*).

Rules of law, not to mention presumptions of fact, encroaching on this liberty ought to be abundantly justified or restrictively interpreted.

2. Preservation of the prohibition on compensating mental distress.

The position taken is that the prohibition, if restrictively interpreted, rests on a pragmatic policy basis and benefits society by permitting efficient breaches of contract. This concession is subject to—

- 2.1. the differentiation between promise and performance; and
- 2.2. the divorce of mental distress from sentimental benefit.

3. Differentiation between promise and performance.

This distinction, peculiar to the common law system, presents an area of possible overlap between contract and tort law. Acknowledging the premium that a party may place on the promissory element of a contract is the newest phase (already unfolding in Canada) in the sophistication of this branch of law.

The position taken is that, among a myriad of other possibilities, this differentiation facilitates the compensability of *aggravated* mental distress if a contract is breached in a manner indicating a want of good faith.

4. Divorce of mental distress from sentimental benefit.

The position taken is that *sentimental benefit*, if regarded as the fruit of a consumer transaction, parallels *profit*, the fruit in a commercial transaction, as a loss flowing naturally from the breach. Despite its seeming incommensurability, it ought to be compensable under general and not exceptional principles.

Shifting the current emphasis from mental distress onto sentimental benefit eliminates the apparent conflict between maintaining the prohibition and meeting the ends of justice which demand satisfaction of a legitimate contractual expectation.

Nomenclature

The incantatory manner in which the phrase *mental distress* is currently employed is both symptomatic of and obscures the underlying conceptual deficits. The phrase is useful shorthand if the pertinent emotion is qualitatively negative, eg anger, anxiety, disappointment or vexation. It is ill-equipped to capture positive emotional values like pleasure, enjoyment, satisfaction and peace of mind. Indeed, the axiomatic simplicity it suggests stifles exploratory dialogue on the very issue of meaning.¹¹

This dissertation adheres to three distinct narratives of sentimental loss. The phrase *mental distress* is used to denote the negative mental and emotional reactions ascribable to mere breach. The phrase *sentimental benefit* is used to denote the satisfaction or peace of mind that is integral to the performance value of a contract. The phrase *sentimental injury* will refer to the negative mental and emotional reactions attributable to events directly consequent to breach.

Sole reliance on 'mental distress' contributes to a failure to differentiate mental distress from sentimental benefit, as well differentiate between sentimental benefit and sentimental injury for compensative purposes.¹² It also leads to the more pardonable error of leaving the hypothesised distinction between mental distress and sentimental injury unexplored. Lord Millet touched on the implications of this when he observed that:

[N]on-pecuniary loss such as mental suffering consequent on breach is *not within the contemplation* of the parties and is accordingly too remote. The ordinary feelings of anxiety, frustration and disappointment caused by any breach of contract are also excluded, but seemingly for the opposite reason: they are so commonly a

¹¹ See Carty (note 5) 245.

¹² Rose (note 5) 334 and 336.

consequence of a breach of contract that the parties *must be regarded ...as having foreseen it*.¹³

This diagnostic tool draws the analyst inexorably towards embracing foreseeability as the sole explanatory rationale and leads to the mild but unamusing result of noting its applicability in some cases and its inapplicability in others—without being able to justify the difference.¹⁴

The more sobering confusion this causes can be briefly illustrated. *Jarvis v Swans' Tours Ltd*¹⁵ was a case concerning a spoiled holiday. Mr Jarvis was upset by the mere breach (mental distress). Additionally, he did not obtain the pleasure integral to the performance due to him (sentimental benefit). Furthermore, he endured dreadful inconvenience in the Swiss Alps spanning a fortnight (sentimental injury). Now, it is said that the case was decided 'without reference to the problem of remoteness.'¹⁶ But Stephenson LJ's judgment was explicitly on the issue of remoteness¹⁷ and the authorities Lord Denning MR and Edmund-Davies LJ dealt with concerning sentimental injury also raised the question.¹⁸ Yet all the justices clearly had mental distress in mind while making the actual award and not sentimental injury. What was being attempted was compensation for loss of *sentimental benefit*, through an award of damages assessed on the basis of *mental distress*, using a rationale borrowed from *sentimental injury*. The approach demonstrates a 'circuitous route to recovery,' which 'raises false issues and confuses analysis.'¹⁹

Dialectics

Where possible, use of 'consumer versus non-consumer' will be preferred to the more traditional 'commercial versus non-commercial' dialectic, because even a supposedly 'non-commercial' transaction is still commercial from a partisan

¹³ *Johnson v Unisys Ltd* [2001] 2 All ER 801 (HL) at 823c-d.

¹⁴ I Ramsay 'Damages for mental distress' (1977) 55 *Can Bar Rev* 169 at 172.

¹⁵ [1973] 1 All ER 71 (CA) [*Jarvis*].

¹⁶ D Yates 'Damages for non-pecuniary loss' (1973) *MLR* 535 at 537-38; Ramsay (note 14) 172. Cf Rose (note 5) 334; BS Jackson 'Injured feelings resulting from breach of contract' (1977) 26 *International and Comparative LQ* 502 at 504.

¹⁷ At 76f.

¹⁸ At 74d-e and at 75c respectively.

¹⁹ A Kastely 'Compensation for aesthetic and emotional enjoyment' (1986) 8 *U Haw LR* 1 at 2.

perspective. In comparison, a transaction can be purely 'non-consumer' if none of the parties converts the contract subject-matter to personal use.

CHAPTER TWO—LAW, CONCEPTS AND HISTORY

Section one: Law

The Prohibition and the Exceptions: in outline

Quite apart from its preoccupation with financial loss,²⁰ contract law promotes a general prohibition, said to have been established in *Addis v Gramophone Co Ltd*,²¹ against recovery of damages for sentimental loss.²² Simply stated, the court will not grant ‘damages for the disappointment of mind occasioned by a breach of contract.’²³ As the language reveals, the prohibition was initially a restraint the court placed upon its own power.

By 1909, this restraint had transformed into a limit placed on a plaintiff’s substantive rights.²⁴ By the century’s close, the focus of the rule was neither court nor plaintiff. An admirably succinct and authoritative²⁵ passage now characterised the prohibition as immunity conferred upon the defendant:

A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.

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

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

²⁰ Chitty *Chitty on contracts* 29ed (2004) para 26—073.

²¹ *Addis* (note 1) 491.

²² Chitty (note 20) para 26—074.

²³ *Hamlin v Great Northern Railway Company* (1856) 1 H & N 408 (ExchD) at 411 (per Pollock CB) [*Hamlin*]. See *Farley* (note 8) at 815f where Lord Clyde reiterated that *disappointment* is ‘a sufficient label for those mental reactions which in general the policy of the law will exclude.’

²⁴ *Addis* (note 1) 491. See E Peel *Treitel on the law of contract* 12ed (2007) para 20—073. See comment in *Ruxley Electronics and Construction Ltd v Forsyth* [1995] 3 All ER 268 (HL) at 289c (Lord Lloyd) [*Ruxley*].

²⁵ Applied in *Branchett v Beaney Coster & Swale Borough* [1992] 3 All ER 910 (CA) at 916b (Balcombe LJ); *R v Investors Compensation Scheme Ltd, ex p Bowden* [1994] 1 All ER 525 (CA) at 537c (Mann LJ); *Farley* (note 8) 807e-j para 14 (Lord Steyn), at 814g-j para 34 (Lord Clyde), at 819b, e-f para 47 (Lord Hutton), at 828g-829a para 81 (Lord Scott); *Johnson v Gore Wood* (note 6) 505b-c (Lord Bingham), at 509f (Lord Goff), at 515g-516a (Lord Cooke); *Channon v Lindley Johnstone* [2002] EWCA Civ 353 (CA) at para 50 (Potter LJ); *Hamilton Jones v David & Snape* (a firm) [2004] 1 All ER 657 (ChD) at 671a-b para 53 (Neuberger); *Wiseman v Virgin Atlantic Airways* [2006] EWHC 1566 (QBD) at para 14 (Eady J).

breach and mental suffering directly related to that inconvenience and discomfort.²⁶

Loss of reputation and social discredit are sometimes included in the 'injured feelings' menagerie,²⁷ but the former seems pecuniary in character.²⁸ Commercial contracts²⁹ feel the full brunt of the prohibition and the courts have applied it to disallow sentimental damages for wrongful termination of employment,³⁰ non-completion of public carriage,³¹ and professional negligence by solicitors³² and surveyors.³³

The prohibition's primary exception focuses on the object-of-the-contract as evidenced by the terms.³⁴ If the object of the contract is to confer a sentimental benefit, then breach entitles the plaintiff to compensation for the mental distress caused. It was once thought that mental benefit had to either be a central³⁵ or predominant³⁶ object, but it is now accepted that highlighting its importance suffices.³⁷ The courts have applied the exception to allow damages for sentimental loss in contracts relating to spoilt holidays,³⁸ wedding photographs,³⁹ loss of amenity,⁴⁰ violated burial rights,⁴¹ professional negligence by accountants⁴² lawyers,⁴³ and surveyors.⁴⁴

²⁶ *Watts v Morrow* [1991] 4 All ER 937 (CA) at 959j-960a (per Bingham LJ).

²⁷ Chitty (note 20) para 26—074.

²⁸ S Harder *Measuring damages in the law of obligations* (2010) 102. Also Chitty (note 20) para 26—077.

²⁹ *Hayes v Dodds* [1990] 2 All ER 815 (CA) at 824b (and passim).

³⁰ *Shove v Downs Surgical Plc* [1984] 1 All ER 7 (QBD) at 10e-f; *Bliss v SE Thames RHA* [1985] IRLR 308 (CA) at 316.

³¹ *Hamlin* (note 23) 411; *Wiseman v Virgin Atlantic Airways* (note 25) at para 17.

³² *Groom v Crocker* [1938] 2 All ER (CA) 394 at 415C; *Cook v Swinfen* [1967] 1 All ER 299 (CA) at 303C. Cf *Malyon v Lawrence Messer & Co* [1968] 2 Lloyd's Rep 539 at 550-51.

³³ *Watts* (note 26) 956h-j.

³⁴ *Farley* (note 8) 809a (per Lord Steyn).

³⁵ *Knott v Bolton* [1995] 45 Con LR 127 (CA) at 129. Overruled by *Farley* (note 8) 812b para 24.

³⁶ *Farley v Skinner* [2000] EWCA Civ 109 (CA) paras 22-24 (per Stuart-Smith). Cf Capper (note 5) 556.

³⁷ *Farley* (note 8) at 812a para 24.

³⁸ *Jarvis* (note 15); *Jackson v Horizon Holidays* [1975] 3 All ER 92 (CA); *Kepple-Palmer v Exus Travel* [2003] EWHC 3529 (QB); *Milner v Carnival PLC* (t/a Cunard) [2010] EWCA Civ 389 (CA). Cf *Chande v East African Airways Corporation* [1964] EA 78 (HC).

³⁹ *Diesen v Samson* 1971 SLT 49 (Sh Ct).

⁴⁰ *Ruxley* (note 24).

⁴¹ *Reed v Madon* [1989] Ch 408 (ChD).

⁴² *Demarco v Perkins & Bulley Davey* [2006] EWCA Civ 188 (CA).

⁴³ *Heywood v Wellers* [1976] 1 All ER 300 (CA); *Hamilton Jones v David & Snape* (note 25).

⁴⁴ *Perry v Sidney Phillips & Son* (a firm) [1982] 3 All ER 705 (CA).

A secondary exception to the prohibition arises if a breach of contract causes physical inconvenience and discomfort. It is said that the damages assessed may take into account incidental sentimental injury. This task requires the delicate separation of mental distress from sentimental injury.⁴⁵ Although most judgments include both the mental suffering and the physical inconvenience and discomfort in a single assessment,⁴⁶ one salient judgment, in allowing damages physical inconvenience and discomfort, expressly excluded mental suffering.⁴⁷

Section two: Concepts

Loss of promise versus loss of performance

The maxim *pacta sunt servanda*, agreements must be kept, promises are binding—stands tall among the originating *fiats* of contract law. Its tertiary application shapes the law's remedial response to the friction arising from a breach. The nature of this response reveals the predominance of either of two motifs; a moral or reflective outlook focusing on the promisor's obligation and a utilitarian or separatist outlook focusing on the promisee's expectation.⁴⁸ It is said that these motifs account for 'the fundamental difference between the civilian and common law visions of contract.'⁴⁹

An obligation-oriented⁵⁰ enforcement regime gravitates towards specific performance as the prime remedy for breach.⁵¹ An expectation-oriented⁵² enforcement regime adopts discriminates between *promise* and *performance*. If performance can be obtained from an alternate source then failure by the

⁴⁵ *Heywood v Wellers* (note 43) 310h.

⁴⁶ *Burton v Pinkerton* (1867) 2 LR Exch 340 (Exchequer) at 349 (per Bramwell B); *Perry v Sidney Phillips & Son* (note 44) 712g; *Watts* (note 26) 954g and 955f.

⁴⁷ *Bailey v Bullock* [1950] 2 All ER 1167 (KB) at 1170H (per Barry J).

⁴⁸ See S Shiffrin 'The divergence of contract and promise' (2007) 120 *Harvard LR* 708 at 713. Also MP Sharp 'Pacta sunt servanda' (1941) 41 *Col LR* 783 at 784.

⁴⁹ R Hyland 'Pacta sunt servanda: a meditation' (1993-1994) 34 *Virginia J Int'l L* 405 at 430.

⁵⁰ D Hutchison et al *The law of contract in South Africa* (2009) 6; RH Christie and GB Bradfield *Christies law of contract in South Africa* 6ed (2011) 2; Schalk van der Merwe et al *Contract: general principles* 3ed (2007) 8.

⁵¹ See *National Union of Textile Workers v Stag Packings (Pty) Ltd* 1982 (4) SA 151 (TPD) at 155H (per Van Dijkshorst J); *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 (5) SA 73 (CPD) at 84I (per Foxcroft J). Also Hutchison (note 50) 319.

⁵² R Brownsword *Contract law Themes for the twenty-first century* (2000) 8 para 1.11.

promisor to keep the promise itself is irrelevant.⁵³ Remedial relief is availed only if the promisee fails to obtain performance elsewhere or does so at a higher cost.⁵⁴

If pursued to its extreme, the moral outlook crystallises contractual expectation in a manner that may finally fail to consider whether the expectation retains its reasonableness in the new breach-created context.⁵⁵ A reckless pursuit of the utilitarian outlook annihilates *promise* by ignoring the fragility of our understanding of 'reasonable expectation.' This understanding is sensitive not only to the promise-content, but is attenuated by the limits placed on judicial enforceability. These limits include the general unavailability of specific performance⁵⁶ and punitive damages.⁵⁷

Thus, *pacta sunt servanda* in common law means that while a promisee *must* receive the performance expected; this satisfaction need not come from a promise-keeping by the promisor.⁵⁸ It discounts the promise, attaching hardly any legal liability for loss of it. Indeed, the onus is the *promisee's* to obtain performance elsewhere so as to mitigate damage caused by the promisor.⁵⁹ Liability arising only if the promisee, unsuccessful in their mitigatory endeavours, suffers a performance deficit. And even then it is not a promise-keeping liability, but a duty to redress the performance deficit by paying damages on an indemnity basis.⁶⁰ These rules import a signal disregard for *loss of promise* as distinguished from *loss of performance*. As Holmes put it, 'The duty to keep a contract at

⁵³ *Alfred McAlpine Construction Ltd v Panatown* [2001] 1 AC 518 (HL) at 534D (per Lord Clyde: 'A breach of contract may cause a loss, but is not in itself a loss in any meaningful sense.').

⁵⁴ *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL) at 849B-C.

⁵⁵ Such a response may terminate the immediate conflict only at the cost of sowing seeds of future disharmony. It may also lead to economic waste. See for example *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (ChD) at 811B (Brightman J) where during a housing shortage a promisor built houses in violation of a restrictive covenant requiring pre-authorisation by the promisee. Court rejected the promisee's request for a demolition order.

⁵⁶ Shiffrin (note 48) 723. Cf C Fried 'The convergence of contract and promise' (2007) 120 *Harvard LR Forum* 1 at 4-5.

⁵⁷ Shiffrin (note 48) 726.

⁵⁸ See PS Atiyah *An introduction to the law of contract* 5ed (1995) 37. Also O Kahn-Freund 'Pacta sunt servanda—a principle and its limits' (1973-1974) 48 *Tulane LR* 894 at 894.

⁵⁹ Shiffrin (note 48) 724-25.

⁶⁰ *Wertheim v Chicoutimi Pulp Company* [1911] AC 301 (PC) at 307.

common law means a prediction that you must pay damages if you do not keep it,—and nothing else.’⁶¹

The general rule that no premium is placed on promise suggests, as a logical corollary, that liability is unlikely to be imposed for damage issuing solely from loss of promise. It is hardly surprising then, to encounter a rule prohibiting compensation for the type of harm attributable to loss of promise—*feelings of disappointment*. It would be imprudent to extend a rule generated by this exclusionary rationale to other sentimental loss whose cause is capable of being explained upon a differentiating hypothesis. If a sentimental loss can be shown to be causally connected to a non-mitigable performance-deficit, then it warrants compensation.

Damages

While remedies⁶² for breach are many and varied⁶³ the common judicial ones are damages and specific performance.

Specific performance is an order compelling a contract breaker to perform their obligation and is granted at the court’s discretion.⁶⁴ Damages, on the other hand, compel the contract breaker to pay money as a substitute for performance and must be granted to an entitled plaintiff. Not surprisingly, damages are the default judicial remedy for breach of contract.⁶⁵

⁶¹ Holmes ‘The path of the law’ (1897) 10 *Harvard LR* 457 at 462.

⁶² *Remedy* is a loaded term, especially in the contract context. P Birks ‘Rights, wrongs and remedies’ (2000) *OJLS* 1 at 3 puts forward the strongest case. Several other commentators agree that the remedial character of contract law is coloured by one’s doctrinal proclivity: Holmes (note 61) 461-62; LL Fuller and WR Perdue ‘The reliance interest in contract damages’ (1936) 46 *Yale LJ* 52 at 52; D Harris et al *Remedies in contract and tort* 2ed (2002) 3; S Smith *Contract theory* (2004) 388; C Webb ‘Justifying damages’ in JW Neyers et al (eds) *Exploring contract law* (2009) 139 at 139-40.

⁶³ Some of the available options are administrative action, alternative dispute resolution, injunctions, self help, and substituted performance detailed in Harris (note 62) 69, 38, 198, 43 and 210 respectively.

⁶⁴ *Co-operative Insurance Society Ltd v Argyll Stores* [1998] AC 1 (HL) at 9F (per Lord Hoffman); *Dowty Boulton Paul Ltd v Wolverhampton Corporation* [1971] 1 WLR 204 (ChD) at 211G (per Pennycuik VC); GH Treitel *Remedies for breach of contract: a comparative account* (1988) page 47; *JC Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 (HC of A) at 298 (per Dixon J). See EA Farnsworth ‘Legal Remedies for Breach of Contract’ (1970) 70 *Col LR* 1145 at 1151; G Washington ‘Damages in contract at common law’ (1931) 47 *LQR* 345 at 345.

⁶⁵ *Cassell & Co Ltd v Broome* [1972] 1 All ER 801 (HL) at 823d. Harris (note 62) 74.

Definition

Damage, in law, refers to detriment to a person's state of affairs produced by the act or omission of another.⁶⁶ This detriment may elicit a remedial response from the law. If it does, the damage is further characterised as injury; if it does not, the condition is described as damage without injury.⁶⁷

'Damages' have been variously defined as 'the sum of money payable as compensation for an injury resulting from a tort or breach of contract,'⁶⁸ as 'the pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort or a breach of contract, the compensation being the form of a lump sum awarded at one time, unconditionally'⁶⁹ and as 'the pecuniary recompense given by process of law for an actionable wrong.'⁷⁰ These definitions suggest that the idea of compensation is integral to the concept of damages, but other types of damages do exist.

Concept analysis

If the motive and conduct of the defendant evinces an intention to intensify the plaintiff's sense of injury, then *aggravated damages* may be awarded to augment the ordinary compensatory award.⁷¹ Although the normal quantum is amplified, the award remains compensative and not punitive.⁷² This is because the award focuses on the additional suffering the plaintiff experiences as a result of the defendant's acts. This essentially compensatory nature implies dual utility in contract and tort, but they are limited to the latter.⁷³ An attempt to introduce

⁶⁶ *Halsbury's Laws of England* 4ed (1998) 12(1) 802.

⁶⁷ *Ibid.*

⁶⁸ A Ogus *The law of damages* (1973) 1.

⁶⁹ H McGregor *McGregor on damages* 18ed (2009) 3.

⁷⁰ Harder (note 28) 3. See also *Jabour v State of Israel Absentee's Property Custodian* [1954] 1 All ER 145 (QBD) at 150F-H.

⁷¹ *Vorvis v Insurance Corp of British Columbia* [1989] 1 SCR 1085 (SC) at 1099h (per McIntyre J).

⁷² *Rookes v Barnard* [1964] 1 All ER 367 (HL) at 412G-H.

⁷³ Assault and battery: *W v Meah* [1986] 1 All ER 935 (QBD); False imprisonment: *Thompson v Metropolitan Police Commissioner* [1997] 2 All ER (CA); Defamation: *McCarey v Associated Newspapers Ltd (No 2)* [1965] 2 QB 86 (CA); and Trespass: *Drane v Evangelou* [1978] 2 All ER 437 (CA).

aggravated damages into the realm of contract law was rejected in *Kralj v McGrath*.⁷⁴

Exemplary damages, on the other hand, do aim to punish and deter.⁷⁵

Their measure is not taken from the loss suffered by the plaintiff and may result in overcompensation. *Nominal damages* are awarded if the plaintiff, in proving an infringement of right, fails to prove that it resulted in substantive loss.⁷⁶

Restitutionary damages are intended to restore value that had been erroneously transferred to the defendant.⁷⁷

The term compensation does not seem to describe the nature of damages, but rather the function of the majority of awards. The existence of these other damages types indicates that the functional needs of justice need not always be limited to a compensative approach. One writer observes that, 'since contract serves several functions, it is not surprising that a single damage measure will fail to achieve all the objectives.'⁷⁸

Redefinition

The reparative diversity canvassed above suggests that a tentative re-definition of damages may be attempted. Damages are a versatile, multidimensional, court-ordered substitutionary relief in the form of a money payment. This re-definition attempts to downplay function, because the functional aspect does not speak to the *nature* of damages, but rather to their *measure*.

Measure

The question of measure relates to the limits placed on the function and scope of damages. Since these rules are grounded in antiquity, it would be remiss not to at least outline the historical background. This review will suggest that these limitations have less to do with their actual subject matter and more to do with

⁷⁴ [1986] 1 All ER 54 (QB) at 61e. See also *AB v South West Water Services Ltd* [1993] 1 All ER 609 (CA) at 624j. Cf Law Com No 247 *Aggravated, Exemplary and Restitutionary damages* (1997) § 6.2 Pt II paras 1.26 and 1.36 echoing the Canadian approach in *Fidler v Sun Life Assurance* [2006] 2 SCR 3 para 53 (per McLachlin CJ and Abella J).

⁷⁵ *Rookes v Barnard* (note 72) 407D.

⁷⁶ See McGregor (note 69) 413-15.

⁷⁷ McGregor (note 69) 454. The term may also refer to the disgorgement of profits: see *Attorney General v Blake* [1998] Ch 439 (CA) at 458F (Lord Woolf MR).

⁷⁸ S Rea 'Nonpecuniary loss and breach of contract' (1982) 11 *JLS* 35 at 36.

the power relations that existed between judge and jury at the time of their creation.⁷⁹

Remoteness

The rule prescribing the scope of contractual liability may also be outlined here. Sentimental loss was wedged back into contract law's purview through the ironic employment of this exclusionary rule.⁸⁰ The remoteness rule as stated in *Hadley v Baxendale*⁸¹ is that:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.⁸²

This rule for gauging the scope of liability for damages has stood the test of time.⁸³ It is designed to cope with a situation where the knock-on effects of a breach spiral out of control and bring about consequences that the contract breaker could not have foreseen. If this occurs, saddling a defendant with the responsibility of making good the whole damage produces a manifest injustice.⁸⁴

The House of Lords later took pains to finesse the point that within 'contemplation' did not mean 'reasonably foreseeable' in *C Czarnikow Ltd v Koufos (The Heron II)*.⁸⁵ Lord Reid, after reanalysing the *Hadley* decision, concluded that Alderson B's dictum was not intended to simply distinguish between foreseeable and unforeseeable loss; rather, the highlighted distinction was between consequences that were *commonplace and likely to occur* as opposed to consequences which, though foreseeable, were not as likely.

⁷⁹ Dawson (note 7) 241-42.

⁸⁰ H Street *'Principles of the law of damages'* (1962) p 236-237.

⁸¹ (1854) 9 Exch 341 (ExchD).

⁸² At 354 (per Alderson B).

⁸³ Farnsworth (note 64) 1200 and 1202.

⁸⁴ See *Nurse v Barns* (1664) Sir T Raym 77 (KBD) at 77 where £500 damages were awarded on a £10 contract.

⁸⁵ [1969] 1 AC 350 (HL) at 385C-F (per Lord Reid).

Section three: History

Jury autonomy

As early as the twelfth century, civil cases before the King's courts were tried before judge and jury. Given that the jurors were typically members of the same community as the litigants and deeply conversant with the matter in contention, they had little need for fresh information about the case at hand. This led to a shifting of much of the adjudicatory responsibility from judge to jury, including the duty to assess damages.⁸⁶ The damages awarded aimed at achieving substantive justice on the facts of the case and were not limited to a merely compensatory function.⁸⁷

By the eighteenth century, however, a steadily expanding society meant jurors became less conversant with community affairs and increasingly reliant on the information adduced in court. Judges, therefore, began to gradually reclaim the prerogatives that traditionally resided within the province of the jury. Since a jury, swayed by the emotive circumstances of a case, was more prone to make excessive awards, judicial rules evolved to circumscribe their discretion.⁸⁸

Judicial intervention

*Livingstone v Rawyards Coal Company*⁸⁹ expresses the unitary principle that developed to guide awards of damages in both contract and tort. The measure was to be:

[The] sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.⁹⁰

This principle demanded that the defendant effect a restitutio in integrum (returning everything to the state as it was before). In tort, this restoration

⁸⁶ Washington (note 64) 346. See comment in *Cassell & Co Ltd v Broome* (note 65) 869g (per Lord Diplock)

⁸⁷ F Pollock *Pollock's principles of contract* 12ed (1946) 537.

⁸⁸ Washington (note 64) 362-64.

⁸⁹ (1880) 5 App Cas 25 (HL). See also *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 (HL) at 688-89 (per Viscount Haldane LC).

⁹⁰ At 39 (per Lord Blackburn). See JA Seibert 'Punitive and nonpecuniary damages in actions based upon contract' (1985-1986) 33 *UCLA LR* 1565 at 1565.

involved *corrective* justice, a giving back of what was previously possessed. Restoration in contract was an admixture of corrective and *distributive* justice. Distributive justice chiefly concerned granting the promisee the value of what had not been previously possessed (but which had been promised). Corrective justice required sometimes restoring that which, though previously possessed, was lost on account of the breach. This suggests intersect, in logic and principle, between contractual and tortious damages.

A similar but contract-specific assessment principle is captured in Baron Parke's timeless words:

The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages as if the contract had been performed.⁹¹

With Alderson B magnanimously adding that, 'where a person makes a contract and breaks it, he must pay the whole damage sustained.'⁹²

Although seemingly broad, the sweep of this rule is tempered by having regard to the nature of the contract as a whole as well as to the risks addressed by its terms. However, even in this compensatory climate, exemplary damages were, on occasion, awarded for breach of contract.⁹³ From a historical perspective, therefore, the default rule that damages for breach of contract are invariably compensatory was clearly not absolute.

Certainty of error: the rise of pecuniary interest in contract

It remains to be seen how the second default rule of contract damages came about. This rule prescribes that the only compensable loss is financial loss.⁹⁴ We have touched on a possible explanation for excluding the emotive elements of a case from the jury's scrutiny (and thus from the remedial ambit of contract law), but how did contract law come to fixate on the financial?

⁹¹ *Robinson v Harman* (1848) 1 EX 850 (ExchD) at 855. A principle described as 'deceptively broad' today: see DH Peek (1971-1972) 4 *Adel LR* 466 at 466. See also *Bank of Uganda v Masaba* [1999] 1 EA 2 (SCU) at 23g (Oder JSC).

⁹² *Ibid* 856.

⁹³ *Lord Sondes v Fletcher* (1822) 5 B & Ald 835 (KBD) at 836; *Smith v Thompson* (1849) 8 CB 44 (CP) at 61-62 (per Maule J).

⁹⁴ See *Groom v Crocker* (note 32) 418H (MacKinnon J); *Sunley & Co v Cunard White Star Ltd* [1939] 2 KB 791 (KB) at 799 (per Hallet J).

The rule limiting loss to the financial was designed to deal with the frequent objections lodged by defendants against excessive damages awarded by the jury. A judge was more confident in setting aside the award of damages if the error of the jury could be clearly shown. This *certainty of error* was demonstrable in mercantile cases, because trading accounts could be audited with relative ease. Since business-related matters formed the bulk of contractual litigation, the commercial ethic became synonymous with the contractual ethic. As was noted in *Sharpe v Brice*:

[T]he same rule does not prevail upon questions of tort, as of contract. In contract the measure of damages is generally a matter of account, and the damages given may be demonstrated to be right or wrong. But in *torts* a greater latitude is allowed to the jury.⁹⁵

The intriguing result of this state of affairs was that, though sourced from a unitary principle, the application of subordinate remedial rules in contract and tort led to wildly disparate results. The demand for precision in the proof of contract damages led to an unwarranted narrowing down of the concept of loss by the exclusion of 'uncertain' nonpecuniary loss thereby instigating a departure from the strived-for-ideal of full compensation.⁹⁶ One commentator noted that:

Damages in contract could easily be left at large ...and might include many elements of loss which are at present excluded. This, it has been said, would lead to confusion and uncertainty in commercial affairs; though perhaps the confusion and uncertainty would not be much greater than that caused by the complications of some of the present rules. At all events ...it is convenience, rather anything fundamentally ingrained in the nature of contract, which demands that it be treated with more rigidity than tort.⁹⁷

Conclusion

This chapter attempted to show that both contracts and contract-damages are remarkably supple tools capable of accomplishing a rich diversity of purposes. For largely historical reasons, however, this functionality has been curtailed. Power is prone to abuse and the desire to protect a defendant from unduly high damages awards meted out by an incensed jury is understandable. This led to a subliminal separation of emotive from non-emotive concerns in contract. Promise, with its

⁹⁵ (1774) 2 Black W 942 at 942-943 (per De Grey CJ).

⁹⁶ See Kastely (note 19) 2.

⁹⁷ Washington (note 64) 366.

extremely sensitive moral undertones, was purged from contract's domain leaving behind a coolly-calculating focus on performance.

Although limited functionality of damages is advantageous in that it minimises opportunities for abuse, it also binds the hands of justice in meritorious cases. A prohibition that initially protected defendants from the court's own excesses of power eventually transmuted into a tool employed to assist defendants in evading accountability for harm caused to justly aggrieved plaintiffs.

The other likely consequence of this overprotective policy was that it impaired the development and sophistication of contract functionality. It inspired a quest for certainty that led to a preoccupation with pecuniary value. This process pushed back contract's potential of becoming an all-purpose vehicle that effortlessly facilitated both market and non-market relations.⁹⁸ A medium that was capable of promoting and safeguarding both financial and sentimental interest.

Distinguishing between loss of promise and loss of performance assists in rationalising the purpose the prohibition was meant to serve. It explains why these developments were not able to entirely eliminate non-pecuniary concerns from contract law. Apart from the tortuous issue of sentimental loss, less controversial exceptions to the prohibition relate to the recovery of damages allowed if the breach causes injury to the property⁹⁹ or person¹⁰⁰ of the promisee.¹⁰¹

⁹⁸ See J Wightman *Contract: a critical commentary* (1996) 2-3 with regard to the two ideas of contract.

⁹⁹ *Henry Kendall and Sons v William Lillico and Sons Ltd* [1969] 2 AC 31 (HL) at 103F; *H Parsons (Livestock) Ltd v Uttley v Ingham and Co Ltd* [1978] QB 791 (CA) at 804E-G.

¹⁰⁰ *Grant v Australian Knitting Mills Ltd* [1936] AC 85 (PC) at 102-03 (Lord Wright); *Godley v Perry* [1960] 1 WLR 9 (QBD) at 16 (Edmund Davies J).

¹⁰¹ The award may also reflect an assessment of the mental suffering experienced as a corollary of the physical pain or mental illness: see *H West and Sons Ltd v Shephard* [1964] AC 326 (HL) at 340 and *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 (CA) at 822C respectively.

CHAPTER THREE — THE PROHIBITION

Introduction

Although *Addis* is taken to have established the prohibition, some commentators ascribe a narrower rationale to it, claiming that it proscribes the sentimental loss caused by *manner* of breach—not mere breach.¹⁰² A second group accepts it as the prohibition’s definitive source.¹⁰³ While a third discusses the prohibition in isolation.¹⁰⁴ The judiciary is equally equivocal.¹⁰⁵ This chapter examines the *Addis* judgment in detail, comparing it with other cases accepted as affirming the prohibition, in the hope of throwing points of convergence and divergence into relief.

*Hamlin v Great Northern Railway Co.*¹⁰⁶

The plaintiff, a tailor by profession, was travelling to Hull on the defendant’s train. His plan was drum up business by attending the market day. Contrary to schedule, the train only got as far as Grimsby and he was compelled to spend the night there. He sued.

The jury was instructed by the trial judge to limit their considerations to the financial costs of staying overnight and of completing the journey. In any event, the judge warned them not to exceed five shillings. The jury awarded five shillings on the dot. Hamlin appealed on the ground that the trial judge’s instruction took no account of his inconvenience and emotional distress.

No general damages allowed

Pollock CB outrightly denied the compensability of injured feelings, regarding them as having ‘no place in questions of contract.’¹⁰⁷ In his opinion there was a distinction between the cases in which the jury had an unfettered discretion (all non-contract cases apparently) and cases in which the jury was compelled to act

¹⁰² See Rose (note 5) 333; Veitch (note 5) 233; Tettenborn (note 5) 96.

¹⁰³ See Peek (note 91) 466; Yates (note 16) 536; Dawson (note 7) 233; Burrows (note 5) 119; Bridge (note 5) 333; Carty (note 5) 244; Macdonald (note 5) 134-35.

¹⁰⁴ Jackson (note 16); Ramsay (note 14).

¹⁰⁵ *Cook v Swinfen* (note 32) 303C; *Bliss v SE Thames RHA* (note 30) at 316. Cf *Malik v BCCI* (note 3) 9e-f; *Johnson v Unisys Ltd* (note 13) 807 para 15.

¹⁰⁶ *Supra* (note 25).

¹⁰⁷ At 411.

within the parameters of the judge's direction (all contract cases apparently).¹⁰⁸ This strongly suggests that the prohibition was really purposed at preventing a plaintiff from recovering damages simply by soliciting jury sympathy.

The judge then transitioned into a discussion of the importance, in contract law, of demonstrating the loss sustained through breach with estimable certainty. In the absence of which, the plaintiff's expectation loss dwindled to nominal damages. He was kind enough to add the proviso that '*damages of a pecuniary kind*' that were sustained consequentially could augment this nominal recovery.¹⁰⁹ The 'guiding rule' was that:

[N]o 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.¹¹⁰

If courts do not keep a tight rein on mental distress damages, plaintiffs can use them to sidestep the remoteness rule. A reasonable person in Hamlin's position would be more upset over their Hull plans being derailed than over being stranded in Grimsby. The Railway Co was not privy to the Hull plans and so the remoteness rule excluded liability. Framing the claim as one for mental distress damages could be interpreted as an attempt to circumnavigate *Hadley*.

Pollock CB did concede that disappointment flowed naturally from breach and as such *was* foreseeable, but he insisted that despite (or perhaps because of) its ubiquity, disappointment, nevertheless, fell outside the law's cognisance. Before closing, he did say that the guiding rule was not absolute, but that '[e]ach case ...must be decided with reference to the circumstances peculiar to it.'¹¹¹

The question that lingers is whether it is unjust to impute to the Railway Company awareness that, separate from the accommodation cost, stoppage in Grimsby was seriously likely to cause their clientele a modest measure of inconvenience. Was Hamlin not entitled to recover at least that much?

¹⁰⁸ Ibid.

¹⁰⁹ *Hamlin* (note 23) 411.

¹¹⁰ Ibid.

¹¹¹ Ibid.

Addis v Gramophone Co Ltd

The facts have already been canvassed.¹¹² Due to the Court of Appeal's finding that the facts disclosed no cause of action, what fell to be decided in *Addis* was technically a question of substantive legal right.¹¹³ Nevertheless, it is difficult to divorce the issue of damages from the question of substantive liability.¹¹⁴ Indeed, their Lordships vacillated between the two approaches while discussing the four main points of decision: the nature of the contract, the boundary of liability, the functional differentiation of damages, and jury competence.

Lord Loreburn regarded Mr Addis' claim as clashing with the customs of the commercial world. In disallowing it, he remarked that, '[s]uch considerations have never been allowed to influence damages in this kind of case.'¹¹⁵ It is not easy to discern whether his Lordship confined this remark to the employment relationship¹¹⁶ (or even more specifically, to the wrongful-dismissal aspect of that dynamic¹¹⁷) or whether he meant it to apply generally. Irrespective, he was categorical that 'the manner of dismissal' did not affect the rule.¹¹⁸

Lord Atkinson viewed Addis' allegation, based as it was on the impact of the respondent's conduct upon his reputation, as blurring the boundaries between tort and contract.¹¹⁹ It amounted to a claim for defamation.¹²⁰ Interestingly, the reason Lord Shaw gave for dismissing the claim was that the facts fell short of an independent action in tort. He reasoned that it would be unfair to the respondent if a claim based on evidence inadequate to sustain a tort action, were to succeed in imposing liability simply because Mr Addis sued in contract,

[T]here seems nothing in these circumstances, singly or together, which would be recognized by the law as a separate ground of action.... I

¹¹² Supra text (note 1).

¹¹³ *Addis* (note 1) 491 (per Lord Loreburn LC).

¹¹⁴ Birks (note 62) 16.

¹¹⁵ *Addis* (note 1) 491. Cf *Wallace v United Grain Growers Ltd* [1997] 3 SCR 701 (SC) at para [90] (per Iacobucci J).

¹¹⁶ Bridge (note 5) 344.

¹¹⁷ See comment in *Malik v BCCI* (note 3) 21c (Lord Steyn).

¹¹⁸ *Addis* (note 1) 491.

¹¹⁹ At 493. Also at 492 (Lord James). Cf *Administrator, Natal v Edouard* 1990 (3) SA 581 (AD) at 597E-G (per Van Heerden JA).

¹²⁰ At 494.

cannot see why acts otherwise non-actionable should become actionable or relevant as an aggravation of a breach of contract which, *ex hypothesi*, is already fully compensated.¹²¹

In effect, both Law Lords decided against Mr Addis, one doing so on the footing that contract and tort ought to have differing scopes of liability and the other on the footing that contract and tort ought to have the same scope of liability.

The second basis of Lord Atkinson's decision was his aversion to a prayer for what seemed to be exemplary damages. This departed from the compensatory bedrock of contract damages.¹²² He regarded as immutable the notion that damages are pegged to the specific benefit promised in contract terms, '[Mr Addis] is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept, and no more.'¹²³

Citing authorities decided as late as the nineteenth century, Lord Collins' response was that 'at one time it was competent for juries to give [exemplary] damages.'¹²⁴ The majority's attempt to confine this historical prerogative was 'arbitrary and illogical' to him, because a breach of contract could easily occur in 'circumstances just as deserving the reprobation of a jury as those which might accompany the commission of a [tort].'¹²⁵

Lord Collins shared Lord Shaw's opinion that the facts did not constitute independent tortious liability and, thus, to deny a relief in contract would leave Mr Addis entirely without a remedy. He pointed out that the scope of a contract breaker's liability is determined partly by the standard of what a reasonable person would regard as a loss flowing naturally from breach. This was a question of fact and since the jurors were the authoritative triers of factual matters their findings were not to be lightly impeached. He thus concluded that:

I am not disposed, unless compelled by authority to do so, to curtail the power of the jury to exercise ... a salutary power, which has justified

¹²¹ At 503.

¹²² At 494.

¹²³ At 496.

¹²⁴ At 497.

¹²⁵ At 498.

itself in practical experience, to redress wrongs for which there may be, as in this case, no other remedy.¹²⁶

The final difficulty the case presents is in discerning whether it turned on the issue of *Hadley* remoteness or policy. Finding that no special circumstances were communicated that ‘fairly and reasonably’ suggested the parties contemplated an extraordinary liability, Lord Gorell concluded, ‘[t]he latter branch of the [*Hadley*] rule is inapplicable to the facts of this case.’¹²⁷ In his view, Mr Addis needed to demonstrate that the sentimental loss occasioned to him was such as would naturally flow from the breach. This was a question of fact and could have been left to the jury, but yet the majority regarded this matter as falling outside the jury’s purview.¹²⁸

One commentator argues that this was because sentimental loss transcended issues of *Hadley* remoteness.¹²⁹ This opinion is consonant with the view expressed in *Hamlin* that disappointment although foreseeable is noncompensable. Another speculates that it was the lack of a recognised legal duty not to break contract in a reckless *manner* that meant no liability could attach for the ensuing harm.¹³⁰ According to this view, the House of Lords would still have dismissed the appeal even if the *manner of breach* had caused a pecuniary loss.¹³¹

This argument is correct up to the point where it reveals itself to be circular. A distinction may exist between loss of promise and loss of performance.¹³² However, one breach causes both losses and sentimental loss can characterise the ensuing harm in either category. Mr Addis’ claim based on the manner of breach was both sentimental and pecuniary. Why he failed to recover damages for lost employment prospects is difficult to understand.¹³³

¹²⁶ At 503.

¹²⁷ At 501.

¹²⁸ At 491 (Lord Loreburn LC), at 492 (Lord James), at 496 (Lord Atkinson), at 501 (Lord Gorell) and at 504 (Lord Shaw). See Dawson (note 7) 242.

¹²⁹ Dawson (note 7) 242.

¹³⁰ Enonchong (note 5) 620. See Tettenborn (note 5) 101-02.

¹³¹ Enonchong (note 5) 621-23.

¹³² Webb (note 62) 142.

¹³³ Pollock (note 5) 2 criticises the decision on this very point.

Some of the fruit of his litigation may have been sacrificed to poor strategy.¹³⁴ Lord Atkinson observed that, '[m]uch of the difficulty which has arisen in this case is due to the unscientific form in which the pleadings ...have been framed, and the loose manner in which the proceedings at the trial were conducted.'¹³⁵ Damages were awarded for pecuniary loss caused by manner of breach in *Malik v Bank of Credit and Commerce International SA*.¹³⁶ Therefore, if one accepts the argument by conceding that *Addis* was decided on the issue cause of action, but then takes the logic one step further by enquiring *why* no cause of action exists, it brings one back to the starting premise—no cause of action exists because sentimental loss is not recognised.¹³⁷

The correctness of this view is illustrated by two cases *Wilson v United Counties Bank Ltd*¹³⁸ and *Groom v Crocker*.¹³⁹ In the first, Wilson was a customer of the respondent bank. The respondent undertook to manage Wilson's business for the duration of his military service. The obligation included a duty to take 'all reasonable steps to maintain [Wilson's] credit and reputation.'¹⁴⁰ Contrary to this, creditors went unpaid and debts unpursued. Trade languished. As a result, Wilson's reputation was tarnished and business floundered to the point of bankruptcy. The damages awarded at trial included the loss of reputation occasioned by breach. The respondent challenged this award, arguing that *Addis* closed the door on nonpecuniary loss, particularly loss of reputation. Lord Atkinson responded by saying:

What was contended for [in *Addis*] ...was that [Mr Addis] was entitled to recover damages in respect of the hurt to his feelings and the injury to his reputation caused by the offensive and depreciatory manner in which he was ...dismissed.

The present case is wholly different. Major Wilson is not seeking to recover damages to any extent due to the breach, in such a manner as that of a contract not directly connected with his credit and reputation. He is seeking to recover damages for the injury caused to his credit and

¹³⁴ See comment in *Johnson v Unisys Ltd* (note 13) 530H-531A para 16 (Lord Steyn).

¹³⁵ *Addis* (note 1) 493.

¹³⁶ *Supra* (note 3) 9j and 11h (Lord Nicholls) by implying a duty of trust and confidence.

¹³⁷ See *Bridge* (note 5) 343.

¹³⁸ [1920] AC 102 (HL).

¹³⁹ *Supra* (note 32).

¹⁴⁰ *Wilson v United Counties Bank* (note 139) 113.

reputation by the defendants' neglect to perform the service they had by their contract bound themselves to perform—namely, to take all reasonable steps to maintain that credit and reputation.¹⁴¹

The consequential loss involved here is financial, but the logic employed suggests that Lord Atkinson's denial of damages in *Addis* turned less on the character of loss (as sentimental or financial) and more on the content of the bargain. In his view, since Mr Addis' employment contract did not cover the loss in question, damages would have conferred an unbargained for benefit.¹⁴²

In *Groom v Crocker*¹⁴³ the plaintiff, whose reputation suffered at the hands of his lawyer, was denied a recovery in contract because he was unable to show a justiciable loss. Groom was involved in a motor accident. An investigation proved the other driver to be entirely at fault. Crocker, the solicitor instructed by Groom's insurer, filed a defence containing a falsified admission of fault. This was part of a 'knock-for-knock' conspiracy between the insurers of both drivers aimed at minimising their expenses. When judgment was entered against Groom, the insurer paid up. Groom sued the solicitor after hearing of his so-called negligent driving.

The court found the claim for sentimental loss to be unsustainable, '[regarding] the general damages for injury to his reputation or his feelings, *Addis v Gramophone Co Ltd* is, I think, a conclusive authority.'¹⁴⁴ *Wilson v United Counties Bank Ltd*¹⁴⁵ was distinguished not on the basis of *Hadley* remoteness, but because it dealt with pecuniary loss. "'Credit" as a careful driver (except possibly to a professional chauffeur) is not a business asset, but a social or personal distinction.'¹⁴⁶ If it were simply a matter of cause of action, the facts of *Groom* present little difficulty in formulating an implied duty to safeguard the client's reputation by not throwing the case. Indeed in a similar case, at the doorstep to the 1970s legal renaissance, Lord Denning MR did so with an unobtrusive one-

¹⁴¹ Ibid 132. See also A Chandler and J Devenney 'Breach of contract and the expectation deficit: inconvenience and disappointment' (2007) 27 *Legal Studies* 126 at 130-31.

¹⁴² See *Addis* (note 1) 495.

¹⁴³ *Supra* (note 32).

¹⁴⁴ *Groom v Crocker* (note 32) 415C (per Scott LJ).

¹⁴⁵ *Supra* (note 139).

¹⁴⁶ *Groom v Crocker* (note 32) 419A (per MacKinnon LJ).

liner, 'She is entitled to general damages for the loss of the chance of a more favourable outcome, for the simple reason that it does affect a person's standing to be found the guilty party instead of the innocent party.'¹⁴⁷ The 30 year gap between the decisions does not indicate a great shift in mores, for even at the time *Groom* was decided Sir Wifrid Greene MR could not help but remark

I should have been glad if I could have found the law different from what I conceived it to be. Professional men such as solicitors and doctors are in a position where a breach of duty may often lead to mental suffering and social discredit without any real pecuniary damage.¹⁴⁸

Apart from *Farley* itself, *Cook v Swinfen*¹⁴⁹ is the case that best illustrates the distinction between mental distress, sentimental benefit and sentimental injury. The plaintiff had been let down by the solicitor she instructed to respond to a divorce petition filed against her. As seen above, Lord Denning MR regarded compensating the plaintiff for loss of a sentimental benefit intimately connected to her bargain as a relatively simple task.¹⁵⁰ He also suggested the compensability of consequential loss such as anxiety or nervous shock, provided it fell within the reasonable contemplation of the parties—*Hadley* remoteness.¹⁵¹ He, nevertheless, went on to expressly reiterate the noncompensability of mental distress thus upholding *Groom v Crocker* on that point and citing *Addis* to boot.

I think that, just as in the law of tort, so also in the law of contract damages can be recovered for nervous shock or anxiety state if it is a reasonably foreseeable consequence.... It can be foreseen that there will be injured feelings; mental distress; anger, and annoyance. But for none of these can damages be recovered. It was so held in *Groom v Crocker* on the same lines as *Addis v Gramophone Co Ltd*.¹⁵²

In effect, his Lordship was saying that sentimental injury (anxiety) is compensable, but mental distress is prohibited and all this operating distinct from the question of foreseeability.¹⁵³ This suggests neutrality in the *Hadley* remoteness rule.¹⁵⁴

¹⁴⁷ *Cook v Swinfen* (note 32) 302F. See Jackson at 508-09.

¹⁴⁸ *Groom v Crocker* (note 32) 402. Cf *Last-Harris v Thompson Brothers Ltd* [1956] NZLR 996 (SC) at 999 lines 15-20 (Archer J).

¹⁴⁹ *Supra* (note 32). See Jackson (note 16) 507.

¹⁵⁰ See text at note 152.

¹⁵¹ See Rose (note 5) 336; Burrows (note 5) 127.

¹⁵² *Cook v Swinfen* (note 32) 303B-C.

¹⁵³ A distinction that is sometimes difficult to grasp: see comment in *Heywood v Wellers* (note 43) 308g-j (James LJ). Also Jackson (note 16) 509.

Once a head of damages is permissible the *Hadley* rule may be invoked to circumscribe its limits. But if a head of damages is prohibited one cannot point to mere foreseeability as a ground for its inclusion.¹⁵⁵ The enigma as to what criteria was employed to open the door to one type of sentimental loss and close the door to another was not unravelled.

Conclusion

The *Hamlin* case suggests that the prohibition was directed at excluding qualitatively negative, sympathy-inducing, sentimental considerations from the jury's purview and in disallowing the claim the decision also touched on the need to establish certainty of loss. The default guiding rule that emerged from all this was said not to be absolute, but sensitive to the contracting context.

Addis on the other hand seemed to present a rather different picture. The very contextual singularities warranting a departure from the prohibition were seized upon to deny the remedy. By this time, it had clearly become the province of the judge to see that justice was done with respect to contract law. The only uncertainty about the loss in *Addis* was its extent and not its existence, but the decision went against the appellant.

Interplay between corrective and distributive justice is inevitable in contract law and it is indeed arbitrary to seize upon this characteristic alone as a ground to deny relief. The dissent in *Addis* had more in common with the reservation expressed in *Hamlin* that a case with peculiar facts could create the extenuating circumstances warranting a departure from the prohibition.

It is also interesting to note that the *Hadley* rule was employed to justify the *Addis* decision, when *Hamlin* had made clear that the prohibition operated independent of the issue of remoteness.

¹⁵⁴ Street (note 80) 236-237.

¹⁵⁵ Cf Phang (note 5) 355-56 (and passim).

CHAPTER FOUR—RATIONALES FOR THE PROHIBITION

Introduction

The judiciary formulated a prohibition, but have failed to detail the relevant underlying considerations of policy.¹⁵⁶ Due to the patently unjust results of adopting an interpretation with a broad scope, academic minds have tried to evaluate the possible reasons for its existence. These reasons include the fear of flooding courts with frivolous litigation, the notion that sentimental damages precipitate needless commercial instability, dilemma over compensative versus punitive functions and the attendant assessment problems.

The compensative versus punitive dilemma

The difficulty of distinguishing between compensative and punitive damages is cited as the most probable cause underlying the prohibition.¹⁵⁷ As previously noted, punitive damages are an anathema in English contract law.¹⁵⁸ The view is that imposing liability for both pecuniary and nonpecuniary loss is unduly harsh¹⁵⁹ and amounts to double recovery.¹⁶⁰

Although damages for mental distress are repeatedly characterised as compensative as opposed to punitive, the difficulty lies in the line drawing.¹⁶¹ ‘The difference,’ it has been said, ‘between compensatory and punitive damages is that in assessing the former the [court] must consider how much the plaintiff ought to receive whereas in assessing the latter [it] must consider how much the defendant ought to pay.’¹⁶² This neat conceptual package contrasts with the practical effect of an award.¹⁶³ The same award may be experienced as purely

¹⁵⁶ Enonchong (note 5) 631; Tettenborn (note 5) 97; Kastely (note 19) 6-8. See also *Halsbury's* (note 66) 822.

¹⁵⁷ Peel (note 24) para 20—073. Cf comment in *Johnson v Unisys* (note 13) 807d para 15 (Lord Steyn).

¹⁵⁸ *Herbert Clayton v Oliver* [1930] AC 209 (HL) at 220 (Lord Buckmaster); *Ruxley* (note 24) 270e (Lord Bridge).

¹⁵⁹ See Burrows (note 5) 132-33.

¹⁶⁰ See *Farley* (note 8) 833e (Lord Scott). See Sebert (note 90) 1571-72. Cf I MacNeil ‘Efficient breach of contract: circles in the sky’ (1982) 68 *Virginia LR* 947 at 968; Kastely (note 19) 8-9.

¹⁶¹ Macdonald (note 5) 135. See Enonchong (note 5) 617. *Ruxley* (note 24) 288h-j (Lord Lloyd). *Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co Ltd* (note 89) 689 (Viscount Haldane LC).

¹⁶² *Cassell & Co Ltd v Broome* (note 65) 839e (per Lord Reid).

¹⁶³ Phang (note 5) 345.

compensative (or even under-compensative) by one party, and as punitive by the other. It is noted that ‘when one examines the cases in which large damages have been awarded ...it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed.’¹⁶⁴

In *Addis* the majority viewed the damages allowed by the jury as exceeding the natural compensatory threshold and straying instead into the region of punitiveness. Their decision is criticised for conflicting with the basic compensatory standard expressed in *Robinson v Harman*.¹⁶⁵ But, interestingly, it is that very standard that Lord Atkinson invoked as the reason for dismissing the appeal.¹⁶⁶ This suggests that the two opposing viewpoints are both agreed as to the applicable legal principle, but disagree on the *extent* to which it applies in any given case. If this amounted to no more than a factual enquiry, then it is quite possible to see two tribunals to draw divergent conclusions from the same set of facts—both with good reason.

However, due to the courts’ reactionary attitude towards exemplary damages they have been less willing to resolve the question as to where compensation stops and punishment begins and more willing to be viewed as under-compensating rather than over-compensating a promisee.¹⁶⁷ This trepidation reaches its acme when dealing with a complaint pertaining to *manner* of breach. As was stated in *Honda Canada Inc v Keays*:

[T]he confusion between damages for conduct in dismissal and punitive damages is unsurprising, given that both have to do with conduct at the time of dismissal. It is important to emphasize here that the fundamental nature of damages for conduct in dismissal must be retained. This means that the award of damages for psychological injury in this context is still intended to be compensatory.¹⁶⁸

¹⁶⁴ *Rookes v Barnard* (note 72) 407G (per Lord Devlin). See also Law Com (note 74) para 1.16.

¹⁶⁵ Macdonald (note 5) 135.

¹⁶⁶ *Addis* (note 1) 494.

¹⁶⁷ *Aerial Advertising Company v Batchelors Peas* [1938] 2 All ER 788 (CA) at 796H (per Atkinson J).

¹⁶⁸ [2008] 2 SCR 362 (SC) at para 58 (per Bastarache J).

This goes to show that if sentimental loss were re-characterised as genuinely compensable this would open the door to a more comprehensive enforcement of contracts.¹⁶⁹

Commercial stability

The mercantile mindset and the pride of place given to the test of certainty serviced the need for a mode of quantifying damages that would ensure the grant of similar awards in comparable cases. The desired ‘uniformity of the law and certainty in commercial affairs’ were said to require the strict exclusion of sentimental considerations, principally *feelings of disappointment*.¹⁷⁰ These concerns, more viable in the days when damages were a jury prerogative, tend to lose their cogency in modern times, particularly in contexts where the judge is the sole arbiter of quantum.¹⁷¹

The notion of extending the liberal tort approach into the realm of contract was also regarded as likely to precipitate ‘*confusion and uncertainty in commercial matters*’ if applied without discrimination or to ‘*create anomalies*’ if applied selectively.¹⁷² Confusion and uncertainty would result because the defendant’s liability would be affected by *motive*. As Lord Atkinson put it, ‘if [motive] may be taken into account to aggravate damages, as it undoubtedly may be [in tort], it may also be taken into account to mitigate them.’¹⁷³ The needless complexity this introduces in litigation would slow down the resolution of commercial disputes whereas the parties placed a high premium on a justice that is swift and a liability that is certain.¹⁷⁴ From a merchant’s perspective, therefore, a policy restricting damages to pecuniary loss justified itself. Nonetheless, one is

¹⁶⁹ Hahlo (note 5) 304.

¹⁷⁰ See Peek (note 91) 466; Bridge (note 5) 332; AG Chloros ‘The doctrine of consideration and the reform of the law of contract’ (1968) 17 *International and Comparative LQ* 137 at 139.

¹⁷¹ See Harder (note 28) 106; KB Soh ‘Anguish, foreseeability and policy’ (1989) 105 *LQR* 43 at 45; Macdonald (note 5) 139.

¹⁷² *Addis* (note 1) 495 (per Lord Atkinson). In *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 (HC) Mason CJ, after noting the convergence of contract and tort (at 362), maintained that if a sentimental loss arose ‘directly from the breach of contract itself’ then justice required the law to remedy it (at 365).

¹⁷³ At 495-96.

¹⁷⁴ Bridge (note 5) 359 writes that ‘[t]he first and most obvious point to make is that it is expensive and time-consuming to assemble a case showing that [an intangible] loss has been suffered.’

left wondering: should the *preferences* of the commercial class be elevated to the status of a general principle of law?¹⁷⁵

The ‘Yes!’ answer one writer¹⁷⁶ offers comes with a rider: yes, because the majority of contracts ‘normally concern commercial matters.’ This may mean one of two things. It may mean that most contractual *litigation*, as opposed to contractual *friction*, is of a commercial bent.¹⁷⁷ Now, the reasons an aggrieved consumer may have for opting not to litigate are legion¹⁷⁸ and it is obvious too that, prior to Denning MR’s intervention in the 1970s, the law had reached a state of impasse.¹⁷⁹ In the absence of consumer litigation, the courts were slow to develop consumer-oriented principles of law; and in the absence of consumer-oriented principles of law, the consumer remained reluctant to turn to litigation for a remedy. Indeed, it was unlikely that many would run the gamut of trial without a set of clearly-defined principles that vindicated the consumer’s performance interest in a holistic manner. So if the consumer is loath to litigate because of the law’s perceived insensitivity, then it is circuitous to use the demonstrable scarcity of non-commercial litigation as justifying the status quo.

Assumption of risk

Alternatively, the ‘Yes!’ may be interpreted as suggesting that sentimental loss falls outside the parameters of contemplated business risk.¹⁸⁰ This contention invites two responses. The shorter one is to point out that we cannot assume displacement by the criterion of ‘reasonable contemplation’ without pressing on to conclude that in such a case the *Hadley* remoteness rule suffices to exclude liability.¹⁸¹ The prohibition is then rendered redundant.

¹⁷⁵ See *Baltic Shipping Co v Dillon* (note 173) 362 (per Mason CJ); Enonchong (note 5) 630.

¹⁷⁶ McGregor (note 69) para 3—020. Cf Rose (note 5) 333.

¹⁷⁷ See Harris (note 62) 30.

¹⁷⁸ These pertain to structural impediments and personal idiosyncracies, eg constraints on access to justice, volume of complaints vis-à-vis judicial capacity, delay caused by the existence and exploitation of procedural loopholes, cost considerations and uncertainty of outcome.

¹⁷⁹ See Jackson (note 16) 504.

¹⁸⁰ E Peel (note 24) para 20—073. Cf Enonchong (note 5) 631.

¹⁸¹ *Brown v Waterloo Regional Board of Commissioners of Police* (1983) 43 OR (2d) 113 (CA) at 118 (per Weatherston JA). Cf Carty (note 5) 244.

Be that as it may, a contract can transcend mere exchange of promises and act as a 'risk-allocation' vehicle.¹⁸² If so, it is conceivable that commercial players implicitly accept that the mental distress caused by breach is part of the fair cost of doing business.¹⁸³ Not only commercial players, but even consumers, to a lesser degree, are capable of countenancing contract breaking with a decent measure of fortitude. It is for this reason that the prohibition has been described as having 'a core of common sense.'¹⁸⁴ It is important, however, to be clear about the type of risk under discussion.

Mere breach (and the attendant mental distress) relates to loss of promise and not loss of performance. A commercial contractor will let their counterpart off the hook with regard to mere loss of promise and mitigate to the best of their ability. However, if mitigation is unsuccessful they will insist upon the utmost farthing with respect to the loss of performance, ie the expectation loss. Is it farfetched to argue then that even if a consumer accepts the risk of loss of promise (and the attendant mental distress), this does not involve a forfeiture of compensation for the sentimental benefit forming an integral part of the consumer's expectation loss?

Furthermore, the distinction attempted in the literature between commercial and non-commercial contracts, in as far as it turns on the issue of remoteness, constitutes a fragile basis for establishing entitlement to sentimental damages.¹⁸⁵ Granted that it was the prime consideration that opened the door to the possibility of sentimental damages,¹⁸⁶ and that '*personal, social or family interests*' are 'a useful test' or convenient starting point in choosing whether to award sentimental damages,¹⁸⁷ but later writers¹⁸⁸ and judges¹⁸⁹ have exploded

¹⁸² PS Atiyah 'Promises and the law of contract' (1979) 88 *Mind* 410, 412.

¹⁸³ *Johnson v Gore Wood & Co* (note 6) 516c (per Lord Cooke). See OByrne (note 5) 344; Carty (note 5) 245; Brodie 'The beginning of the end of *Addis v The Gramophone Company?*' (2009) 38 *Industrial LJ* 228 at 232.

¹⁸⁴ Tettenborn (note 5) 97. See Harder (note 28) 107.

¹⁸⁵ See *Farley* (note 8) 831h (Lord Scott). Also Yates (note 16) 537.

¹⁸⁶ McGregor '*McGregor on damages*' 13ed (1972) 44-5.

¹⁸⁷ See Yates (note 16) 537; Ramsay (note 14) 174.

¹⁸⁸ Veitch (note 5) 235-36; Dawson (note 7) 243-44; Sebert (note 90) 1589 and at 1594.

¹⁸⁹ *Anglo-Continental Holidays Ltd v Typaldos Lines (London) Ltd* [1967] 2 *Lloyds Rep* 61 (CA) at 66 (per Lord Denning MR) awarding damages for loss of goodwill to a company.

this theory. Upon closer inspection, it is apparent that the distinction amounts to no more than a presumption that it is more probable than not, that purely commercial contracts will discount the nonpecuniary aspect of a transaction.¹⁹⁰ This presumption of fact remains rebuttable.¹⁹¹

The floodgates rationale

The *floodgates rationale* views with trepidation the American tradition of awarding phenomenal sums as compensation for sentimental loss.¹⁹² A culture of judicial largesse in granting sentimental damages is viewed as posing the risk of cultivating a needlessly litigious society.¹⁹³ Valid as this concern may be it still needs to be balanced against the importance of addressing a genuine societal grievance. The fact that a remedy is likely to be frequently employed, if availed, may be equally indicative of its social necessity.¹⁹⁴

Let it also be remembered that principles of law pronounced in the courtroom have an extrajudicial impact.¹⁹⁵ The disinclination to acknowledge the legitimacy of sentimental loss for fear that the courts will be flooded with litigation also deprives aggrieved promisees of crucial leverage in negotiating more comprehensive out-of-court settlements.

In any event, this issue can be addressed by keeping a tight rein on the quantum awarded.¹⁹⁶ In the absence of the destabilising effect of an untrained and emotive jury, this is not a difficult task to perform. And the reality is that English courts and the commonwealth in general have adopted a restrained approach to the quantifying of sentimental loss.¹⁹⁷

¹⁹⁰ Newell (note 5) 330.

¹⁹¹ Phang (note 5) 355.

¹⁹² *Ibid* 349.

¹⁹³ *Farley* (note 8) 813f (Lord Steyn: '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').

¹⁹⁴ See *Harder* (note 28) 110; *Soh* (note 172) 45.

¹⁹⁵ *Harris* (note 62) 44.

¹⁹⁶ *Veitch* (note 5) 240.

¹⁹⁷ See comments in *Ruxley* (note 24) 289h (per Lord Lloyd); in *Vorvis v Insurance Corp of British Columbia* (note 71) 1122a-c (per Wilson J). See also *Macdonald* (note 5) 139; *Phang* (note 5) 349.

Incommensurability

It is also said that sentimental loss presents the challenge of translating intrinsic value of the contract subject matter into pecuniary terms.¹⁹⁸ This objection gives the impression that accuracy is guaranteed in cases of pure pecuniary loss. That is not the case.¹⁹⁹ While the desire for certainty is commendable, based as it is on the noble notion that justice must not only be done but be seen to be done, the elusive pursuit of precision must not itself become an obstacle to substantive justice. As Holmes observed:

The training of lawyers is a training in logic.... The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion and repose is not the destiny of man.²⁰⁰

The task is not an entirely new one.²⁰¹ Physical inconvenience presents similar assessment difficulties, yet is regarded as compensable. And it is embarrassingly easy to allow the difficulty of the task to overshadow the task soberly determining whether the justice of the case calls for compensation. Once that question is answered in the affirmative, the courts have always demonstrated an inventive capacity for meting out the necessary justice.²⁰²

It should also be noted that difficulty of assessment is a valid objection for a total prohibition on compensating sentimental loss, but once that door is opened the objection can no longer be employed as a cogent explanation for why one sentimental loss is compensated and the other is not. This is because 'uncertainties about the measurement and even the existence of emotional distress are likely to be similar in both situations.'²⁰³ Incommensurability thus

¹⁹⁸ See Macdonald (note 5) 141; Burrows (note 5) 133. See also Law Com CP No 132 *Aggravated, Exemplary and Restitutionary damages* (1993) § 2.12.

¹⁹⁹ See comment in *Foamintol Ltd v British Plastics* [1941] 2 All ER 393 (KB) at 401H (per Hallet J: 'There may be cases in which the quantifying of pecuniary loss is extremely difficult, and yet the Judge has to do the best he can.'). See also *Biggin & Co Ltd v Permanite Ltd* [1951] 1 KB 422 (KB) at 438 (per Devlin J).

²⁰⁰ Holmes (note 61) 465-66.

²⁰¹ *Ruxley* at 278a (Lord Mustill). See *GW Atkins Ltd v Scott* (1991) 7 Const LR 215 (CA) at 221.

²⁰² *Chaplin v Hicks* [1911] 2 KB 786 (CA) at 792-93 (per Vaughan Williams LJ); *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 (HC) at 81 (per Isaacs J); *Fink v Fink* (1947) 74 CLR 127 (HC) at 143 (per Dixon and McTiernan JJ).

²⁰³ Sebert (note 90) 1588.

remains a secondary inquiry, the primary one being: has a loss truly been suffered?

Subjectivity

The question of loss is allied to valuation conflicts. For example there may appear to be no loss if translated value equals contract price,²⁰⁴ if the translated value conflicts with the court's intuitive estimate of the loss,²⁰⁵ or if the promisee's taste is idiosyncratic.²⁰⁶

Contract law sets its face against the proposition that a promisor may be presumed to have undertaken a liability whose scope vacillates with the emotional temperament of a promisee. It was said that:

If the mental reaction to breach and resultant damage were itself a head of damage, the liability of a party in breach would be at large and liable to fluctuation according to the personal situation of the innocent party.²⁰⁷

This statement not only assumes a subjective approach to the assessment of damages, it also seeks to establish a polarity between a precariously uncertain quantum on one hand and offers zero-recovery as the next alternative. Zero recovery, however, neither the logical option nor the only alternative.²⁰⁸ In the words of Lord Mustill:

There are not two alternative measures of damage, at opposite poles, but only one: namely the loss truly suffered by the promisee ...the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure.²⁰⁹

It has been suggested that the best solution for arriving at quantum is to award a figure objectively representative of the loss.²¹⁰ This mirrors the fair market value approach for pecuniary damages that uses an objective measure derived from societal norms limited by the remoteness rules. The court can apply

²⁰⁴ *Ruxley* (note 24) 284b read with 287d (Lord Lloyd).

²⁰⁵ *Yates* (note 16) 540.

²⁰⁶ *Ruxley* (note 24) 276 (Lord Mustill).

²⁰⁷ *Baltic Shipping Co v Dillon* (note 173) 369 (per Brennan J). See *Phang* (note 5) 349.

²⁰⁸ *Veitch* (note 5) 240 suggests embracing a policy of awarding exemplary damages.

²⁰⁹ *Ruxley* (note 24) 277e-f (per Lord Mustill). Although the remark pertained to the polarisation of 'diminution' and 'cost of cure' measures, the kernel of truth it contains is germane.

²¹⁰ *Yates* (note 16) 540.

the test of a reasonable person placed in the promisee's circumstance and award that sum.²¹¹ This approach solves the problem of a vacillating liability on the part of the promisor, at the time of contracting. As one writer notes, '[o]n balance, it is hard to make scientific the process of awarding damages for intangible losses in contract cases. The most one can hope for is internal consistency in awards.'²¹²

Proof

Disqualification of sentimental loss also hinges on its intangibility.²¹³ This suggests problems of proof.²¹⁴ Injured feelings are easy to concoct and even when they genuinely exist, so does the temptation to overstate their true extent in the hopes of inflating the damages award.²¹⁵ One writer argues that the law in the modern day has reached such a level of forensic sophistication that ensures 'courts are competent to judge whether the plaintiff has satisfied the burden of proving that he has suffered the mental distress alleged.'²¹⁶

Failure to acknowledge sentimental benefit results in under-compensation. Intuitively, one would also expect that if both over-compensation and under-compensation miss the target, then it would be far better to err on the side that benefits the party who had little choice about being in this position.²¹⁷ It is the contract-breaker who, so to speak, accepted the risk and consequences of breach. If they wished to avoid the risk of having to over-compensate their counterpart, they could have done so by rendering a due performance.

Conclusion

As has been seen so far, it is possible to adopt two interpretations of the prohibition. The restrictive interpretation limits its scope to mental distress, ie feelings of disappointment. Understood this way, it acts as a uniform prohibition

²¹¹ D Harris et al 'Contract remedies and the consumer surplus' (1979) 95 *LQR* 581 at 585. See Kastely (note 19) 10-11. *Wright v British Railways Board* [1983] 2 AC 773 (HL) at 777C (per Lord Diplock) details an approach for tort cases that is adaptable to this purpose.

²¹² Bridge (note 5) 368. See Harder (note 28) 109.

²¹³ Dawson (note 7) 259.

²¹⁴ Enonchong (note 5) 629.

²¹⁵ Macdonald (note 5) 141. See P Evans 'Spoiled holidays: damages for disappointment or distress' (2004) 6 *Legal Issues in Business* 19 at 22.

²¹⁶ Burrows (note 5) 133.

²¹⁷ In *Slatter v Hoyle and Smith* [1920] 2 KB 11 (CA) at 25 Scrutton LJ observes that English law does not provide a perfect indemnity. See also Sebert (note 90) 1572-73.

applying to all contracts, consumer and non-consumer. The areas of sentimental benefit and sentimental injury are excluded from its ambit and are subject to the general principles of contract law. The unrestrictive interpretation attempts to apply the prohibition to all types of sentimental loss, but, in doing so, subjects it to all the objections discussed in the literature as this chapter has tried to show. These criticisms shred whatever credentials it aspires to advance on this broader basis. The fears of exceeding a compensative level of assessing sentimental loss is significantly lessened in a jury-free system and in these times consumer interests are on par with commercial interests. For as long as a commercial contractor has the right to indemnify their expectation loss, profit, then it stands to reason that a consumer too needs their expectation protected. If this expectation takes the form of a sentimental benefit, the courts ought not to shirk their duty. Rather than be pre-occupied with ascertaining the subjective measure of sentimental loss, the courts can employ an objective standard which in due time will give rise to a consistency in awards. The establishment of these principles is not likely to result in a flood of litigation, but is very likely to endow consumers with much needed leverage to obtain better extrajudicial solutions to contract friction with the titans of commercial world.

CHAPTER FIVE—THE EXCEPTIONS

Introduction

The dominant theme of the twentieth century legal mindset was that *contract* was synonymous with *commerce*. The existence of rules of contract law revolved around servicing economic interests. To suggest that nonfinancial loss merited consideration at all, let alone *equal consideration* with the concrete and fiercely competitive interests of the business world was regarded as indulgent poppycock.

The analysis presented in the previous chapters sought to question the actual scope of the prohibition, but doubtless the perception of a blanket proscription did exist. The paradigm shift introduced by the legal renaissance of the 1970s is well known. What is less recognised is how the change-agents fared in locating sentimental loss within appropriate conceptual framework.

The pre-existing legal framework

A modest evaluation of the existing pro-sentimental loss framework is here attempted here to gauge how revolutionary the 1970s changes were. This is done by examining three cases: *Kemp v Sober*,²¹⁸ *Burton v Pinkerton*²¹⁹ and *Hobbs v London and South Western Railway Co.*²²⁰ The last two represent the long-standing rule allowing the recovery of ‘parasitic’ sentimental damages; styled parasitic because recovery depends on the existence of another nonpecuniary loss—physical inconvenience.²²¹

Kemp v Sober demonstrates the ability of the courts to transcend remedial presumptions so as to ensure that contractual interests are protected. Kemp was a real estate developer. She owned houses in a vast estate. ‘User rights’ were sold subject to a specific user covenant. A buyer was prohibited from using the property to ‘carry on any trade, business or calling whatever in or upon any part of it, or otherwise use or suffer the same to be used to the annoyance, nuisance or injury’ of any other people on the estate.²²² When Ann Sober (who suffered the

²¹⁸ (1851) 1 SIM (NS) 517 (ChD) at 520.

²¹⁹ Supra (note 46).

²²⁰ *Hobbs v LSW Railway Co* [1874-80] All ER Rep 458.

²²¹ Veitch (note 5) 232.

²²² *Kemp v Sober* (note 219) at 517.

misfortune of occupying a house adjacent to the Kemp residence) thought to start up a ladies school, the plaintiff moved the court to pre-empt the ‘considerable annoyance’ that the defendant’s educational endeavours constituted.²²³

Lord Cranworth agreed that the students would constitute an ‘annoyance not only from their practising music and dancing, but from their relations and friends continually calling upon them.’²²⁴ In response to the argument that ‘annoyance’ did not constitute loss, his Lordship stated:

It was said that this case comes within the principle of those cases in which the Court has refused to interfere, because no damage has been actually sustained. But a person who stipulates that her neighbour shall not keep a school stipulates that she shall be relieved from all anxiety arising from a school being kept; and the feeling of anxiety is damage.²²⁵

In *Burton v Pinkerton*, the plaintiff was employed on the defendant’s ship. When war broke out between Spain and Peru, the defendant capitalised on this by placing his vessel at the disposal of the Peruvian navy. The plaintiff, unwilling to continue service under these new circumstances left the ship and was promptly arrested for desertion. Upon release he returned to England and sued. The majority in the Court of Exchequer were unanimous in holding that Burton, apart from the imprisonment, was entitled to relief for ‘the inconveniences and annoyances he had [otherwise] suffered.’²²⁶

Hobbs v London South Western Railway Co is not clear as to whether sentimental injury is compensable. In that case, the Hobbs family were travelling to Hampton Court on the defendant’s train. The train stopped short at Esher and they were forced to trudge the remaining four miles—in the rain. The defendant contended that the walk, being a non-financial loss, fell outside contract law’s cognisance.

Cockburn LJ rejecting this view, holding that substantial personal inconvenience was compensable. He did not consider *Hamlin* as supplying a

²²³ At 518.

²²⁴ At 520.

²²⁵ At 520. Although the case involved injunctive relief, the judgment leaves no doubt regarding the defendant’s liability if the breach had been actual instead of anticipated.

²²⁶ *Burton v Pinkerton* (note 46) 349 (per Bramwell B). Emphasis added.

contrary principle, but was prepared to overrule it if it were so construed.²²⁷

Applying the remoteness rule, he found that the need to employ alternative means to reach the destination was causally connected to the breach.²²⁸

Blackburn J agreed.²²⁹ Neither justice drew a distinction between the physical and emotional elements of the distress. Archibald J in giving his judgment, however, explicitly limited the compensable inconvenience to the physical element.²³⁰ It was left to Mellor J to tip the scale in favour of a combined recovery.

Unfortunately, his oft-cited statement is open to either interpretation. He said:

[F]or mere inconvenience, the result of the temper and annoyance or vexation at something not occurring which a person sets his mind upon, there being no real physical inconvenience, damages cannot be recovered. That is purely sentimental, and not a case where the word inconvenience, as I here use it, would apply.²³¹

This statement can be read as allowing recovery for sentimental injury while excluding mental distress. The facts of the case fell within Mellor J's proposed rationale. What commends this interpretation is that it simultaneously places the case on the same footing as *Burton* (which was cited by Blackburn J) and reconciles it with the prohibition as stated in *Hamlin*.²³²

Nevertheless, the passage can read as a rejection of sentimental loss considerations. This interpretation was adopted in *Bailey v Bullock*.²³³ The plaintiff, in that case, instructed his solicitors to obtain vacant possession of a house he owned by a certain date. This they failed to do and the plaintiff having nowhere else to stay was forced to move in with his wife's parents in very cramped living quarters. He sued for the inconvenience and mental distress and the defendant pleaded the prohibition. In finding for Bailey, Barry J was careful to underline the point that:

²²⁷ *Hobbs v LSW Railway Co* (note 221) 461A. Cf *Commissioner of public works v Dreyer* 1910 EDL 325 (Dist Ct) at 333 (per McGregor Ag J).

²²⁸ At 461F.

²²⁹ At 462I.

²³⁰ At 464I.

²³¹ At 463I (per Mellor J).

²³² Also see *Calabar Properties Ltd v Sticher* [1984] 1 WLR 287 (CA) at 296A-B (per Stephenson LJ); *McCall v Abelesz* [1976] QB 585 (CA) at 594E (per Lord Denning MR).

²³³ *Bailey v Bullock* (note 47) 1171. A construal advanced also in McGregor (note 69) para 3—019. See Burrows (note 5) 128.

there is a very real difference between mere annoyance and injury to feelings, on the one hand, and physical inconvenience, on the other. This difference is made clear in a short passage in the judgment of Mellor J in *Hobbs'* case.... The other members of the court deciding *Hobbs'* case delivered judgments in the same sense, and the court was clearly of opinion that in a case based on a breach of contract, alone damages could be awarded for serious physical inconvenience and discomfort.²³⁴

Barry J was able to distinguish mental distress from consequent inconvenience, but accepting a linkage between inconvenience and sentimental injury was perhaps too close to a conflict with *Addis*.²³⁵

These cases make clear that the compensability of sentimental benefit and sentimental injury can be attained under basic principles of contract without resort to *exceptional measures*. Although contract is trumpeted as traditionally concerned with the financial to the radical exclusion of all manner of sentimental value, *Kemp* demonstrates the paramount objective of judicial enforcement of contracts is the safeguarding of the value created by the contractual obligation, irrespective of whether it is financial or sentimental.

Burton and Hobbs illustrate the courts' willingness to recognise the compensability of an emotional state caused substantially adverse physical conditions provided it is not caused by mere loss of promise (ie caused by being stranded). The ensuing liability for sentimental injury was circumscribed by two factors: it had to derive from serious physical hardship or inconvenience, in other words it had to be far removed from mere feelings of disappointment. It also had to satisfy the *Hadley* remoteness rule and fall within the ordinary limits of recovery.²³⁶

The 1970s renaissance

'[T]he continuing lack of systematic rationalisation of contractual remedies'²³⁷ and an inability to divorce the concept of 'value' from its pungent pecuniary overtones, nevertheless meant that the 1970s Court of Appeal did not realise that

²³⁴ *Bailey v Bullock* (note 47) 1170-71.

²³⁵ Cf *Athens-Macdonald v Kazis* [1970] SASR 264 (Aust HC) at 277 (Zelling J) for a modern take that emphasises the indivisibility of physical and mental inconvenience.

²³⁶ Mitigation being the prime example: see *Jamal v Moolla Dawood Sons & Co* [1916] 1 AC 175 (PC) 179 (per Lord Wrenbury).

²³⁷ Harris (note 217) 582.

even after *Addis* there still remained two different avenues for compensating sentimental loss. Its reformative energies, therefore, focused on expanding the functionality of what it perceived to be the sole residual bastion—physical inconvenience—the rule on sentimental injury. As will be seen, this approach forced one remedial tool to perform the work of three and spawned

a confusion between two distinct categories of mental unrest: that arising when the plaintiff has suffered injury to his existing mental state and that arising when the defendant has failed to provide the mental satisfaction that he promised in the contract.²³⁸

Nature of the contract test

Mayne and McGregor²³⁹ were among the first to offer a modest critique the prohibition's sweep. They argued that the growing awareness of the needs of the non-commercial world called for a reassessment of commercially-oriented presumptions. The chief presumption being that parties' concern was exclusively pecuniary. They argued that in an appropriate case a court would be justified in not applying the prohibition.

The Scots were the first to pick up on this idea in *Diesen v Samson*.²⁴⁰ This case resolved the sentimental damages problem on the basis of lost sentimental benefit. A photographer failed to turn up for a wedding and deprived the bride of a pictorial record of the happy day. *Addis* was cited by the defendant, but the prime consideration of the court was the commercial versus non-commercial distinction. It was said that:

The contract in the present case would seem to be one of the kind envisaged by [Mayne and McGregor], because it was not commercial ...and was exclusively concerned with the pursuer's personal, social, and family interests and with her feelings.... What both the parties obviously had in their contemplation was that the pursuer would be enabled to enjoy such pleasure in the years ahead. This has been permanently denied her by the defender's breach of contract and, in my opinion, it is as fitting a case for the award of damages.²⁴¹

²³⁸ Rose (note 5) 334.

²³⁹ Mayne and McGregor *Mayne and McGregor on Damages* 12ed (1961) page 44.

²⁴⁰ *Supra* (note 39). Cf *Carpel v Saget Studios Inc* 326 F Supp 1331, 1333 (ED Pa) (1977) an American wedding photographs case. The claim failed for lack of 'reasonable certainty' as to the quantum of loss.

²⁴¹ At 50(per Sheriff-Substitute JM Peterson).

Having identified the sentimental loss, the next step of assessing it proved 'a matter of great difficulty' because the subjective experience of pleasure differed not only between individuals but also within the same individual over time.²⁴² Nevertheless, the court was able to do so by 'preserv[ing] a sense of proportion' and by 'exercis[ing] moderation.'²⁴³

The Remoteness Experiment

English law too soon attempted to sever ties with the limitations of the past and chart a new path recognising the compensability of non-pecuniary loss.²⁴⁴

Although heralded by a number of cases,²⁴⁵ the honour of breaking with tradition went to *Jarvis v Swans Tours Ltd*.²⁴⁶ The plaintiff in that case booked a trip to the Swiss Alps on the strength of a brochure prepared by the defendant. The holiday did not answer to the description and he sued. The trial judge found for the plaintiff and awarded him £31, this being the difference between the price paid and the holiday actually received. The Court of Appeal revised this assessment and awarded £125—double the contract price.

While *Diesen* relied entirely on the nature-of-the-contract test, *Jarvis* vacillated between applying this test and striving to separate sentimental injury from its time-honoured association with physical inconvenience.²⁴⁷ Lord Denning MR began by giving short shrift to the principle espoused in *Hobbs v London South Western Railway*, that damages are unavailable for mental distress, 'I think such limitations are out of date.'²⁴⁸ Stephenson LJ, despite citing McGregor, also leaned towards explaining the basis of the decision along the lines of sentimental injury rather than loss of sentimental benefit.²⁴⁹ Edmund Davies LJ adopted a more cautious approach. Accepting that *Hobbs* could well do with reappraisal, he

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Hahlo 'Damages for mental distress' (1973) 51 *Can Bar Rev* 507 at 508.

²⁴⁵ *Stedman v Swans Tours Ltd* (1951) 95 Sol Jo 727 (CA); *Feldman v Allways Travel Service* [1957] CLY 934 (Cty Ct); *Hipkiss v Graydon* [1961] CLY 9042 (Cty Ct); *Mafo v Adams* [1970] 1 QB 548 (CA).

²⁴⁶ *Jarvis* (note 15).

²⁴⁷ See Harder (note 28) 96.

²⁴⁸ *Jarvis* (note 15) 74e. He accepted the *Bailey v Bullock* interpretation of the case. See Hahlo (note 245) 508.

²⁴⁹ At 77b-c. See Rose (note 5) 336.

did not decide the point.²⁵⁰ Instead, he emphasised the difference in contract types and nudged the decision back onto a nature-of-the-contract track.²⁵¹

If nothing further was said in *Jarvis*, the decision could be placed in the same category with *Wilson v United Counties Bank*²⁵² and *Kemp v Sober*.²⁵³ The quantum leap, in legal terms, was taken when Denning MR repeatedly challenged the prohibition on compensating mental distress. He said that, 'If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset and frustration caused by the breach,'²⁵⁴ and again, 'He is entitled to general damages for the disappointment he has suffered and the loss of the entertainment which he should have had.'²⁵⁵ In doing so, Denning MR purported to overrule *Hamlin*, but a modest Pollock CB in that case had allowed for exceptions to the prohibition and so the case needed no overruling. On the other hand *Addis*, the oracular centrepiece of the anti-sentimental loss ethic, was not mentioned at all.

The other justices in the case did not discuss the decision in *Hamlin*, but Stephenson LJ's views appear to be in harmony with those of Lord Denning MR

I agree that ...there may be contracts in which the parties contemplate inconvenience on breach which may be described as mental: frustration, annoyance, disappointment; ...this is such a contract, the damages for breach of it should take such wider inconvenience or discomfort into account.²⁵⁶

Edmund Davies LJ, however, was 'of the opinion that ..."vexation" and "being disappointed"...are relevant considerations which afford the court a guide in arriving at a proper figure.'²⁵⁷ This last approach is the most commendable of the three. An understanding of the disappointment accompanying non-fulfilment of an expectation *can guide* in estimating the pleasure that would have been

²⁵⁰ At 75b-e.

²⁵¹ At 75g.

²⁵² *Supra* (note 139). See Dawson (note 7) 252.

²⁵³ *Supra* (note 110).

²⁵⁴ *Jarvis* (note 15) 74e. Followed in *Jackson v Horizon Holidays* (note 38) 96c (Lord Denning MR). The innovation has spread to other commonwealth jurisdictions: see also *Bank of Uganda v Masaba* (note 91) 24b (per Oder JSC: '[D]amages may be awarded for disappointment arising out of a breach of contract').

²⁵⁵ At 74g.

²⁵⁶ At 77b.

²⁵⁷ At 76a.

experienced, but that is a far cry from trying to quantify the disappointment itself in money terms.

This particular holding in *Jarvis* is problematic on several levels. It was unnecessary to the attainment of a just compensation, since in his Lordship's own view, '[t]he right measure of damages [wa]s to compensate him for the loss of entertainment and enjoyment which he was promised, and which he did not get.'²⁵⁸ This focus on sentimental benefit was all that was needed. Instead furor over mental distress created a needless conflict of principle with *Addis*. Lastly, it should be noted that whereas permitting recovery for *sentimental benefit* in consumer transactions, as a counterpoint to *pecuniary benefit* in non-consumer transactions balances the law; an anomalous imbalance comes into being when recovery for mental distress is allowed in consumer transactions but disallowed in non-consumer transactions. Severe disappointment at breach is not the exclusive experience of consumer contractors. As has been noted, '[t]here is no reason to assume that a businessman's disappointment will be any less than that of a tearful bride or unhappy holidaymaker.'²⁵⁹

Moving on from principles to practicality, the court conceded the difficulty in assessment with the proviso that 'it is no more difficult than the assessment which the courts have to make every day in personal injury cases for loss of amenities.'²⁶⁰

The three-headed Hydra created in *Jarvis* began wreaking havoc in *Cox v Philips Industries Ltd*.²⁶¹ Lawson J's judgment in that case is a study of the chaos engendered by failing to distinguish and balance the implications of compensating mental distress and a sentimental injury loosed from the traditionally stabilising requirement of physical inconvenience. *Cox v Philips Industries Ltd* was an employment case with facts similar to *Addis*: an employee pressured out of their job. A long period of clinically diagnosed depression and anxiety had preceded the

²⁵⁸ At 75a (per Lord Denning MR). See *Milner v Carnival PLC* (note 38) para 27 (Ward LJ).

²⁵⁹ Yates (note 16) 538.

²⁶⁰ *Jarvis* (note 15) 74f. Cf HR Hahlo 'The frustrated vacationer-German solution' (1973) 51 *Can Bar Rev* 703 at 705. The award of £125 has caused no small controversy: see Yates (note 16) 539-40; Rose (note 5) 335 (passim).

²⁶¹ [1976] 3 All ER 161 (QBD).

resignation. Seeking to avoid a collision course with *Addis*, Lawson J attempted to distinguish the case by reasoning that the injury in *Cox* related to breaches occurring in the continuing course of employment whereas *Addis* related to dismissal.²⁶²

Dismissing the arguments of the defendant, that the case failed the nature-of-the-contract test, Lawson J reasoned that foreseeability alone sufficed, since there was:

[N]o reason in principle why, if a situation arises which within the contemplation of the parties would have given rise to vexation, distress and general disappointment and frustration, the person who is injured by a contractual breach, should not be compensated...²⁶³

With due respect, the judge's reasons proceed no further than those of counsel in *Hamlin*. Disappointment is caused by virtually every breach of contract. In principle, therefore, feelings of disappointment could be regarded as compensable damage. Their exclusion is grounded not on principle, but on considerations of policy.²⁶⁴ Lawson J was walking the same tightrope that Lord Denning MR had in *Jarvis*; with one difference. *Jarvis* was a case that satisfied the nature-of-the-contract test and this acted as a safety net for the decision. There was no safety net in *Cox*. This difference would prove fatal.

The test of reasonable contemplation is critical when the causal link between breach and a particular loss is disputable. It is hardly needed with regard to mental distress and sentimental benefit, because these flow naturally and immediately from breach thus raising little doubt as to causation. On the other hand, sentimental injury requires the test of reasonable contemplation, but its operation had always been linked to physical inconvenience.²⁶⁵ Lawson J by relying on the ground of mental distress to grant the plaintiff a remedy placed the case on a collision course with *Addis*.²⁶⁶

²⁶² Ibid 166b.

²⁶³ Ibid 166e.

²⁶⁴ *Hayes v Dodds* (note 29) 824a.

²⁶⁵ Dawson (note 7) 258.

²⁶⁶ *Bliss v SE Thames RHA* (note 30). See Rose (note 5) 337. The clinically diagnosed depression and anxiety could have provided the necessary 'physical inconvenience' nexus for sentimental injury. In fact modern cases on psychiatric illness in the workplace vindicate Lawson J's innate sense of

Alternative or cumulative recovery?

This issue arose in the case of *Heywood v Wellers*²⁶⁷ where the Court of Appeal's vacillation between the nature-of-the-contract test and sentimental injury reached its apex. The plaintiff was being harassed by a past acquaintance, M, and instructed the defendant solicitors to take action to prevent further molestation. The actions of the clerk who handled the case read like a litany of error. He filed the case in the wrong court, made unnecessary interim applications, did not make necessary interim applications and failed to report the molester's breach of injunction to court. When the solicitors sought to bill the plaintiff for these 'services,' she opted to sue them instead.

The case seems open to resolution on two approaches that both recognise sentimental benefit and sentimental injury: an *alternative* approach and a *cumulative* approach. The plaintiff contracted for a service, the defendant shirked its duty, and loss ensued. The substandard service, by itself, was a diminution of utility, ie loss of sentimental benefit; the further molestation was a consequent inconvenience with its inherent sentimental injury. The *cumulative* approach would differentiate between these losses and then aggregates the respective assessments. The *alternative* approach recognises the respective losses without appreciating the qualitative difference between the loss of sentimental benefit and the suffering of sentimental injury. Accordingly, it considers the plaintiff or court free to elect which approach upon which to base the award.

Since the obligation related to the conferral of a mental benefit, this satisfied the nature-of-the-contract test and the promisee was entitled to the sentimental benefit inherent in the performance. Ensuing breach would entitle the plaintiff to the value of her lost expectation. At the time of contracting, the parties may have also reasonably contemplated that further acts of molestation were a seriously possible consequence of breach. This consequent molestation

justice: see *McLoughlin v O'Brian* [1983] 1 AC 410 (HL); *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455(HL); *Gogay v Hertfordshire County Council* [2000] IRLR 703(CA); *Hatton v Sutherland* [2002] EWCA Civ 76 (CA).

²⁶⁷ *Supra* (note 43).

amounted to physical inconvenience and the mental suffering directly related to it was, in principle, compensable.

From the defendant's perspective, its duty under the contract was diligent performance of the obligation. If discharged, it was not liable even if further molestations occurred. If breached, it was liable even if further molestation did not occur.²⁶⁸ Of course, the indemnity principle results in only nominal damages being awarded in the latter scenario.²⁶⁹ But if breach coincided with further molestation, the defendant was liable damages for lost expectation. This figure, representing the fruit of the plaintiff's bargain, would then be augmented by an estimate of the value of reasonably contemplated consequent loss.

Which approach did the Court of Appeal adopt? Lord Denning MR led the charge with the sentimental injury approach, reasoning

[The solicitors] were under a duty by contract to use reasonable care. Owing to their want of care she was molested by this man on three or four occasions. This molestation caused her much mental distress and upset. It must have been in their contemplation that, if they failed in their duty, she might be further molested and suffer much upset and distress. This damage she suffered was within their contemplation within the rule in *Hadley v Baxendale*.²⁷⁰

It is apparent here that the symbiosis between the physical inconvenience and the mental suffering is preserved. In this approach, however, the causal link between the breach and the later incidences of molestation was tenuous. The duty was to secure an injunction that would have afforded the plaintiff a reasonable *opportunity* and not a veritable *guarantee* of peace of mind. The solicitors pointed out, rightly one would think, that the molestations could have re-occurred in any event or not at all.²⁷¹

The inconvenience-distress relationship is missing when one turns to James LJ's judgment. He broadly declares

²⁶⁸ *Ratcliffe v Evans* [1892] 2 QB 524 (CA) at 528 (per Bowen LJ: 'the law presumes that *some* damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights, and calls it general damage.').

²⁶⁹ See *Wertheim v Chicoutimi Pulp Company* (note 60) 307.

²⁷⁰ *Heywood v Wellers* (note 43) 306g.

²⁷¹ At 459D.

It is also the law that where, at the time of making a contract, it is within the contemplation of the contracting parties that a foreseeable result of a breach of the contract will be to cause vexation, frustration or distress, then if a breach occurs which does bring about that result, damages are recoverable under that heading (*Jarvis v Swans' Tours Ltd*).²⁷²

A rule as broad as this is unworkable. Vexation, etc are foreseeable in most breaches. For this reason, perhaps, James LJ supplemented his rule with a 'good sense' test. The good sense of the judge is to determine whether the mental distress in a given case is compensable.²⁷³ This 'good sense' test creates a degree of uncertainty more precarious to a prospective litigant than the 'inconvenience' rule it seeks to replace. Bridge LJ was closer to the mark in identifying the issue as:

[A] question of awarding damages to the plaintiff to reflect the value of the relief she would have obtained from the unwelcome attentions of Mr Marrion if the litigation had been properly conducted by the defendants...²⁷⁴

In his opinion the defendants' liability stemmed from the breach of their primary contractual obligation and the plaintiff was to be restored the lost benefit of the bargain. Mental distress caused by misconduct of litigation was, in his opinion, not compensable. The plaintiff's right to relief in the instant case was that the loss was 'the direct and inevitable consequence of ...failure to obtain the very relief which it was the sole purpose of the litigation to secure.'²⁷⁵

However, the directive to 'value of the relief she would have obtained from the unwelcome attentions of Mr Marrion' benefits from Lord Hoffman's incisive caution that, '[b]efore one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss it is necessary to decide for what kind of loss he is entitled to compensation.'²⁷⁶ Speaking in terms of sentimental benefit, Mrs Heywood's entitlement under the contract was the peace of mind garnered from receiving competent legal representation.²⁷⁷ Suggesting that she was *entitled* to relief from the molestation

²⁷² At 308h.

²⁷³ At 309e.

²⁷⁴ At 310e.

²⁷⁵ At 310h.

²⁷⁶ *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 (HL) at 211 (per Lord Hoffman).

²⁷⁷ Cf *Hamilton Jones v David & Snape* (note 25) paras 58-59 (per Neuberger J).

itself, a matter over which the lawyers had but limited control, is a tempting, but ultimately unsustainable conclusion. It was only when the contractual obligation was breached and molestation continued that, subject to the question of remoteness, Mrs Heywood became entitled to an award reflecting the sentimental injury she suffered. This award would assess the actual injury occasioned by breach of duty (and not 'relief from molestation' to which the plaintiff had no legal entitlement).

It has been a recurrent misfortune that decisions in this area of the law compensate for sentimental injury when they ought to compensate for sentimental benefit; and compensate for sentimental benefit when they ought to compensate for sentimental injury.

The Decline of Remoteness

As the consequences of an unanchored remoteness test became more apparent, the next decade witnessed a retreat back to the orthodox position. This began in the case of *Perry v Sidney Phillips and Son*.²⁷⁸ The defendant had negligently failed to report substantial defects in a house surveyed for the plaintiff. The court's finding for the plaintiff was unanimous. Though, in the absence of a warranty, the defendant's liability was limited to the negligence in conducting the survey (and not for the existence of the house defects themselves per se). There was a subtle divergence of opinion among the justices. An unrepentant Lord Denning MR opined that:

If a man buys a house for his own occupation on the surveyor's advice that it is sound and then finds out that it is in a deplorable condition, it is reasonably foreseeable that he will be most upset. He may, as here, not have the money to repair it and this will upset him all the more. That too is reasonably foreseeable. All this anxiety, worry and distress may nowadays be the subject of compensation.²⁷⁹

Kerr LJ, however, based the recovery of damages on the physical discomfort caused by breach.²⁸⁰ Oliver LJ echoed him.²⁸¹

²⁷⁸ Supra (note 44).

²⁷⁹ At 709b-c.

²⁸⁰ At 712g.

²⁸¹ At 710h-j.

Bliss v South East Thames Regional Health Authority,²⁸² a case concerning repudiatory breach of employment, dealt another blow to the developments of the past decade. The respondents cross-appealed the trial judge's decision to award damages for mental distress. The notion that sentimental injury could be awarded through an unqualified remoteness test was soundly rejected by Dillon LJ, who said:

In *Cox v Philips Industries Ltd* Mr Justice Lawson took the view that damages for distress ...could be recovered for breach of a contract ...if it could be said to have been in the contemplation of the parties that the breach would cause such distress etc.... I do not think that that general approach is open to this court unless and until the House of Lords has reconsidered its decision in *Addis*.²⁸³

This sentiment was echoed in *Hayes v James & Charles Dodds*,²⁸⁴ a case in which Staughton LJ, sought to finally reconcile English law with Scots law (as pronounced in *Diesen*). His emphasis was reminiscent of the nature-of-the-contract test:

I am not convinced that it is enough to ask whether mental distress was reasonably foreseeable as a consequence, or even whether it should reasonably have been contemplated as not unlikely to result from a breach of contract. It seems to me that damages for mental distress, in contract are, as a matter of policy, limited to certain classes of case.²⁸⁵

The plaintiffs, in the case, were attempting to recover damages for mental distress as a result of their solicitor's faulty advice (advice that led to the falling through of a commercial venture). Staughton LJ (with whose decision Sir George Waller concurred) expressly excluded the commercial realm from the ambit of damages for mental distress, saying:

[The compensable class] should not, in my judgment, include any case where the object of the contract was not comfort or pleasure or relief of discomfort, but simply carrying on a commercial activity with a view to profit.²⁸⁶

²⁸² *Supra* (note 30).

²⁸³ *Ibid* 316.

²⁸⁴ *Supra* (note 29).

²⁸⁵ *Ibid* 824a.

²⁸⁶ *Ibid* 824b. Damages for sentimental loss were to remain a 'special and restricted head of damage' at 826j (per Purchas LJ).

The Object of the Contract test

The definitive position of the Court of Appeal on the question of sentimental damages is *Watts v Morrow*.²⁸⁷ The significance of this case was that it ended the confusion wrought by attempts to expand sentimental injury that characterised the developments of the 1970s. It also transformed the *nature-of-the-contract* test into an object of the contract test. The latter change would introduce its own complications.

Like *Perry*, *Watts* was also suit against a surveyor for a misleading report. The surveyor was appealing the trial judge's decision to award damages for mental distress. The first bone of contention was whether the survey contract passed the nature-of-the-contract test. This had been the basis of the award at trial, because in the judge's view a contract for surveying a residential home was purposed at providing a measure of emotional reassurance. Ralph Gibson LJ regarded this as 'an impossible view of the ordinary surveyor's contract' because 'there was no express [or implied] promise for the provision of peace of mind or freedom from distress.'²⁸⁸ Bingham was equally terse, 'A contract to survey the condition of a house for a prospective purchaser does not ...fall within this exceptional category.'²⁸⁹ The exceptional category being, cases where 'the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation.'²⁹⁰

Therefore, since the survey contract did not satisfy the object of the contract test, entitlement to sentimental damages hinged on satisfying the court that the mental distress related to sentimental injury.²⁹¹ Bingham LJ put to rest any hopes of reviving the mere 'foreseeability' rationale.²⁹² But this did not exclude the recovery on the basis of sentimental injury because, in his view, 'damages are ...recoverable for physical inconvenience and discomfort caused by

²⁸⁷ Supra (note 26).

²⁸⁸ At 956h-j.

²⁸⁹ At 960a.

²⁹⁰ At 960a. Cf *Branchett v Beaney* (note 25) 916j-917a (Balcombe LJ).

²⁹¹ At 956j-57a (per Ralph Gibson LJ); at 960a (Per Bingham LJ).

²⁹² At 959.

the breach *and mental suffering* directly related to that inconvenience and discomfort.²⁹³

Bliss, Hayes and Watts accept the object-of-the-contract hypothesis as supportive of an exception to the prohibition on compensating mental distress.²⁹⁴ They regard them as justifiable on the ground that, '[i]f the law did not cater for this exceptional category of case it would be defective.'²⁹⁵ But in so far as this view is correct, these 'exceptions' amount to a piecemeal overruling of the decision of a superior court and thus violate precedent. However, if the nature-of-the-contract hypothesis is an apt explanation for the justice of the case, and if this hypothesis can be located within the same analytical framework within which *Addis* was decided, then the general principles of contract law can be reconciled to the so-called exceptions.²⁹⁶ The issue came up peripherally for consideration in *Ruxley Electronics and Construction Ltd v Forsyth*²⁹⁷ but counsel avoided arguing the point for strategic reasons.²⁹⁸ Notwithstanding, the House of Lords affirmed the object-of-the-contract exception to the *Addis* rule.²⁹⁹ But the court was still focused on compensating for mental distress and not sentimental benefit. Half a decade would pass before another consideration of the matter would occur in the House of Lords.

²⁹³ At 960.

²⁹⁴ Harder (note 28) 96.

²⁹⁵ *Watts v Morrow* (note 26) 960 (per Bingham LJ).

²⁹⁶ Pollock (note 5) 2 argued that 'there is nothing exceptional' about an award of damages if the loss it compensated flowed naturally from breach. See *Fidler v Sun Life Assurance Co of Canada* (note 74) para 49 (per McLachlin CJ and Abella J).

²⁹⁷ *Supra* (note 24).

²⁹⁸ *Ibid* 289b.

²⁹⁹ *Ibid* 289c-d.

Farley v Skinner: the final word?

It will be remembered that the plaintiff in this case instructed his surveyor to investigate aircraft noise and received positive reassurances. He bought the home and renovated it before discovering the aircraft nuisance.

The prohibition

Farley thwarts any hope that the reforms of the last 30 years fundamentally shifted perceptions regarding the prohibition. A unanimous House of Lords reaffirmed the propriety of excluding mental distress from the compensatory ambit of contract law.³⁰⁰ This should neither surprise nor dishearten. What is worrisome is that instead of eliminating the commercial bias that pervades the characterisation of loss *Farley* perpetuates it by reaffirming the primacy of financial loss in contract law.³⁰¹ The legitimate departures from this presumptive characterisation are styled 'exceptions' irrespective of the fact that these departures are founded on principles more fundamental than the prohibition.

Contractual guarantee versus duty of care

The importance of carefully defining the precise obligation and sentimental interest in issue came into play in *Farley* as well. The surveyor argued in his defence that his obligation was a duty to exercise reasonable care and not to guarantee Mr Farley's enjoyment of the home, ie it was not a contract to achieve a result. Viewed in this light, the case fell outside the exceptional category. Lord Steyn characterised the claim as based on a 'failure to investigate and report, thereby depriving the buyer of the chance of making an informed choice whether or not to buy resulting in mental distress and disappointment.'³⁰²

The shared perspective of both Court of Appeal and House of Lords was that the pertinent sentimental benefit in the case was enjoyment of the property. This analysis may profit from rectification. Without doubt Mr Farley's prime grievance was the aircraft noise, but was this disturbance a loss of sentimental benefit or a sentimental injury under the contract terms? The sentimental benefit

³⁰⁰ *Farley* (note 8) 809d para 18 (per Lord Steyn), 814c para 32 (per Lord Browne-Wilkinson), 817a para 40 (per Lord Clyde), 819a-c para 47 (per Lord Hutton) and 829b para 82 (per Lord Scott).

³⁰¹ At 808h para 16 (Lord Steyn).

³⁰² At 809e para 18.

protected under the contract terms was the satisfaction of receiving competent service from a paid professional. The satisfaction, if not pleasure, that Farley would have felt had Skinner done a sterling job of alerting him about the aircraft noise. By providing substandard service, the surveyor deprived Mr Farley of this sentimental benefit. In addition to this deprivation, Mr Farley then had the misfortune of suffering consequent sentimental injury—physical inconvenience via aircraft noise. As one writer put it, '[w]hen we give damages, whether in contract or tort, we do it to compensate for a particular breach of a particular duty.'³⁰³ Absent this realisation, it is nearly impossible to determine whether the compensation was for loss a sentimental benefit or sentimental injury.³⁰⁴

The issue can be viewed from another perspective. Suppose the surveyor had discharged his duty impeccably, but had been misinformed by local authorities in Blackboys village and by the airport authorities about the aircraft flight path. Could Farley have been able to sue for the consequent noise nuisance? Certainly not. Could he have sued if the surveyor had guaranteed the absence of aircraft noise? Quite possibly. As Lord Steyn himself noted, 'I fully accept, of course, that contractual guarantees of performance and promises to exercise reasonable care are fundamentally different. The former may sometimes give greater protection than the latter.'³⁰⁵ The difference between contractual guarantee and the duty to exercise care is only material if the focus is on the pleasure of enjoying the property. It is immaterial if the pleasure in question is the delivery of competent professional service, the proper entitlement under either scenario. Although Lord Steyn arrived at this identical conclusion, he did so illustratively rather than analytically:

Take the example of a travel agent who is consulted by a couple who are looking for a golfing holiday in France. Why should it make a difference in respect of the recoverability of non-pecuniary damages for a spoiled holiday whether the travel agent gives a guarantee that there is a golf course very near the hotel, represents that to be the case, or

³⁰³ Tettenborn (note 5) 101.

³⁰⁴ A distinction that continues to elude both the courts and commentators: see *Channon v Lindley Johnstone* (note 25) para 56 concerning the admitted negligence of a solicitor in divorce proceedings. Also E McKendrick and K Worthington 'Damages for non-pecuniary loss' in Nili Cohen and Ewan McKendrick (eds) *Comparative Remedies for breach of contract* (2005) 287 at 313.

³⁰⁵ *Farley* (note 8) 812e para 25.

negligently advises that all hotels of the particular chain of hotels are situated next to golf courses? If the nearest golf course is in fact 50 miles away a breach may be established. It may spoil the holiday of the couple. It is difficult to see why in principle only those plaintiffs who negotiate guarantees may recover non-pecuniary damages for a breach of contract. It is a singularly unattractive result that a professional man, who undertakes a specific obligation to exercise reasonable care to investigate a matter judged and communicated to be important by his customer, can ...“please himself whether or not to comply with the wishes of the promisee which, as embodied in the contract, formed part of the consideration for the price.”³⁰⁶

The exceptions

Object of the contract

Farley highlights the fact that contracts are made for a multiplicity of motives and making it unnecessary to require the entire or predominant part of a contract to be concerned with sentimental value. It suffices if an important object of the contract is so characterised. As Lord Steyn put it:

There is no reason in principle or policy why the scope of recovery in the exceptional category should depend on the object of the contract as ascertained from all its constituent parts. It is sufficient if a major or important object of the contract is to give pleasure, relaxation or peace of mind.³⁰⁷

The House of Lords reasoned that if the courts failed to compensate loss of a sentimental benefit simply because it was not the predominant object of the contract, a view advanced by the Court of Appeal, then this turned the contractual obligation into a sham. Borrowing from Lord Mustill’s emphatic judgment in *Ruxley*, Lord Steyn added that:

the principle of *pacta sunt servanda* would be eroded if the law did not take account of the fact that the consumer often demands specifications which, although not of economic value, have value to him.³⁰⁸

If a promisee proves that an important part of the contract was conferral of sentimental benefit, then loss of it suffered as a result of breach establishes the promisor’s liability to pay sentimental damages. This welcome advance, however, must be set against what appears to be the beginnings of a new error in *Farley*, in relation to scope.

³⁰⁶ At 812g-j para 25.

³⁰⁷ At 812a-b para 24 (per Lord Steyn).

³⁰⁸ At 810f-g para 21 (per Lord Steyn).

Despite being within the same exceptional category, *Jarvis*³⁰⁹ and *Ruxley*³¹⁰ are antipodal. *Jarvis* represents sentimental loss that eschews specification. As Edmund Davies LJ laboured to explain:

In assessing those damages the court is *not* ...quantifying the difference between such items as the expected delicious Swiss cakes and the depressingly desiccated biscuits and crisps provided for tea, between the ski-pack ordered and the miniature skis supplied, nor between the “Very good ... House party arrangements” assured and the lone-wolf second week of the unfortunate plaintiff’s stay.³¹¹

On the other hand, specification lies at the very heart of *Ruxley*. The contract in that case specified a 7 ft 6 in deep swimming pool. The one built was only 6 ft. Lord Mustill had the following to say with regard to the discrepancy:

[C]omparatively minor deviations from specification or sound workmanship may have no direct financial effect at all. Yet the householder must surely be entitled to say that he chose to obtain from the builder a promise to produce a particular result.³¹²

Neither the *Jarvis* nor *Ruxley* approach is superior to the other, the usefulness of each depends on the factual matrix of the case.

The danger and temptation posed by *Ruxley* is that its focus on specifics downplays the sentimental, even as *Jarvis*’ approach amplifies the sentimental. A desire to eradicate sentimental considerations from contract law may lead to a disproportional emphasis on the *Ruxley* approach. Traces of this are already visible in Lord Steyn’s requiring that a promisee accentuate the pertinent obligation at the time of contracting³¹³ and Lord Hutton’s similar three-step process

I consider that as a general approach it would be appropriate to treat as cases falling within the exception and calling for an award of damages those where: (1) the matter in respect of which the individual claimant seeks damages is of importance to him, and (2) the individual claimant has made clear to the other party that the matter is of importance to him, and (3) the action to be taken in relation to the matter is made a specific term of the contract.³¹⁴

³⁰⁹ Supra (note 17).

³¹⁰ Supra (note 24)

³¹¹ *Jarvis* (note 15) 75h-76a.

³¹² *Ruxley* (note 24) 276j.

³¹³ *Farley* (note 8) 809b para 18.

³¹⁴ At 823b-d para 54.

The rationality of steps (1) and (2) speaks for itself. Step (3) is potentially troublesome if applied across the spectrum of the exceptional category instead of being limited to *Ruxley*-type cases. To require Mr Jarvis to itemise his holiday itinerary or Ms Heywood to detail the specific legal steps she wishes taken is a tall order. There are times when a contractor has specifics in mind and times when the specifics are left to the professional. The law ought to cater for both. Yet Lord Clyde regarded the specificity of Mr Farley's instruction as constituting the 'critical factor' in his decision.³¹⁵ It is possible for a lawyer to secure the ostensible approval of a client to any legal measures taken and yet these measures could be as inappropriate as those employed in *Heywood*. Would a genuine claim for sentimental damages based on an uninformed acquiescence not be torpedoed by exclusive reliance on the *Ruxley* approach?

Inconvenience

After the well-intentioned, but misguided, efforts of the 1970s Court of Appeal to retool this category, the first task of the House of Lords was to effect a rehabilitation.

Breaches of contracts that seemingly fall outside the object-of-the-contract category and bear no sign of an accentuated sentimental interest are remedied under this category. What is critical is that the breach triggers an event that constitutes a substantial inconvenience. This being a question of fact means that there is room for a diversity of opinion as to whether a case crosses the threshold. Inconvenience alone, however, does not suffice, but must satisfy the remoteness test.³¹⁶ Fortunately, loss in this category is treated in accordance with the 'established principles for the recovery of contractual damages.'³¹⁷

Problems arise when one begins to grapple with the intangible mental states that accompany the inconvenience. The availability of damages for '*mental suffering* directly related to ...inconvenience' is to be taken with a pinch of salt.³¹⁸ In Lord Clyde's view, inconvenience only includes a mental distress component if

³¹⁵ At 817c para 41.

³¹⁶ At 826j-827a para 84 (per Lord Scott).

³¹⁷ At 829a-b para 82 (per Lord Scott).

³¹⁸ At 815a para 35 (per Lord Clyde).

the contract itself had sentimental interest as one of its objects.³¹⁹ The other Law Lords took a more liberal view. Lord Hutton³²⁰ agreed with the trial judge's decision to compensate for the 'annoyance' resulting from the inconvenience, but this endorsement is not free from equivocation. *Farley's* contract had sentimental interest as one of its objects; and so, to that extent, Hutton's view was reconcilable with Lord Clyde's. His Lordship also approved of the *Bailey v Bullock* approach and yet this emphatically excluded recovery for distress.

In contrast, Lord Scott regarded the line separating physical from nonphysical as context dependent.³²¹ This view is regarded as broadening the category to a point threatening to engulf the prohibition.³²² A concern only plausible if the prohibition is taken to be as wide-ranging as is commonly believed, but otherwise there is a world of difference between the mental distress and sentimental injury. Lord Scott highlighted the very point that what is crucial is the *cause* rather than the *nature* of inconvenience.³²³ Recovery was ruled out if the mental suffering derived from mere breach; but if it derived from another source then it was compensable within the ambit of the remoteness rule. Given that Lord Steyn abstained from discussing this point, one may conclude that their Lordships' current opinion on the issue is finely balanced.

Quantum

The general view of the House is that awards in this area of the law ought to be restrained and modest.³²⁴

Conclusion

The House of Lords placed their stamp of approval on the developments of the past decades that have seen more recognition being given to nonfinancial interest in contract. It is believed that this trend is set to continue and rise in

³¹⁹ At 814j para 34.

³²⁰ At 824h-825a paras 58-59.

³²¹ At 829e para 85. A good illustration is *Athens-Macdonald v Kazis* (note 236) where four days of letter writing was held to constitute inconvenience.

³²² Harder (note 28) 95.

³²³ *Farley* (note 8) 829f para 85.

³²⁴ *Ibid* 813f para 28 (Lord Steyn), 814c para 32 (Lord Browne-Wilkinson) concurring, 825c para 61 (Lord Hutton); and 833f para 110 (Lord Scott).

prominence.³²⁵ The judgment in *Farley* is commendable for establishing a liberal interpretation of the object-of-the-contract requirement. Nevertheless, much of the work in relation to the object-of-the-contract ‘exception’ waits to be done. One writer recently opined that ‘the courts have not been able to come up with a consistent approach as to which contracts fall into this category.’³²⁶ Although the helpful ‘consumer surplus’ concept has received repeated mention in several of the more recent judgments,³²⁷ comments indicate that its full implications are yet to be unpacked.³²⁸ The inevitable outcomes of postponing this very necessary work include maintaining the self-perpetuating analytical deficits³²⁹ highlighted within these pages, the most symptomatic of which is the persistence basing awards on mental distress instead of the lost sentimental benefit.³³⁰

³²⁵ Harder (note 28) 103.

³²⁶ Harder (note 28) 97.

³²⁷ *Alfred McAlpine Construction Ltd v Panatown* (note 53) 589B (per Lord Millet); *Ruxley* (note 24) 277f-g (per Lord Mustill).

³²⁸ *Ibid* 810h para 21 (per Lord Steyn: ‘I do not therefore set much store by the description “consumer surplus”’).

³²⁹ Bridge (note 5) 327.

³³⁰ *Mitchell v Durham* (t/a Trade Direct) [1999] CLY 1375 (Douce J) where the compensation was based on the mental distress rather than on the sentimental benefit lost.

CHAPTER SIX—A QUESTION POLICY REFORM

Introduction

The law does not operate in a vacuum and it is incumbent upon lawgivers and interpreters to push the boundaries of the law in a manner that resonates with the needs and best interests of society. This ethic, embodied in the 1970s wave of judicial activism, was characterised by a willingness to mete out a justice substantially unfettered by legalistic abstractions.³³¹ *Jarvis* evidenced this trend by granting damages that seemingly challenged the then existing limitations on recovery.

While, in the course of policymaking, principle has to sometimes give way to pragmatism, in seeking to develop the law by engrafting new policy directions it is essential that old policy segues into new policy. Not only so, but a duty remains to integrate the implications of the new policy in a manner harmonious with the principles constituting the existing law's fabric. This approach presumes a top-down paradigm. In the case of sentimental damages, however, the exigencies of life resulted in a bottom-up approach. *Jarvis* began a train of legal thought that expressed a befuddling cocktail of new and reclaimed principles of law. Instead of inducing a comparative policy analysis, the challenge it immediately posed was the task of clarifying the elements that belonged to the old policy framework and the elements that constituted new policy.

Old policy: lost utility

On the traditional view, the underlying purpose of contract law has always been the provision of an adequate bulwark for the community's commercial interests.³³² The rallying call of these diverse interests is the goal of economic efficiency.³³³ The heart of the old framework, therefore, compensated for a *pecuniary* performance deficit. The rising significance of consumerism challenges this approach by highlighting its inadequacy. The injustice that the courts countenanced and tried addressing was a *non-pecuniary* performance deficit. Handicapped by the restrictive presumption that contractors sought to confer

³³¹ Veitch (note 5) 231-232.

³³² Thriving even in the twenty-first century, see McGregor (note 69) para 3—013.

³³³ See Sebert (note 90) 1566.

only monetary gain upon each another, the courts felt compelled to locate and apply an alternate, but ultimately superfluous, narrative upon which to base the compensation intuitively recognised as due to an aggrieved plaintiff.³³⁴ They eventually settled on the idea of foreseeability.

Recovery on the basis of foreseeability in the 1970s was an attempt to maintain a façade of continuity with existing law. The appeal of the strategy lay in the fact that it was simple, cloaked in venerable authority and its application affords the judge a comfortable measure of discretion. But the practice also meant that the work of unravelling the precise content and extent of the new policy remained untouched.³³⁵ Foreseeability, unpacked, became a red herring rather than a true solution to the problem.³³⁶

As the problems of the foreseeability rationale became more apparent, the next decade witnessed a shift to an object-of-the-contract test. This crossover from the consequences of breach to a centring on the actual contract obligation is not trouble-free because it was not accompanied by a switch of focus away from negative mental-emotional reaction (characteristic of the foreseeability approach) to positive mental-emotional reaction (the essence of genuine contract expectation). To date the courts continue to err in capturing the basis of the compensation in the negative even though this approach creates problems in demarcating the exception's parameters vis-à-vis the prohibition.³³⁷ This difficulty disappears once the shift is made from negative to positive. The possibility of setting this area of law on a more sound jurisprudential footing is better appreciated against the backdrop of a more fundamental shift in thinking—regarding the consumer surplus.

The consumer surplus³³⁸

The focus of consumer interest in a contract centres, consciously or subconsciously, on 'the excess utility or subjective value obtained from a "good"

³³⁴ See comment in *Johnson v Unisys Ltd* (note 13) 823e (Lord Millet).

³³⁵ Ramsay (note 14) 172 and 175.

³³⁶ Rose (note 5) 333.

³³⁷ Macdonald (note 5) 142-146.

³³⁸ This section engages with ideas predominantly sourced from the seminal Harris (note 212) 582-86.

[or service] over and above the utility associated with its market price.³³⁹ A consumer may not always contract with a mind to resale value. Attention is, instead, usually fixed on the anticipated, nonpecuniary satisfaction of actually consuming a good or service. When breach occurs, the intangible and nonmarket nature of this utility creates difficulty not only in terms of valuing the loss, but in perceiving its very existence to begin with. A difficulty further exacerbated by the loss in question being representative of a subjective, rather than an objective, value. The common and simplistic recourse is to assume that contract price equals utility value. This assumption falters when tested against the notion of loss when a similar breach occurs in the purely commercial realm.

Expected gain, from a wholesaler's perspective, is the difference between production cost and wholesale price. And the difference between the cost price and eventual resale price of a commodity (minus expenses) gives the expected gain from a non-consumer's perspective. The next logical step, economists contend, is that the measure of expected gain for a consumer transaction is the difference between purchase price and (what would have been) the maximum purchase price acceptable to the consumer.³⁴⁰ The maximum acceptable purchase price is known as the reservation price.³⁴¹

To illustrate, suppose X, a retailer, contracted to buy a product from Y, a wholesaler, at R100, planning to resale it to Z, a consumer, for R150. If Y breaks the contract, then X suffers a R50 expectation loss.

Now suppose Z, the consumer, contracted to buy the product from X, the retailer, at R150, but would have been willing to pay up to R200 for it. If X breaks the contract, then Z suffers a R50 expectation loss too.

The final consumer may not replicate the conscious calculations of a businessperson, but that does not mean their mind inhabits a profit-free cosmos. In addition to expecting to recoup the value of personal energy and creativity expended in earning the money used to pay the price (comparable to a

³³⁹ Ibid 582.

³⁴⁰ Ibid 583.

³⁴¹ V Grover and P Ramanlal 'Six myths of information and markets' (1999) 23 *MIS Qtrly* 465 at 467.

businessperson's overheads and running costs) the consumer, too, contemplates a gain from the transaction. This gain takes the form of a *surplus* utility value. Obtaining this *utility* is the very motivation of a consumer transaction in the same way that obtaining *profit* is the very motivation of a non-consumer transaction.³⁴² This utility may be mundanely functional or exceptionally aesthetic, but the anticipation of it solicits a mental-emotional response of satisfaction from a consumer—this satisfaction, is the fruit or object of any and all consumer transactions.³⁴³ As the understanding of this reality gradually unfolds, even now apparent in the constantly expanding object-of-the-contract test for sentimental damages, the current remedial approach will resolve into a nature-of-the-contract test—the pertinent type simply being a consumer contract.

It is often said that sentimental value is justifiably disallowed in ordinary commercial contracts because non-pecuniary loss is not within the reasonable contemplation of commercial parties.³⁴⁴ But is this assumption accurate upon closer analysis? Consider for a moment how 'X the retailer' fixes the R150 price. Is this not done *partly* through estimating the utility valuation placed on the product by a consumer and then fixing the sale price below this value? Research shows that 'managers consider consumer reservation prices as "the cornerstone of marketing strategy,""³⁴⁵ The price needs to be lower, because if it is higher than utility value the product remains unsold. Retaining the money is a more advantageous outcome for the consumer. Of course one could argue that the price equals utility value. But, theoretically speaking, even then the product still remains unsold because, values being equal, the money (a versatile medium of exchange) represents a more advantageous store of value. As has been observed, '[k]nowledge of consumer reservation prices in a practical setting offers a much-

³⁴² S Nossal 'Recovery in contract of damages for mental distress' (1996) 26 *Hong Kong LJ* 162 at 168

³⁴³ Kastely (note 19) 8.

³⁴⁴ *Johnson v Unisys* (note 13) 823 para [70] (per Lord Millet).

³⁴⁵ K Jedidi and Z Zhang 'Augmenting conjoint analysis to estimate consumer reservation price' (2002) 48 *Management Science* 1350 at 1351 citing JC Anderson et al 'Understanding customer value in business markets' (1993) *J Bus to Bus Marketing* 3.

needed decision aid for managers.³⁴⁶ Be that as it may, the point currently being made is that when court awards 'X the retailer' damages for lost profits, the profit element of the award is a capitalisation of (a portion of) the consumer surplus. In other words, it is derivative of the very sentimental value that the law, subsequently, purports to deny the consumer.

So, why does the consumer surplus escapes judicial notice? One reason is the sometimes marginal value of the consumer surplus.³⁴⁷ The sheer minimalism suggesting that it ought to be excluded from the law's purview since 'the law cares not for small things' (*de minimis non curat lex*).³⁴⁸ This plausible argument needs to be balanced against the realisation that a minute consumer surplus is comparable to a small profit margin in the world of pure commerce. Even if the profit margin on a single product is small, an aggregation of these small returns (as represented in total sales volume) keeps the entire business afloat. Likewise, the seemingly trivial value of surplus in one consumer transaction does not detract from the genuineness of loss in the event of breach. And similarly it is the aggregation of such 'small' benefits that, in the final analysis, make consumption worthwhile.

Even if the courts opt to overlook a fractional consumer surplus, commercial entities will not. The dictates of economic efficiency rapidly reveal the profitability of cutting corners in such a policy climate and this, in itself, distorts the operation of the market mechanism.³⁴⁹ This is because the loss to an individual consumer will be minimal and, thus, non-litigable. Yet, the gains to the commercial actor, in the form of expenses incrementally saved through systematic noncompliance over a broad customer base, will be substantial. *Groom v Crocker* where Groom's lawyer colluded with his insurer in the filing of a false admission of negligence so as to keep running costs low illustrates this. This unprofessional conduct resulted in lost utility to the plaintiff and ought to have

³⁴⁶ K Jedidi and Z Zhang 'Augmenting conjoint analysis to estimate consumer reservation price' (2002) 48 *Management Science* 1350 at 1364.

³⁴⁷ Kastely (note 19) 9.

³⁴⁸ Harris (note 212) 585. See also Veitch (note 5) 240.

³⁴⁹ Kastely (note 19) 8.

been compensated under ordinary principles as a (non-pecuniary) expectation loss.

Another objection is the *transient* argument.³⁵⁰ Quite possibly this is aimed at feelings of mental distress rather than sentimental benefit. Applied to the latter it obscures the live issue of entitlement by equating the duration of a consumer's experience with its significance. If a court were to tell X the retailer 'Yes, it is true Y breached your contract, but we will not award you R50. This is because we believe it will soon be spent anyway.' It surely ought not to matter whether the plaintiff will immediately exhaust the fruit of their contract be it R50 or R500. It is a benefit contracted for and its loss ought to be compensated. Similarly, if a breach of contract results in lost utility, this is a bona fide and compensable diminution of value.

Indeed, one may also enquire whether the economic efficiency encouraged in contract law is an end in itself. If one takes the ultimate consumer as the *raison d'être* for all the hustle and bustle characteristic of the commercial world, then it is arguable that safeguarding the interest in actual performance of an obligation is the prime purpose of contract law.³⁵¹ If a commercially-oriented 'rule of law' is promoted as applying to the broad spectrum of contractual interests and yet is found to ultimately hinder the maximisation of society's aggregate consumption interest, can it retain its justification?³⁵²

The best explanation for the dearth of claims for lost utility is the possibility of mitigation. In most cases of breach, it is more cost effective for a consumer to get the good or service from a substitute supplier. It is reasonable to assume that, when this happens, a similar level of satisfaction is conferred. The consumer surplus comes into play in the relatively few cases when mitigation is no longer possible, eg the holiday³⁵³ or wedding³⁵⁴ is over, the molestation has

³⁵⁰ *Baltic Shipping Co v Dillon* (note 173) 365.

³⁵¹ D Friedmann 'The performance interest in contract damages' (1995) 111 *LQR* 628 at 628 (and *passim*).

³⁵² See Kastely (note 19) 12.

³⁵³ *Jarvis* *supra* (note 15).

³⁵⁴ *Diesen v Samson* *supra* (note 39).

occurred,³⁵⁵ the swimming pool is in the ground,³⁵⁶ or the house is paid for and occupied.³⁵⁷ Once the courts accept the rationale underpinning the consumer surplus, damages reflecting it (as argued in chapter four) can be calculated on the objective basis of a reasonable person in society. Since the protection of sentimental benefit can be done through ordinary expectation damages (awarded for lost utility instead of lost profits)³⁵⁸ the remaining question, is whether the mental distress damages *Jarvis* introduced to the remedial arsenal of contract law can be redirected to a new purpose.

New policy: lost promises

A pure *loss of performance* approach satisfies the proposition that ‘the remedial regime for breach of bargain contracts should make promisees indifferent between performance and legal relief.’³⁵⁹ And this is the right approach in the vast majority of cases, but what of the minority of cases? It must be remembered that *pacta sunt servanda* is not neutral or indifferent. It is pro-promise. If the nature of the transaction shows that a promisee places a high or even higher premium on promise-keeping rather than indemnification for mere loss of performance, should the law not have an answer for this exceptional scenario? The tentative answer is yes.

The discussion, in chapter two, concerning loss of promise versus loss of performance distinguished the moral and utilitarian approaches to contract enforcement. Although good morals between contractors amply justifies the notion that they should observe their promises to each other, the state is not necessarily the presumptive guardian of the morality of its citizenry, especially in matters to do with the voluntary assumption of obligation with its speculative train of risks and rewards. The availability of the legal machinery to enforce promises must, in the end, rest on a separate basis—the common good. This

³⁵⁵ *Heywood v Wellers* supra (note 43).

³⁵⁶ *Ruxley* supra (note 24).

³⁵⁷ *Farley* supra (note 8),

³⁵⁸ See *Sun Life Assurance Company of Canada v Fidler* (note 74) para 54.

³⁵⁹ MA Eisenberg ‘Actual and virtual specific performance, the theory of efficient breach and the indifference principle in contract law’ (2005) 93 *California LR* 975 at 977.

requires a lenient approach.³⁶⁰ It is, therefore, commendable that in the majority of cases the law takes into account human fallibility by requiring that the promisor indemnify the promisee only for the performance deficit arising from breach. But the preservation of a civil society also demands that if a promisee is exceptionally aggrieved by the breaking of a promise, the state, the monopoly of coercive power, is obligated to provide a forum for the resolution of that dispute.³⁶¹ This was the heart of the problem in *Addis*. Thus, a third approach to contract enforcement, where law adopts an accommodative stance towards moral or normative contract content, resides between the extremes.³⁶²

The promissory premium

Law and morality are both concerned with ordered and ordering behaviour, but the uniqueness of contract law is that it provides an interface for contractors to voluntarily participate in the dynamics of these forces.³⁶³ Promise-making invests a contract with normative content by giving birth to moral rights between promisor and promisee. It creates a trust relation that inures to the benefit of either or both.³⁶⁴ The violation of these moral rights may give rise to a situation meriting mental distress damages.

This type of compensation would be a concern separate from the loss a promisee sustains from loss of performance. It would reflect intersect between contract and tort by importing an element of fault or bad faith into the reparative equation.³⁶⁵ The proposition that contractors assume the risk of the distress resulting from mere breach is only true to a degree. If a promisor breaks promise in a highhanded and exploitative manner that shows a substantial lack of good faith on its part towards the promisee, then this should elicit a compensative response from the law. This used to be part of the rationale behind the breach of

³⁶⁰ Breach ought to be tolerated if the contract is wasteful: see D Friedmann 'Economic aspects of damages and specific performance compared' in D Saidov and R Cunnington *Contract damages: domestic and international perspectives* (2008) 65 at 77.

³⁶¹ AS Gold 'Consideration and the morality of promising' in JW Neyers et al (eds) *Exploring contract law* (2009) 115 at 132.

³⁶² Shiffrin (note 48)

³⁶³ Gold (note 359) 118.

³⁶⁴ C Fried *Contract as promise* (1981) 8.

³⁶⁵ J Tomain 'Contract compensation in nonmarket transactions' (1985) 46 *U Pitt LR* 867 at 889-90.

promise to marry suits. Alternatively the contractors themselves could put in a term elevating their promissory interest. An example of this a confidentiality clause. In such cases it is apparent that the promisee places a high premium on the promise and yet there may be no correlative performance loss.³⁶⁶

Admittedly this is a very novel concept. The separation of promise and performance may have largely been an accident of the common law regime, but it is tentatively suggested that this divorce may yet yield some advantages in by opening up an avenue for the expansion and sophistication of contract law. This increasing sophistication is already evidencing itself in a grudging willingness to acknowledge sentimental loss. Will it reach its bloom in the protection of the promissory premium?

In any event, the Canadian Supreme Court is quietly exploring the possibilities of awarding 'moral damages.'³⁶⁷ In the case of *Wallace v United Grain Growers Ltd*³⁶⁸ the appellant had been headhunted by the respondent. Though reluctant to leave his then employer (for whom he had worked for 25 years) he was finally persuaded by a guarantee of job security conditioned on performance. He was the respondent's top salesperson for 14 consecutive years and received numerous commendations, but was eventually fired. When pressed for a reason, it was alleged that he had failed to discharge his duties. This allegation was withdrawn when trial commenced.

The appellant sued contending that the contractual guarantee of tenure meant that he could not be fired. This argument was rejected on the ground that it interfered unreasonably with an employer's prerogative over its workforce.³⁶⁹ Nevertheless, the court declared in no uncertain terms that the contemptuous manner in which the dismissal was carried out merited compensation. Iacobucci J put the matter thus:

³⁶⁶ It has been suggested that the court ought to have power to order restitution to the promisee of profits gained by the promisor from an 'efficient breach' carried out in bad faith: see Friedmann (note 358) 83. See comment in *Attorney General v Blake* [2001] 1 AC 268 (HL) at 284H (per Lord Nicholls: '[T]here seems to be no reason, *in principle*, why the court must in all circumstances rule out an account of profits as a remedy for breach of contract').

³⁶⁷ *Honda Canada Inc v Keays* (note 169) para 59 (per Bastarache J).

³⁶⁸ *Supra* (note 116).

³⁶⁹ At paras 76-78.

[T]he law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal [because] when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating.³⁷⁰

Although this is a newly developing area of contract law, it holds promise.

Cases concerning loss of promise through grievous *manner* of breach are few and far between, this may explain why *Addis* has survived so long without being overruled, but the few are likely to be highly meritorious. They will also give occasion for the award of damages that will truly be for 'mental distress.' These damages will also vindicate our personal and societal sense of moral wrong. This was the nature of appeal that Mr Addis made to the House of Lords in 1909. An appeal that, for the most part, went unheard. Recognition and separate compensation for loss of promise, moves contract law one step closer to ensuring the remedial regime is not indifferent between 'performance and legal relief' but rather remains capable of promoting the ideal of *pacta sunt servanda*.

³⁷⁰ At para 95. *Re Public Service Employee Relations Act* [1987] 1 SCR 313 (SC) at 368 (per Dickson CJ: 'A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.')

CHAPTER SEVEN—CONCLUSION

In a civilised society, the State enjoys a monopoly of coercive power. For the most part, this power is employed to protect rather than advance the interests of the populace. It suffices if the people are at liberty to advance their interests as they see fit. It was in a judicial pursuit of this ideal that the prohibition against compensating mental distress first evolved. The defendant needed protection from jury malevolence. In deciding whether or not to perpetuate the principle it is important to pay heed to where the advantage now lies. Which contracting constituency is in need of protection?

Incommensurability is as much a red herring today as foreseeability was in the 1970s. At least the judges in the days of yore could justify their reservation by pointing to an unruly jury. Perhaps, if the principle were let loose then, there may have been hell to pay. Today, however, the judiciary is the sole arbiter of damages. If the judiciary boasts the capacity to assess non-pecuniary damages in tort law, it becomes hard to imagine then, that this capability evanesces with a change of pleadings.

Since a similar difficulty is presented and surmounted in tort, this invites one to attribute the non-compensability of contractual loss, when it is non-pecuniary in character, to the dominance of the commercial ethic in contract. The judiciary has, from the first, evidenced a deep seated reluctance to extend the operation of the 'exceptions' to the prohibition anywhere near the commercial sector. It is quite possible that relief was denied in the consumer sector in the because of the belief that it would act as a gateway to unprincipled recovery in the commercial sector. This amounts to an employment of the State's coercive power not only to advance the interests of one sub-culture in society, which is not problematic in itself, but can be when it is done at the expense of denying the rights of the society at large.

Conceptually divorcing mental distress from sentimental benefit highlights the merits of compensating the latter. When the loss in question is perceived to be a fruit of the contract this dissolves the compensative-punitive dilemma. The fact that interest enjoying protection is a consumer interest rather than a non-

consumer one reduces the likelihood of it spawning commercial stability. Indeed one may argue that it injects a much needed dose of reality into the so-called efficiency breach theory, by necessitating the taking into account of all pertinent values and costs. While both consumer and non-consumer transaction can be regarded as assuming the risk of mental distress, it is anomalous of the law extend this presumption, in the consumer context to a forfeiture of sentimental benefit, while at the same time safeguarding the financial benefit of non-consumer transaction. This defeats the purported goal of uniformity in the law. The floodgates fear not only ignored the fact that judges were now in full control of damages quantum, but also overlooked the need for the courts to play a protective role in the contest between consumer and commercial conglomerates. This protective role extended to providing judicial support to extrajudicial dispute resolution. In the same way that the remoteness rule is employed to obtain an objective measure of loss in a non-consumer context, an objective approach could satisfactorily be adopted in compensating claims for sentimental loss.

These rationcinations lead to the conclusion that the so-called 'exceptions' to the prohibition are hardly exceptional, but call for an ordinary remedial response from contract law. Much of the confusion in this area of law arises from attempting to reinvent the wheel. The legal framework that pre-existed the 1970s revolution, and one could argue that pre-existed the crystallisation of the prohibition in the early twentieth century provided a reliable foothold for the compensatory endeavours in this regard, but this facility went largely unexploited. The conceptual hangover from that day is that the courts are still stymied by the difficulties inherent in framing the exceptions in mental distress terms and in awarding damages not aimed at compensating the plaintiff for the utility value lost in the particular good or service. The comforting thought, however, is that the jurisprudence in this area is constantly evolving and refining the underpinning rationales. A shift away from mental distress to reparation for loss of sentimental benefit, by taking proper cognisance of the consumer surplus, will be a step in the right direction.

Finally, this paper has tried to suggest that the trend in contract law at the moment seems to be moving toward a reintegration of the notions of promise and performance in the remedial regime of the law. This is also a step in the right direction in light of the fact that the historical causes of their separation are, in many jurisdictions, largely eliminated. Intersect between contract and tort, law and morality through the active engagement and participation of both the law-makers and the law-users may yield the next level of jurisprudential sophistication.

The paramount responsibility of a just judicial system is to promote contract fulfilment within the dual framework of balanced partisan and societal interests. The current status quo, however, still reflects a triumph of the commercial interest over both.

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