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Cry Me a River: Recovery of Mental Distress Damages in a Breach of Contract Action—A North American Perspective

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I. INTRODUCTION

Both American and Canadian courts have manifested a historic, but nonetheless problematical, reluctance to award mental distress damages in contract. Both jurisdictions share an identical rule: general damages for mental distress are not ordinarily recoverable in a breach of contract action.[1] The rationales for such a long-standing rule are multiple and, at

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[1] *See, e.g.*, Desmarais v. Sciola, No. CV-97-279, 1998 Me. Super. LEXIS 153 (Me. June 17, 1998) (holding that no recovery for mental distress damages in a suit for breach of implied warranty of merchantability could be had when the purchaser of a chiller lost hundreds of lobsters); *see* E. ALLAN FARNSWORTH, CONTRACTS ¶ 12.17, at 840 (3d ed. 1999); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 571 (5th ed. 2003); *see also* Hobson v. Am. Cast Iron Pipe Co., 690 So. 2d 341, 344 (Ala. 1997) (holding that the general rule would not permit recovery for mental distress based on a breach of employment contract). For Canadian authority on point, see JAMIE CASSELS, REMEDIES: THE LAW OF DAMAGES 203 (2000). For a comparison between the law of the United States and Brazil on this topic, see generally Patricia Maria Basseto Avallone, *The Award of Punitive and Emotional Distress Damages in Breach of Contract Cases: A Comparison Between the American and the Brazilian Legal Systems*, 8 NEW ENG. INT'L & COMP. L. ANN. 253 (2002).

times, inconsistent. For instance, some judges contend that mental distress damages cannot be awarded in contract because they are not foreseeable according to the test in the landmark case of *Hadley v. Baxendale*.[2] Other courts refuse to award such damages because virtually any breach of contract brings with it disappointment and upset and thus virtually *every* action for breach of contract would have a mental distress recovery component. On this basis, courts regularly identify fear of opening the floodgates as a justification for the general rule against recovery.[3]

Courts also cite the role and nature of contract law as a reason for denying mental distress damages. In short, judges are significantly concerned that if mental distress damages were recoverable, then contract law would lose some of its tough-minded, commercial focus. For instance, the Supreme Court of North Carolina justified the rule against recovery on the basis that contracts generally concern business or professional interests where the "[p]ecuniary interest is dominant."[4] Canadian and English

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[2]Hadley v. Baxendale, 156 Eng. Rep. 145 (1854). For a full articulation of the foreseeability test in *Hadley v. Baxendale*, see discussion *infra* Part III. In *Erlich v. Menezes*, 981 P.2d 978 (Cal. 1999), for example, the court refused to award mental distress damages to the plaintiff notwithstanding the defendant's failure to deliver the promised "dream house." The court explained:

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

Id. at 982 (quoting Applied Equipment Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454, 515–16 (Cal. 1994)).

[3]The British Columbia Court of Appeal in *Warrington* v. *Great-West Life Assurance Co*. (1996), 139 D.L.R. (4th) 18 at para. 15 (B.C.C.A.), notes, with apparent approval, that English courts have recently "sounded a note of caution, based on the concern that in almost any contract, it can be expected that the party not in breach will experience mental distress as a result of the breach." The British Columbia Court of Appeal, in *Wharton* v. *Tom Harris Chevrolet Oldsmobile Cadillac Ltd.*, [2003] 3 W.W.R. 629 at para. 48 (B.C.C.A.), endorsed the following statement from the English Court of Appeal in *Watts v. Morrow,* [1991] 1 W.L.R. 1421, namely that the rule against recovery "is not . . . founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy." *Id*. at 1445.

[4]Lamm v. Shingleton, 55 S.E.2d 810, 813 (N.C. 1949). As Brian A. Blum summarizes the matter:

judges have expressed similar sentiments.[5] Indeed, Lord Cooke of Thorndon of the House of Lords recently articulated this conclusion in the following way: "[c]ontract-breaking is treated as an incident of commercial life which players in the game are expected to meet with mental fortitude."[6]

In fashioning the general rule, courts appear to favor the attitudes and expectations of the "reasonable businessman" who either presumably would not experience distress in face of breach, or if he did, would not regard this as a risk borne by the other side. This perspective creates the implicit background for the following statement by the Supreme Court of Idaho:

> Life in the competitive world has at least equal capacity to bestow ruin as benefit, and it is presumed that those who enter this world do so willingly, accepting the risk of encountering the former as part of the cost of achieving the latter. Absent clear evidence to the contrary we will not presume that the

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

BRIAN A. BLUM, CONTRACTS: EXAMPLES AND EXPLANATIONS 631 (2d ed. 2001).

[5]This position regarding commercial contracts is evident in the following case quoted by the British Columbia Court of Appeal in *Warrington* (1996), 139 D.L.R. (4th) 18 at para. 15 (B.C.C.A.):

> As Staughton, L.J. commented in Hayes v. James & Charles Dodd (a firm) [1990] 2 All E.R. 815 (C.A.), one would "not view with enthusiasm the prospect that every ship-owner in the Commercial Court having successfully claimed for unpaid freight or demurrage, would be able to add a claim for mental distress suffered while he was waiting for his money." His Lordship suggested that damages for mental distress should as a matter of policy be limited to "certain classes of case . . . where the contract which has been broken was itself a contract to provide peace of mind or freedom from distress" (quoting *Bliss* v. *S. E. Thames Reg. Health Auth*. [1987] I.C.R. 700 (C.A.) at 718).

Joseph Perillo observes that the general rule against recovery is the judiciary's way of defining the limits of business risk. PERILLO, *supra* note 1, at 571 (quoting MCCORMICK ON DAMAGES 593 (1935)).

[6]Johnson v. Gore Wood & Co., [2001] 2 W.L.R. 72 at 108 (H.L.). A Canadian judge makes a similar point in *Warrington*, (1996), 139 D.L.R. (4th) 18 at para. 19 (B.C.C.A.), stating "[w]hereas mental suffering is often the foreseeable consequence of tortious conduct, its avoidance is not commonly a benefit contemplated by the contract."

> parties to a contract such as the one before us meant to insure each other's emotional tranquility.[7]

Despite reluctance to award recovery for mental distress damages in contract cases, courts in Canada and the United States provide such awards under two circumstances. The first such circumstance goes to the *manner* of breach. As discussed in Part IV, when the defendant acts outrageously or reprehensibly at the *time* of breach, damages for mental distress are recoverable. Such an award reflects the court's recognition that the defendant has not merely breached the contract; he or she has done so in a *manner* that requires additional recompense or punishment. The second circumstance permitting recovery for mental distress goes to the *fact* of breach. The general rule against recovery for the fact of breach would not ordinarily warrant mental distress damages, but a burgeoning set of exceptions has now emerged. As discussed in Part V, there are two main approaches to this matter within American and Canadian jurisprudence. First, some courts have determined that mental distress damages are recoverable if the contract at bar fits within a special category.[8] Other courts, in more direct defiance of the general rule, are prepared to assess the matter on the basis of foreseeability alone.[9] If mental distress damages are a reasonably foreseeable consequence of breach, they are recoverable. As this article will show, the judicial approach to exceptions is unstable, leading to needless complexity in the law.

This article challenges the general rule against recovery for mental distress damages, arguing that the current patchwork of exceptions is unworkable.[10] That is, while the general rule presupposes that contracts are not intended to ensure the plaintiff's "emotional tranquility,"[11] it would

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[7]Hatfield v. Max Rouse & Sons Northwest, 606 P.2d 944, 952 (Idaho 1980). This case involved an allegation by the plaintiff of mental distress in light of an auctioneer mistakenly selling his property at below the reserve price. The jury awarded $10,000 for mental distress, in addition to compensatory and punitive damages. The award for mental distress was reversed on the basis that mental distress was not a foreseeable consequence of breach. *Id*.

[8]*See* discussion *infra* Part V.A.

[9]*See* discussion *infra* Part V.B.

[10]Professor Douglas J. Whaley describes contract law in the United States with regard to emotional distress damages as "in a state of chaos." *See* Douglas J. Whaley, *Paying for the Agony: The Recovery of Emotional Distress Damages in Contract Actions*, 26 Suffolk U. L. Rev. 935, 947 (1992). He proposes the adoption of a foreseeability test, which is discussed *infra* Part VI.

[11]*See*, *e.g.*, *Hatfield*, 606 P.2d at 945.

appear that the informing rule is not sufficiently robust to be useful. Put another way, if the general rule were genuinely descriptive of most contracts, then there would not be so many exceptions. The better alternative is to treat all contracts on an equal footing instead of relegating "nontraditional" contracts to an inferior legal position. In this way, recovery for mental distress damages would follow ordinary principles of contract law instead of being relegated to an exception-based approach.

The process of developing a better alternative to the status quo has already begun in some courts. In a recent decision in the United Kingdom, *Farley* v. *Skinner*,[12] Lord Steyn took a less rigid approach to the question of recoverability for mental distress damages in contract cases. According to Lord Steyn, the plaintiff is entitled to secure damages for intangible loss[13] provided that an important part of the contract is to provide "pleasure, relaxation, or peace of mind."[14] The Supreme Court of Hawaii in *Francis v. Lee Enterprises*, *Inc*.[15] took a similar approach, reversing a ruling which forbade noneconomic damages in contract.[16] The Hawaiian court stated that courts ought to focus on the nature of the contract itself and permit mental distress damages where such a loss is foreseeable.[17]

Building on the approach and conclusions in *Farley* v. *Skinner* and *Francis v. Lee Enterprises*, this article argues that courts in both the United States and Canada should abandon the general rule against recovery for intangibles. Part II provides some brief historical context by considering recovery for mental distress damages in tort cases. The strict barriers to recovery in this area appear to indicate a generalized judicial skepticism about the legitimacy of intangible injury and act as a preview of how the courts respond to claims in contract.[18] Part III provides necessary context

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[12][2001] 3 W.L.R. 899 (H.L.).

[13]*Id*.

[14]*Id*. at para. 24.

[15]971 P.2d 707 (Haw. 1999).

[16]*Id*.

[17]*Id*. at 713.

[18]Contrast this approach to civil rights cases in which mental distress damages are generally sought and the plaintiff's testimony may be all that is required to support an award. "Significantly, however, a majority of the federal courts that have held a plaintiff's own testimony as sufficient to sustain an award of damages for emotional distress usually subject such claims

for examining mental distress damages in the contractual arena by assessing this topic in relation to the *Restatement (Second) of Contracts*. It concludes that aspects of the *Restatement* are actually *more* exacting on the plaintiff seeking mental distress recovery than the common law. This heightened standard betrays the anxiety with which claims for intangibles continue to be met.

Part IV focuses on recovery for mental distress in contract law through punitive or aggravated damages. This section concludes that, while such avenues of recovery are essential, courts have set the bar exceedingly high for recovery—perhaps another outgrowth of the judiciary's discomfort with intangible loss. This part underscores the ideas that recovery for *manner* of breach does not provide recompense to the plaintiff who is upset due to the defendant's breach alone, but only where the breach has been accompanied by high-handed or outrageous conduct.

Part V discusses the law concerning recovery based on the *fact* of breach. It is in such contexts that the general rule against recovery for mental distress damages operates. This part illustrates and critiques the various strategies courts have followed in order to prevent the general rule from working an injustice in a given case. The first most commonly followed strategy, which permits recovery when the contract fits within a special category, is impeachable on logic alone. As Professor Edward Veitch has observed, once is it acknowledged that mental distress damages are recoverable in certain circumstances, it is difficult to justify any limitation on those categories.[19] The second approach, permitting recovery only on the basis of reasonable foreseeability, is one followed by numerous courts in Canada and advocated for in the United States by Professor Douglas Whaley.[20] The difficulty with this rule is simply contextual. To the extent that the judge makes the classical assumption (namely, that contracts are unlikely to contain intangible content) that assumption propels the conclusion that the contract in question contains no such content. Such a mindset, in turn, makes it much less likely that mental distress damages will

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to heightened scrutiny." Lewis R. Hagood, *Claims of Mental and Emotional Damages in Employment Discrimination Cases*, 29 U. Mem. L. Rev. 577, 586 (1999).

[19]Edward Veitch, *Sentimental Damages in Contract*, 16 U.W.O.L.R. 227, 236 (1978) (citations omitted).

[20]*See* Whaley, *supra* note 10.

pass the foreseeability test of *Hadley v. Baxendale*.[21] In short, the second approach to recovery—while appearing to be flexible—may actually produce the same outcome as if the general rule against recovery had been applied at the outset.

Part VI offers suggestions for reform, including how a court might most effectively approach claims for intangible loss in contract. That is, rather than coming to the question of recovery with categories and presuppositions in mind, the court would simply begin by asking the unadorned but elegant question at the foundation of all contract law: "What did the contract promise?" Part VII provides a brief conclusion.

II. Mental Distress Damages in Tort

This part illustrates, in brief, how decisions in both the United States and Canada manifest a reluctance to permit compensation for mental distress in tort by erecting barriers to plaintiffs' recovery. While some of these barriers have been lowered in recent years, there remains a general judicial discomfort with mental injury. The purpose of this section is to provide a larger context for the courts' parallel suspicion of mental distress in the realm of contract.[22]

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[21]156 Eng. Rep. 145 (1834).

[22]Note that both jurisdictions have the tort of intentional infliction of mental suffering. We do not include it in our discussion here because it fundamentally differs from negligent infliction of emotional distress and contract in that the emotional harm in the former category of cases is the direct and intended harm, where in the latter two categories the emotional harm is a consequence of another action of the defendant. In the United States, the *Restatement (Second) of Torts* states:

> Outrageous Conduct Causing Severe Emotional Distress
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> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
> (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
> (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
> (b) to any other person who is present at the time, if such distress results in bodily harm.

Restatement (Second) of Torts § 46 (1965).

In Canada, the tort of intentional infliction of mental suffering requires (1) an act or statement (2) calculated to produce harm and (3) harm. *See* Lewis Klar, Tort Law 73 (3d ed. 2003). See Part IV *infra* for a brief discussion of how the tort of intentional infliction of mental suffering figures in awards for aggravated and punitive damages.

The tort of negligent infliction of emotional distress is recognized by state courts throughout the United States.[23] By the very nature of this tort, compensation is awarded to plaintiffs suffering from mental distress. Nevertheless, courts have devised a number of rules to limit recovery for such damages. The following comment by Justice Hines of the Supreme Court of Georgia provides the necessary background:

> There are three policy reasons . . . [for] denying recovery for emotional distress unrelated to physical injuries. First, there is the fear, that absent impact, there will be a flood of litigation of claims for emotional distress. Second, is the concern for fraudulent claims. Third, there is the perception that, absent impact, there would be difficulty in proving the causal connection between the defendant's negligent conduct and claimed damages of emotional distress.[24]

Claims for mental distress damages have historically been seen as "'parasitic' . . . requiring a host cause of action beyond simple negligence as a basis for establishing a right to recovery."[25] In the United States, these host causes fall into three categories: when damage is alleged to relate to certain protected interests such as the plaintiff's reputation,[26] when the defendant's action was willful and wanton,[27] or when there was a special relationship between the plaintiff and defendant.[28] In addition, if a plaintiff suffered a direct physical impact or injury as a result of the defendant's

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[23]*See* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 54, at 359–60 (5th ed. 1984).

[24]Lee v. State Farm Mut. Auto. Ins. Co., 533 S.E.2d 82, 86 (Ga. 2000).

[25]*See* Clark D. Kimball et al., Damages in Tort Actions § 5.01 (2005).

[26]*See, e.g.*, Meleen v. Hazelden Found., 740 F. Supp. 687, 692 (D. Minn. 1990), *aff'd* 928 F.2d 795 (8th Cir. 1991). The plaintiff sued her former employer for wrongful discharge and defamation. The court of appeals affirmed the district court's dismissal of a claim for negligent infliction of emotional distress, agreeing with the lower court's analysis. *Id*. The district court explained:

> [T]o recover on a claim of negligent infliction of emotional distress, a plaintiff must demonstrate negligence by the defendant which caused her emotional distress, physical manifestations of the distress, and that she was within the zone of physical danger of the negligent act. An exception to the zone of danger rule permits a plaintiff to recover for emotional distress caused by a direct invasion of her rights, such as defamation, malicious prosecution, or other willful, wanton, or malicious conduct.

Meleen v. Hazelden Found., 740 F. Supp. 687, 693 (D. Minn. 1990) (citations omitted).

[27]*Id*. at 693.

[28]Stevens v. First Interstate Bank, 999 P.2d 551, 554 (Or. 2000). A depositor claimed damages for emotional distress as a result of the defendant bank's employee misappropriating plain-

negligent actions, and mental distress damages were caused by that impact, a plaintiff could recover. This rule, known as the "impact rule" was later relaxed in many jurisdictions in favor of a "zone of danger rule," entitling plaintiffs who might have, but did not suffer the physical impact, to recover for mental distress caused by the anticipation of a probable physical impact.[29] Although one court in California predicted the elimination of these barriers, making the recovery of damages possible in any case where mental distress is a foreseeable result of the defendant's negligent conduct regardless of actual or likely physical injury,[30] the California courts have

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tiffs' confidential information in order to obtain credit cards and loans. The court dismissed the emotional distress claim stating:

> In the absence of physical injury, to recover emotional distress damages only, plaintiffs must demonstrate that their relationship with [defendant] gave rise to some distinct "legally protected interest" beyond liability grounded in the general obligation to "take reasonable care not to cause a risk of foreseeable harm" to plaintiffs'. . . . The relationship between plaintiffs, as depositors, and their bank was not of the sort that Oregon courts have found gives rise to the requisite distinct "legally protected interest."

Id. (citations omitted).

[29]The seminal case on the concept of impact and zone of danger is *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968), in which a mother, who witnessed her child being hit by the defendant's car, sued for emotional distress injuries, although she suffered no physical impact from the accident. In determining whether the defendant's liability should extend to one who was not physically injured by the defendant's car, the court stated:

> This foreseeable risk may be of two types. The first class involves actual physical impact. A second type of risk applies to the instant situation. . . . "[P]laintiff is outside the zone of physical risk (or there is no risk of physical impact at all), but bodily injury or sickness is brought on by emotional disturbance which in turn is caused by defendant's conduct. Under general principles recovery should be had in such a case if defendant should foresee fright or shock severe enough to cause substantial injury in a person normally constituted. Plaintiff would then be within the zone of risk in very much the same way as are plaintiffs to whom danger is extended by acts of third persons, or forces of nature, or their own responses."

Id. at 920 (quoting 2 Fowler V. Harper & Fleming James, Jr., The Law of Torts 1035–36 (1956)). *But see* Langeland v. Farmers State Bank, 319 N.W.2d 26 (Minn. 1982). The court refused to expand recovery beyond the zone of danger rule, stating, "[w]e have consistently held that no cause of action exists for the negligent infliction of emotional distress absent either physical injury or physical danger to the plaintiff." *Id*. at 32.

[30]In *Jarchow v. Transamerica Title Ins. Co*., 122 Cal. Rptr. 470 (Cal. App. 1975), the court stated that the impact or injury rule is no longer strictly applied in California, and that courts may adjudicate negligence claims for mental distress when "sufficient guarantees of genuineness are found in the facts of the case—e.g., when the plaintiff has suffered *substantial damage* apart from the alleged emotional injury." *Id*. at 937. In a footnote, the court observed that "the Supreme Court has yet to permit recovery for negligently inflicted emotional distress where

not gone the full distance. That is, although such courts have rejected the specific requirement of physical danger, they still condition recovery on the happening of an "abnormal event" in addition to the defendant's ordinary negligence.[31] Such judicially imposed hurdles appear to be based on a deep judicial distrust of the claimants and their claims evidenced by the policy reasons set forth earlier in this section,[32] rather than on logic.

In Canada, there is no nominate tort of negligent infliction of emotional distress but mental distress caused by negligence is recoverable,[33] which, perhaps, is to say the same thing. Like their counterparts in the United States, Canadian courts are reluctant to award damages for mental distress in tort too easily. In fact, the traditional rule is that there is no recovery for mental distress in negligence if the upset falls short of a recognized psychological disorder.[34] For example, in *Koerfer v. Davies (c.o.b.*

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the mental injury was the only damage caused by the defendant's wrongful conduct. Though endorsement of such an action seems to be the logical end product of the decisional trends in this area, we set forth no such rule in this case." *Id*. at 937 n.11.

[31]In *Soto v. Royal Globe Ins. Co.*, the court stated, "there are two requirements for stating a cause of action for negligent infliction of emotional distress: (1) foreseeability of emotional shock resulting from (2) an 'abnormal event.'" 229 Cal. Rptr. 192, 199–200 (Cal. App. 1986).

[32]*See supra* text accompanying notes 2–6. Fear of fraudulent claims was also recognized in the landmark case *Dillon* v. *Legg*:

> Indubitably juries and trial courts, constantly called upon to distinguish the frivolous from the substantial and the fraudulent from the meritorious, reach some erroneous results. But such fallibility, inherent in the judicial process, offers no reason for substituting for the case-by-case resolution of causes an artificial and indefensible barrier. Courts not only compromise their basic responsibility to decide the merits of each case individually but destroy the public's confidence in them by using the broad broom of "administrative convenience" to sweep away a class of claims a number of which are admittedly meritorious.

441 P.2d at 918.

[33]*See* KLAR, *supra* note 22, at 73.

[34]*See id*. at 426 and the cases cited in his footnote 48. For a recent example of the court applying this standard, see Mustapha v. Culligan of Canada Ltd., [2005] O.J. No. 1469 at para. 230 (Sup. Ct.) (awarding plaintiff $80,000 general damages for distress caused by seeing a dead fly in a sealed container of water supplied by the defendant). In the United States, even a recognized mental disorder may be insufficient injury to warrant a damage award. In *First National Bank v. Drier*, 574 N.W.2d 597, 600 (S.D. 1998), the appeals court reversed an award for damages when the jury instruction on injury resulting from negligent infliction of emotional distress stated that one of the elements of the tort was as follows: " 'Physical injury' is defined as bodily injury or *a diagnosed severe mental illness or injury*." *Id*. In rejecting this instruction, the court stated clearly that "[i]n South Dakota, the tort of negligent infliction of

Caerleton Farms),[35] the Ontario Court of Appeal found that the defendant breached its bailee–bailor relationship and was negligent. However, the Court of Appeal reversed the trial judge's award of $600 for damages for vexation, frustration, and mental distress resulting from the loss of the bailed horse, noting that mental distress arising out of negligence is recoverable only when the plaintiff suffers from a recognizable psychiatric illness.[36]

Not all Canadian jurisdictions, however, demand strict proof of a recognizable psychiatric disorder. Certain courts have shown flexibility by permitting recovery for simple mental distress unaccompanied by a recognizable disorder.[37] For example, in *Mason v. Westside Cemeteries*,[38] an Ontario court challenged in very persuasive terms the premise that grief alone is not compensable in tort and questioned the general rule that the plaintiff must prove the defendant has caused physical symptoms or some recognizable psychiatric illness.[39] The case involved the emotionally traumatic instance of a cemetery negligently losing the cremated remains of the plaintiff's parents. The court stated:

> It is difficult to rationalize awarding damages for physical scratches and bruises of a minor nature but refusing damages for deep emotional distress which falls short of a psychiatric condition. Trivial physical injury attracts trivial damages. It would seem logical to deal with trivial emotional injury on the same basis,

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emotional distress requires manifestation of physical symptoms." *Id*. (quoting Nelson v. Web Water Dev. Ass'n, Inc., 507 N.W.2d 691, 699 (S.D. 1993)).

[35][1994] O.J. No. 1408 (C.A.).

[36]In *Davies,* the court stated that courts have "declined to award damages for mental distress arising from negligence, except where the distress stems from a recognizable psychiatric illness." *Id*. at para. 4. As authority for this proposition, the court cited *Heighington* v. *The Queen*, (1987) 60 O.R. (2d) 641 (H.C.J.), *aff'd*. 69 O.R. (2d) 484 (C.A.) and FREIDMAN, 1 THE LAW OF TORTS IN CANADA 256–57. *See also* Vanek v. Great Atlantic & Pacific Co. of Can. (1999), 48 O.R. 3d 228 (C.A.), *application for leave to appeal to the S.C.C. denied*, [2000] S.C.C.A. No. 50. In *Vanek*, the court declined to reconsider the rule and dismissed the plaintiffs' claim for want of foreseeability even though the plaintiffs were able to show a recognizable psychiatric disorder. *Id*. at paras. 59–65.

[37]See the cases cited in *Vanek*, (1999) 48 O.R. 3d 288 (C.A.), namely: *McDermott* v. *Ramodanovic Estate* (1988), 27 B.C.L.R. (2d) 45, 44 C.C.L.T. 249 (S.C.) and *Rhodes Estate* v. *Canadian Nat. Ry.* (1990), 75 D.L.R. (4th) 248, 50 B.C.L.R. (2d) 273 (C.A.), at para. 64, and *Mason v. Westside Cemeteries Ltd*. (1996), 135 D.L.R. (4th) 361 (Ont. Gen. Div.).

[38]*Mason*, (1996), 135 D.L.R. (4th) 361 (Ont. Gen. Div.).

[39]*Id*. at para. 54.

> rather than by denying the claim altogether. Judges and juries are routinely required to fix monetary damages based on pain and suffering even though it is well known that the degree of pain is a subjective thing incapable of concrete measurement. It is recognized that emotional pain is just as real as physical pain and may, indeed, be more debilitating. I cannot see any reason to deny compensation for the emotional pain of a person who, although suffering, does not degenerate emotionally to the point of actual psychiatric illness. Surely emotional distress is a more foreseeable result from a negligent act than is a psychiatric illness. . . . But what is the logical difference between a scar on the flesh and a scar on the mind? If a scar on the flesh is compensable although it causes no pecuniary loss why should a scar on the mind be any less compensable?[40]

Bolstered by this analysis, the court went on to award mental distress damages even though the anxiety did not take the form of a recognized mental disorder.[41] The court stated:

> [I]t seems equally illogical to me that mental distress damages should be recoverable in a case based on contract [which has no requirement of a recognizable psychiatric illness] but not in a negligence case [which classically does]. I recognize the undesirability of lawsuits based on nothing more than fright or mild upset. However, in my view the more appropriate way to control these frivolous actions is by limiting recovery based on foreseeability (and perhaps proximity or directness) and by awarding limited damages and imposing cost sanctions in cases of a trivial nature.[42]

The Supreme Court of Canada has not considered whether a tort claim for intangible loss must be accompanied by proof of a recognizable psychiatric illness or not, leaving the law in a somewhat uncertain state.[43] As Klar notes, the general refusal to permit recovery is not so much based on logic as it is to limit recovery in an area that courts "fear can extend too far."[44]

This part of the article has illustrated that, with certain exceptions, such as *Mason*,[45] courts in both the United States and Canada regard

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[40]*Id.*

[41]*Id.* at para. 55.

[42]*Id.* at para. 54. *Mason* has recently been questioned in *McLoughlin* v. *Arbor Mem'l Services Inc.* [2004], O.J. No. 5003 at para. 19 (Sup. Ct. Jus.) (involving the mishandling of a cremation and interment).

[43]*See* Devji v. Burnaby (District) (1999), 180 D.L.R. (4th) 205 (B.C.C.A.), *leave to appeal to the S.C.C. refused* [1999] S.C.C.A. No. 608.

[44]*See* KLAR, *supra* note 22, at 73.

[45](1996), 135 D.L.R. (4th) 361 (Ont. Gen. Div.).

claims for intangible loss with suspicion, precipitating the erection of illogical barriers to recovery. Furthermore, courts in both the United States and Canada fear an opening of the floodgates. Parallel concerns animate the judiciary when they assess claims for intangible loss in the contractual arena. This matter is discussed in the next section.

III. Relevant Portions of the *Restatement (Second) of Contracts*

The *Restatement* is an important starting point for assessing American jurisprudence concerning recovery for intangible loss in a breach of contract action. It will be seen that the *Restatement* clearly reflects and supports the general rule against recovery. The *Restatement* is based on the famous English case of *Hadley v. Baxendale*,[46] which provides:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it [the "first arm."] Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them [the "second arm."] Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract.[47]

Various terms have been used in the United States to describe the two types of damages referred to in the *Hadley* case: general and special, or

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[46]156 Eng. Rep. 145 (1854).

[47]*Id*. at 151.

direct and consequential;[48] in Canada, such nominate categories have not developed to the same extent. In both countries, however, courts address the limitation on contract damages articulated in *Hadley* by asking whether or not the damages for which recovery is sought were foreseeable at the time of contracting.[49]

According to the *Restatement*, the usual measure of damages is based on the plaintiff's expectation of interest, including the difference between what was promised and what was received, as well as other losses that are caused by the breach.[50] When those damages are for mental distress, however, the *Restatement* imposes the additional limitation that either the breach of contract also caused bodily harm or that mental distress was particularly likely because of the type of contract between the parties.[51]

There is no doubt that this *Restatement* limitation amounts to a pronounced tightening of the rule stated in *Hadley v. Baxendale*.[52] Indeed, the special limitation on recovery for emotional disturbance in the *Restatement* asks for the plaintiff to show more than *Hadley*- based foreseeability under its "second arm."[53] The *Restatement*, therefore, is consonant with the general rule against recovery for mental distress. It also supports the current state of the American common law which mandates finding special circumstances, beyond what is required for other types of consequential loss,

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[48]Arthur Linton Corbin et al., 11–55 Corbin on Contracts § 998 (Supp. 2004).

[49]*Id*. at § 1007; G.H.L. Fridman, The Law of Contract in Canada 515 (5th ed. 1999).

[50]Section 347 of the *Restatement*, entitled "Measure of Damages in General" provides:

> Subject to the limitations stated in §§ 350–53, the injured party has a right to damages based on his expectation interest as measured by
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> (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
> (b) any other loss, including incidental or consequential loss, caused by the breach, less
> (c) any cost or other loss that he has avoided by not having to perform.

Restatement (Second) of Contracts § 347.

[51]Section 353 of the *Restatement*, entitled "Loss Due to Emotional Disturbance" provides: "Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result." *Id*. at § 353 (1993).

[52]156 Eng. Rep. 145 (1854).

[53]*Id*.

in order for mental distress damages to be awarded. Such additional requirements are explored further in Part V.

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

> (1) A, a hotel keeper, wrongfully ejects B, a guest, in breach of contract. In doing so, A uses foul language and accuses B of immorality, but commits no assault. In an action by B against A for breach of contract, the element of B's emotional disturbance will be included as loss for which damages may be awarded. . . .[54]
> (2) A makes a contract with B to conduct the funeral for B's husband and to provide a suitable casket and vault for his burial. Shortly thereafter, B discovers that, because A knowingly failed to provide a vault with a suitable lock, water has entered it and reinterment is necessary. B suffers shock, anguish and illness as a result. In an action by B against A for breach of contract, the element of emotional disturbance will be included as loss for which damages may be awarded.[55]
> (3) A, a plastic surgeon, makes a contract with B, a professional entertainer, to perform plastic surgery on her face in order to improve her appearance. The result of the surgery is, however, to disfigure her face and to require a second operation. In an action by B against A for breach of contract . . . the element of emotional disturbance resulting from the additional operation will be included as loss for which damages may be awarded.[56]

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

Examples (2) and (3) more closely follow the *Hadley* rule, but rely on the extreme facts of a botched funeral and plastic surgery. In example (2), emotional distress is likely to be the natural result of a breach of contract for funeral services. In example (3), the illustration of a failed cosmetic

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[54] Restatement (Second) of Contracts § 353, cmt. A (1993).

[55] *Id.*

[56] *Id.*

surgery procedure presumably is intended to show special circumstances known to the parties at the time of contracting, namely that the plaintiff is a professional entertainer. However, this contract could also fall into the same category as example (2) in that mental anguish is a natural consequence of disfigurement and the need for additional surgery.

It will be noted, in the cases described below, that not all courts in the United States follow the *Restatement* rule requiring physical injury as a prerequisite to emotional distress damages.[57] As the court in *Volkswagen of America v. Dillard*[58] stated with respect to mental distress damages in connection with a breach of warranty claim:

> [A]lthough Alabama historically did not allow the recovery of damages for mental distress where there was no accompanying physical injury, we have now adopted the rule that recovery may be had for mental suffering without the presence of physical injury, concluding, ... that "to continue to require physical injury ... would be an adherence to procrustean principles which have little or no resemblance to medical realities" (citations omitted).[59]

As the *Restatement* illustrates, foreseeability is an important ingredient in the recovery of mental distress damages for the fact of breach. This part has also shown, however, that special limitations are added before intangible losses are made recoverable. In effect, the *Restatement* raises the bar in such a context, predicting and paralleling the exacting approach which courts in both jurisdictions follow when faced with claims for damages for

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[57]*See, e.g.,* Harvey v. Dietzen, 716 So. 2d 911 (La. 1998) (allowing a claim for emotional distress damages arising out of administratrix's alleged breach of fiduciary duty). In *Hayes v. Blue Cross Blue Shield*, 21 F. Supp. 2d 960 (D. Minn. 1998), the plaintiff claimed emotional distress damages in a suit pursuant to the Americans with Disabilities Act. The court stated: "Minnesota recognizes an additional exception to the physical injury requirement when the plaintiff seeks to recover 'for mental anguish or suffering for a direct invasion of her rights, such as defamation, malicious prosecution, or other willful, wanton or malicious conduct.'" *Id*. at 979 (quoting Bohdan v. Alltool Mfg., 411 N.W.2d 902, 907 (Minn. App. 1987)). *See also* Chizmar v. Mackie, 896 P.2d 196 (Alaska 1995) (awarding emotional distress damages for medical misdiagnosis without accompanying physical injury).

[58]579 So. 2d 1301 (Ala. 1991).

[59]*Id*. at 1306 (quoting Taylor v. Baptist Med. Ctr., 400 So. 2d 369, 374 (Ala. 1981)). In *Volkswagen of America* v. *Dillard*, the court expanded the exception to the general rule against awarding damages for mental distress to include claims for mental distress as a result of a breach of the warranty provision of a new car contract.

mental distress due to both the manner and fact of breach. These matters are explored in the next two parts.

IV. Exceptions to the General Rule Against Recovery for Mental Distress Damages: Recovery Based on the Manner of Breach

Although courts are often reluctant to award damages for mental distress, plaintiffs can recover if they show that the defendant's conduct at the time of breach was sufficiently objectionable. Nonetheless, an underlying judicial recalcitrance shines through. As Section A of this part indicates, many courts in the United States have required that the defendant's manner of breach meet the requirements of an independent tort, such as the intentional infliction of emotional distress or tortious breach of the implied covenant of good faith. Section B of this part indicates that Canadian courts are less strict but that they, too, may require the plaintiff to show that the defendant had committed an independent actionable wrong. While a tort is sufficient in Canada, any additional actionable wrong (including breach of fiduciary duty or another breach of contract) would also meet the requirement.[60]

A. United States

1. Tortious Breach of Contract

This section illustrates that courts in the United States permit recovery for intangible loss when the manner of breach itself is tortious. According to this approach, damages flow from the defendant's tort, not from the breach of contract per se. Many states permit damages for mental distress when the defendant's conduct in breaching the contract amounts to outrageous or extreme tortious conduct or (particularly in the case of a breach of an insurance contract) when the breach is made in bad faith.[61] The most frequently alleged tort in this area is the tort of intentional infliction of

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[60]*See, e.g.*, Whiten v. Pilot Ins. Co. (2002), 209 D.L.R. (4th) 257, [2002] S.C.J. No. 19 (S.C.C.).

[61]For a discussion of emotional distress damages awarded for breach of insurance contracts, see John H. Bauman, *Insurance Law Annual: Emotional Distress Damages and the Tort of Insurance Bad Faith*, 46 Drake L. Rev. 717 (1998).

emotional distress. According to the *Restatement (Second) of Torts*: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."[62] If the elements of this tort are met, a court can then separate the plaintiff's pecuniary loss, which is redressed through contract damages, from the plaintiff's emotional or intangible injuries, which are redressed in tort. Accordingly, courts permit recovery for mental distress in a contractual context, albeit indirectly, and through the fortuity of a tort also having been committed.

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

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"[63]

The *Restatement of Torts* describes an exceedingly high standard indeed.

Plaintiffs who do not establish such a tort, however, do not necessarily fail to recover mental distress damages. In *Dependable Life Insurance Company v. Harris*,[64] for example, the plaintiff had a credit disability policy with defendant. After initially honoring the policy, the defendant ceased making payments to the bank holding the note on plaintiff's car. As the court summarizes the matter: "[a]t least twice, Harris' claims manager called him a cheat and a fraud, in an attempt to frighten him from claiming under the policy. His car was repossessed, he was forced into bankruptcy, and he became severely depressed."[65] On this basis, the court affirmed the lower

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[62]Restatement (Second) of Torts § 46 (1965).

[63]*Id*. § 46, cmt. d.

[64]510 So. 2d 985 (Fla. 1987).

[65]*Id*. at 987.

court's judgment which awarded compensatory damages for intentional infliction of mental distress as well as punitive damages.[66] The appeals court provided no analysis of why punitive damages were appropriate, but clearly believed that the defendant's conduct warranted such damages. Significantly, the court in *Harris* did not characterize the plaintiff's mental and emotional damages as resulting from the breach of the contract of insurance.[67] In fact, no mention of breach of contract damages was made in the case. Instead, the court examined the manner of the breach and measured the defendant's conduct against the standard of outrageousness required for the tort of intentional infliction of emotional distress.

Other tortious forms of conduct on which plaintiffs have relied to secure recovery for mental distress in connection with a breach of contract include assault and battery,[68] fraud and deceit,[69] defamation,[70] and conversion.[71] In these instances, emotional distress damages are compensated through a punitive damage award. Confusion between compensating the plaintiff for mental distress and punishing the defendant for tortious behavior is necessitated by the courts' reluctance to expressly recognize that mental distress may be a direct and compensable injury from a contract breach.

Plaintiffs may also encounter a unique barrier when seeking punitive damages arising from breach of contract. Some courts have actually *raised* the standard for awarding punitive damages when the plaintiff alleges an independent tort causing emotional injury in a breach of contract scenario. Instead of having to demonstrate that the defendant's conduct in relation to the alleged tort was willful or wanton, the ordinary test for punitives, some courts have required the plaintiff to prove the outrageousness standard of the tort of intentional infliction of emotional

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[66]*Id*. at 989. The award of attorneys' fees was reversed on other grounds.

[67]*Id*.

[68]*See* Lee v. Kane, 893 P.2d 854 (Mont. 1995) (alleging assault by lessor causing mental suffering in addition to lost profits in breach of restaurant lease).

[69]*See* First Commerce Bank v. Spivey, 694 So. 2d 1316 (Ala. 1997) (alleging fraudulent misrepresentations by lender in connection with loan contract).

[70]*See* Britt v. Chestnut Hill Coll., 632 A.2d 557 (Pa. Super. Ct. 1993) (alleging breach of contract based on instructor's improper behavior toward student including defamation).

[71]Gonzales v. Personal Storage, Inc., 65 Cal. Rptr. 2d 473 (Cal. Ct. App. 1997) (alleging conversion by defendant storage company as part of a breach of the lease for storage space).

distress.[72] This requirement is peculiar when the plaintiff does not even found his or her case on such a tort. It clearly reflects the deep suspicion with which the judiciary regards mental distress in a contractual context.

In *Brown v. Fritz*,[73] for example, the buyer sued the sellers for misrepresentation of title, misrepresentation of the condition of the property, and negligent infliction of emotional distress, in connection with the parties' contract for the purchase and sale of the sellers' real property.[74] A jury awarded the plaintiff compensatory damages for negligent infliction of emotional distress. On appeal, the court ruled that emotional distress suffered by the plaintiff was the result of the contract breach, not an independent tort. The court then noted "the close parallel between allowable damages for breach of contract under the terminology of 'emotional distress' and for 'punitive damages,' "[75] concluding that a plaintiff could recover only punitive damages in this circumstance and then only if the sellers' misconduct was sufficiently outrageous.[76] This reasoning is perplexing because, ordinarily speaking, an award of punitive damages would not be appropriate in a contract action, and for an independent tort such as fraud or defamation,[77] the assessment of punitive damages would be based on defendant's conduct being willful or wanton.[78] Instead, the court

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[72]*See, e.g.*, Brown v. Fritz, 699 P.2d 1371 (Idaho 1985).

[73]*Id.*

[74]*Id.*

[75]*Id.* at 1376.

[76]*Id.* The court's ruling is based on its erroneous premise that emotional distress damages are not compensatory. The court stated:

> [T]here is no significant, if in fact any, difference between conduct by a defendant which may be seen to justify an award of punitive damages, and conduct which may justify an award of damages for emotional distress. Justification for an award of damages for emotional distress seems to lie not in whether emotional distress was actually suffered by a plaintiff, but rather in the quantum of outrageousness of the defendant's conduct. Although a plaintiff may in fact have suffered extreme emotional distress, accompanied by physical manifestation thereof, no damages are awarded in the absence of extreme and outrageous conduct by a defendant.

Id. at 1376.

[77]*See supra* notes 68–71 and accompanying text.

[78]The Court of Appeals of Oregon addressed this confusion in *Meyer v. 4-D Insulation Co.*, 652 P.2d 852, 854 n.2 (Or. Ct. App. 1982):

applied the higher standard of outrageousness associated with the tort of intentional infliction of emotional distress.

The *Brown* decision is also deficient for failing to recognize the different purposes of compensatory and punitive damages. Indeed, the court takes the position that a punitive damages award cannot coexist with a compensatory award for mental distress.[79] This deficiency was ably criticized in *Walston v. Monumental Life Insurance Company*[80] by Justice Schroeder who stated:

> While the conduct giving rise to a claim for emotional distress and a claim for punitive damages may be of the same quality, it does not follow that the award of damages is either duplicative or must be co-extensive. The emotional distress damages are awardable for a condition particular to the aggrieved party. Punitive damages are awardable primarily to deter future bad conduct. There need be no overlap between the two.[81]

Although it is certainly helpful to plaintiffs that their claims for recovery for mental distress can sound in tort and sometimes result in an award for punitive damages, this approach can also be problematic and restrictive.[82] This is because torts, including the most frequently alleged

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> Damages for emotional distress are compensatory, not punitive. Thus, the quality of the conduct is per se irrelevant, because negligently caused damage may be as disturbing as that caused by a defendant intentionally. Intentionally caused damage causes an additional emotional impact only when the quality of the conduct becomes known to the victim and adds to his remorse or outrage at the destruction of his property. If damages for emotional distress are truly compensatory rather than a disguised form of punitive damages, then the relevance of the quality of the conduct is in its effect on the victim.

[79] *Brown*, 699 P.2d at 1371.

[80] 923 P.2d 456 (Idaho 1996).

[81] *Id.* at 465.

[82] This apparent contradiction between the compensatory nature of damages to the plaintiff and the punitive effect on the defendant is noted by Corbin:

> It has been commonly asserted that damages awarded for mental suffering, indignity and wounded feelings are compensatory in character, and are not exemplary or punitive. While the line between these two kinds of damages is very indistinct and hard to draw, it is, no doubt, true that an instruction authorizing the jury to award punitive damages would result in a considerably larger verdict than an instruction allowing them to consider mental suffering, but insisting that they must be compensatory only, and not punitive.

CORBIN, *supra* note 48, § 1076.

tort of intentional infliction of mental distress, have a stringent mental requirement going to the defendant's intent. Such a tort-based orientation to the question of mental distress recovery for breach of contract clearly places a higher onus on the plaintiff than contract law would ever demand. Instead of simply having to prove breach and its foreseeable consequence (mental distress), the plaintiff has to demonstrate that the defendant also had the requisite mental element to establish the tort in question. Moreover, some courts restrict access to punitive damages when the tort occurs in a contractual context. Requiring proof of the defendant's intent and restricting punitive damages unfairly compromise the plaintiff's claim and demonstrate courts' suspicions when it comes to mental distress claims in a contractual arena.

2. Tortious Breach of an Implied Covenant of Good Faith

When a plaintiff is able to prove tortious breach of an implied term of good faith, mental distress damages may be recoverable. The Uniform Commercial Code (U.C.C.) defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing."[83] The U.C.C. also provides that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."[84] The official comment to this section states: "[t]his section does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract. . . . "[85] Thus, in contracts for the sale of goods, a breach of good faith may result in an award of compensatory damages,[86] but not

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[83]U.C.C. § 1-201(19) (2003).

[84]*Id*. § 1A-304 (2003).

[85]*Id*. cmt. 1. *See, e.g*., Charles E. Brauer Co. v. Nations Bank of Va., N.A., 466 S.E.2d 382 (Va. 1996) (holding that Virginia law does not recognize a separate cause of action in tort for a party's breach of the obligation of good faith, and that such a claim would be merely duplicative of the breach of contract claim).

[86]*See, e.g*., Fette v. Columbia Casualty Co., No. CO-93-242, 1993 Minn. App. LEXIS 954 (Minn. Sept. 22, 1993):

> [The plaintiff's] claim arose from a contract. Without the insurance contract, there would be no relationship between the parties, and thus no basis for liability. Therefore, the breach of any duty owed to the insured is not distinct from the breach of contract. In

punitives.[87] In non-U.C.C. contracts, many courts take a different approach, treating breach of the duty of good faith as a tort, particularly in the area of violations of insurance contracts by insurers.[88] As the Supreme Court of California stated in *Cates Construction v. TIG Insurance Company*:[89]

> In the insurance policy setting, an insured may recover damages not otherwise available in a contract action, such as emotional distress damages resulting from the insurer's bad faith conduct and punitive damages if there has been oppression, fraud, or malice by the insurer. As our decisions acknowledge, tort recovery in this particular context is considered appropriate for a variety of policy reasons. Unlike most other contracts for goods or services, an insurance policy is characterized by elements of adhesion, public interest and fiduciary responsibility.[90]

> other words, no duty existed independently of the performance of the contract. . . . Thus, we conclude the trial court did not err in denying Fette's motion to amend the complaint to include a claim for punitive damages.

Id. at *7–8.

[87]In a more general context, Farnsworth notes:

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

FARNSWORTH, *supra* note 1, at 787 (citations omitted). *See also* Cates Constr., Inc. v. TIG Ins. Co., 980 P.2d 407 (Cal. 1999) (holding that recovery for breach of the implied covenant of good faith and fair dealing was limited to contract remedies); Giampapa v. American Family Mut. Ins. Co., 64 P.3d 230 (Col. 2003) (holding that when an insurance company's refusal to pay contracted for benefits is willful and wanton, plaintiff need not prove a separate tort, and noneconomic damages are available to compensate for mental distress and other nonpecuniary losses).

[88]*See* PERILLO, *supra* note 1, at 477. *See, e.g.,* Gibson v. Western Fire Ins. Co., 682 P.2d 725 (Mont. 1984):

> Although an action against an insurer for a breach of its implied covenant of good faith and fair dealing towards its insured sounds in contract the action is to be regarded as one for tort. The statutory rule for measure of damages in tort cases is the amount which will compensate the injured party for all the detriment proximately caused thereby, whether it could have been anticipated or not.

Id. at 738 (citations omitted).

[89]980 P.2d 407 (Cal. 1999).

[90]*Id*. at 416 (citations omitted).

This tort-based approach allows recovery of punitive damages,[91] and presumably results in an increased damage award to the plaintiff. Regardless of approach, however, tortious breach of the implied covenant of good faith is another basis for recovery for mental distress. Some courts have recognized a similar tort remedy for breach of the covenant of good faith in employment contracts.[92] Others, however, have declined to do so.[93]

Parceling out certain kinds of contracts as meriting special treatment is consistent with the somewhat piecemeal approach that courts have

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[91]*See, e.g.,* Dailey v. Integon General Ins. Corp., 331 S.E.2d 148 (N.C. 1985) (reinstating a verdict for punitive damages on a bad faith refusal to settle an insurance claim).

[92]*See* Decker v. Browning-Ferris Ind. of Colo., Inc., 931 P.2d 436, 445 (Colo. 1997) (citing Kmart Corp. v. Ponsock, 732 P.2d 1364, 1370 (Nev. 1987) ("The special relationships of trust between this employer and this employee under this contract under this type of abusive and arbitrary dismissal cries out for relief and for a remedy beyond that traditionally flowing from breach of contract."). *See also* E. I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436 (Del. 1996) (holding that an employer who manufactured false charges in order to dismiss an at-will employee breached the covenant of good faith). For a comparison of approaches to wrongful termination in the United States and Canada, see Robert C. Bird & Darren Charters, *Good Faith and Wrongful Termination in Canada and the United States: A Comparative and Relational Inquiry,* 41 Am. Bus. L.J. 205 (2004). For a critique of the Canadian approach, see Shannon O'Byrne, *Bad Faith—Contracts of Employment:* Wallace v. United Grain Growers Ltd. (1998) 77 Can. Bar Rev. 492.

[93]Explaining the reason for its refusal to extend damages to contracts for employment, one court stated:

> It is thus apparent that the torts of wrongful discharge in violation of public policy and bad faith breach of the implied covenant of good faith and fair dealing inherent in insurance contracts are based on administrative or legislative declarations of public policy. As a result, employers and insurers have notice of the scope of their duties to their employees and insureds. No parallel declarations of public policy have been articulated by the General Assembly or other governmental institutions with respect to the employment context. In the absence of such declarations of public policy, there is no appropriate basis upon which to ground a tort of breach of an express covenant of good faith and fair dealing in employment contracts. To the extent the contents of employment contracts and insurance contracts are similar, the tort of wrongful termination of an employment contract in violation of public policy represents an appropriate analog to the tort of bad faith breach of the implied covenant of good faith and fair dealing of an insurance contract.

Decker v. Browning-Ferris Indus., 931 P.2d 436, 446 (Col. 1997). *See also* Huegerich v. IBP, Inc., 547 N.W.2d 216 (Iowa 1996), Parnar v. American Homes, Inc. 652 P.2d 625 (Haw. 1982).

followed in awarding mental distress damages based on loss of expectation.[94] Part V returns to this point in more detail.

B. Canada

Like their American counterparts, Canadian judges permit recovery of mental distress damages based on the manner of breach, albeit on a somewhat less restrictive set of limiting principles.

1. Aggravated Damages and the Requirement of an Independent Actionable Wrong

In Canada, a plaintiff who has experienced wrongful conduct on breach causing emotional upset can seek compensation via an award of aggravated damages. According to the Supreme Court of Canada in *Whiten v. Pilot Insurance Company*,[95] aggravated damages compensate the plaintiff for "additional harm caused to the plaintiff's feelings by reprehensible or outrageous conduct on the part of the defendant" at the time of breach.[96] In short, aggravated damages are an augmentation of compensatory damages for intangible loss caused by the defendant's conduct *at the time of* breach.[97]

The Canadian requirement of "reprehensible or outrageous" conduct as a condition to recovery of aggravated damages bears more than a passing similarity to the American requirement, in the context of the intentional infliction of mental suffering, that the defendant's conduct be extreme and outrageous. Also reminiscent of its American counterpart, Canadian law requires that the plaintiff show that the defendant has

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[94]*See* David Tartaglio, Note, *The Expectation of Peace of Mind: A Basis for Recovery of Damages for Mental Suffering Resulting from the Breach of First Party Insurance Contracts*, 56 S. CAL. L. REV. 1345, 1346–47 (1983) (observing that "[t]oday, the sale of peace of mind is an express part of the marketing of insurance contracts" and that as a result, traditional contract law remedies should extend to mental distress damages that an insured suffers when this express promise is breached and the requirement for proving tortious behavior on the part of the defendant should be abolished).

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

[96]*Id.* at para. 116.

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

committed an independent actionable wrong before aggravated damages will lie.[98] In Canada, however, the independent actionable wrong need not be tortious; another breach of contract or fiduciary breach, for example, over and above the one sued upon, will suffice.[99]

2. Punitive Damages

Canadian courts also permit recovery for mental distress via an award of punitive damages. While aggravated damages are intended to compensate the plaintiff, punitive damages are expressly intended to punish the defendant. Unlike the approach taken in the United States,[100] punitive damages are recognized by Canadian courts in the context of a breach of contract action even absent a concomitant tort.[101] The Supreme Court of Canada has confirmed in *Whiten* that an award of punitive damages is available whenever there has been "malicious, oppressive and high-handed misconduct that 'offends the court's sense of decency.'"[102] In *Whiten*,

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[98]*Whiten*, (2002) 209 D.L.R. (4th) 257 at para. 78 (S.C.C.).

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

[100]The U.S. rule was plainly stated by the court in *Weber v. Domel*, 48 S.W.3d 435, 437 (Tex. App. 2001) (stating that "punitive damages are not recoverable for breach of contract, no matter how malicious the breach").

[101]Waddams notes that, until recently, it was generally supposed that punitive damages would not generally be available in a breach of contract. S.M. Waddams, The Law of Contracts 547 (3d ed. 1997).

[102]*Whiten*, (2002) 209 D.L.R. (4th) 257 at para. 36 (S.C.C.). Note that in the recent decision of *Waxman* v. *Waxman* (2002), 25 B.L.R. (3d) 1 (Ont. Sup. Ct.), at para. 1665 *aff'd* [2004] O.J. No. 1765, *application for leave to appeal to the S.C.C. refused* [2004] S.C.C.A. No. 291, the Ontario Superior Court of Justice summarized the factors provided by the Supreme Court in determining the rational limits of a punitive damages award as follows:

1. whether the misconduct was planned and deliberate.
2. the intent and motive of the defendant.
3. whether the defendant persisted in the outrageous conduct over a lengthy period of time.
4. whether the defendant concealed or attempted to cover up its misconduct.
5. the defendant's awareness that what he or she was doing was wrong.
6. whether the defendant profited from its misconduct.

the defendant insurance company refused to pay out on a fire insurance policy on a fabricated theory that the fire was intentionally started. Indeed, from the earliest investigations, all the evidence pointed to the fire being accidental.[103] The Supreme Court of Canada agreed with the trial judge that punitive damages were appropriate because the defendant pressed a weak defense in order to egregiously pressure the financially strapped plaintiffs to accept a low settlement of the fire loss claim.[104] The court concluded that this conduct amounted to a breach of good faith owed by the insurers.[105]

Note that in *Whiten*, the court recognized that any kind of independent actionable wrong may serve as the basis for the award for punitive damages.[106] Justice Binnie, writing for the majority of the Supreme Court stated: "the requirement of an independent *tort* [as a pre-condition to a punitive damages award] would unnecessarily complicate the pleadings, without in most cases adding anything of substance. . . . To require a plaintiff to formulate a tort in a case such as the present is pure formalism" (emphasis added).[107] On this basis, the court ruled that "[a]n independent actionable wrong is required, but it can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation."[108]

Punitive damages have been awarded in Canada in a variety of commercial contexts including wrongful receiverships,[109]

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7. whether the interest violated by the misconduct was known to be deeply personal to the plaintiff (e.g. professional reputation) or was a thing that was irreplaceable.

[103]*Whiten*, (2002) 209 D.L.R. (4th) 257, at paras. 5–6.

[104]*Id*. at para. 30.

[105]*Id*. at para. 128. The Supreme Court, in a particularly comprehensive judgment, went on to affirm the jury's $1 million punitive damages award, observing that, while high, it was "within the rational limits within which a jury must be allowed to operate." *Id*. at para. 128.

[106]*Id*. at para. 82.

[107]*Id*.

[108]*Id*.

[109]*See* Royal Bank of Canada v. W. Got & Associates Electric Ltd., [1999] 3 S.C.R. 408 (awarding punitive damages because the bank appointed a receiver without extending sufficient notice to the debtor).

conversion,[110] breach of a franchise contract,[111] and inducing breach of contract.[112]

C. Conclusion: Recovery for Manner of Breach in the United States and Canada

The foregoing analysis demonstrates that the courts in North America have the power to compensate the plaintiff and/or punish the defendant for highly improper conduct at the time of breach. The commission of a tort, for example, in the manner of breach is clearly a wrong over and above the fact of any breach. Such behavior merits separate judicial consideration, treatment, recompense, and perhaps denunciation. Nonetheless, legal developments in this area are troubling to the extent that American courts limit recovery for mental distress to only those circumstances when the plaintiff is able to establish a relevant tort through the back door. Even the Canadian requirement which includes *any* independent actionable wrong is open to challenge. Simply put, when the defendant's conduct on breach is reprehensible and causes mental distress, the plaintiff should be entitled to an award for punitive or aggravated damages even if there is no conduct reaching the standard of a tort or other actionable wrong.[113] Also open to criticism is the practice by some courts in

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[110]*See* Predovich v. Armstrong (1997), 74 C.P.R. (3d) 351 (Ont. Gen. Div.) (awarding punitive damages in response to the defendant's wrongful conversion of the plaintiff's property).

[111]For example, in *Triple 3 Holdings Inc. v. Jan*, (2004), 48 B.L.R. (3d) 296 (Sup. Ct. Jus.), the court awarded $350,000 in punitive damages against the franchisor in response to its highly egregious pattern of conduct. *See also* Katotikidis v. Mr. Submarine Ltd. (2002), 26 B.L.R. (3d) 140 at para. 76 and (2002), 29 B.L.R. (3d) 258 (Ont. Sup. Ct. Jus.) (awarding punitive damages due to the franchisor's corporate callousness).

[112]Kaur v. Moore Estate, [2003] O.J. No. 1588 (Sup. Ct.) (awarding punitive damages against a variety of parties including a son-in-law who encouraged his father-in-law to rescind the contract in question when there were no grounds to do so).

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

> In my view, the correct approach is to assess the conduct in the context of all the circumstances and determine whether it is deserving of punishment because of its shockingly harsh, vindictive, reprehensible or malicious nature. Undoubtedly some conduct found to be deserving of punishment will constitute an actionable wrong but other conduct might not.

Id. at para. 59. *See also* Shannon O'Byrne & Evaristus Oshionebo, *Punitive Damages and the Requirement for an Independent Actionable Wrong*, 25 Advoc. Q. 496 (2002).

the United States of raising the standard for awarding punitive damages, whenever a plaintiff who suffers emotional injury as a result of the breach also alleges an independent tort, from requiring willful or wanton conduct (the ordinary standard) to requiring outrageous conduct on the part of the defendant (the heightened standard when seeking recovery for intangible loss resulting from a breach of contract).

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

V. Recovery Based on the *Fact* of Breach

Courts in the United States and Canada[114] have traveled similar paths in order to deal with mental distress based on the *fact* of breach alone. In the spirit of the *Restatement*, courts have treated recovery for mental distress as an exception to the general rule. While it is difficult to generalize about the large number of cases where recovery for mental distress has been permitted in spite of the general rule, two main approaches to this matter emerge. One approach asks "does the contract fit within a special category?" The second approach asks, in bold defiance

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[114]In Canada, there is confusion over whether aggravated damages refers *only* to instances where the plaintiff secures recovery based on an independent actionable wrong or whether the same term should be used when the plaintiff is seeking general damages for mental distress. Some cases use the term aggravated damages to refer to aggravated damages properly so called *and* general damages for mental distress, as in *Warrington v. Great-West Life Assurance Co.* (1996), 139 D.L.R. (4th) 18 (B.C.C.A.) at para. 16. Other courts refer to general damages for mental distress as a distinct term, such as in *Hagblom v. Henderson*, [2003] 7 W.W.R. 590 (Sask. C.A.). For further discussion of this and related analysis going to the fact and manner of breach from a purely Canadian perspective, see Shannon Kathleen O'Byrne, *Breach of Good Faith in Performance of the Franchise Contract: Punitive Damages and Damages for Intangibles*, 83 Can. Bar Rev. 431 (2004).

of the restrictive rules of the *Restatement*[115]—"was mental distress foreseeable?"[116]

Contract law's traditional response to complaints of mental distress for fact of breach, in both Canada and the United States, has been to the effect of "cry me a river." As the introduction to this article and cases cited therein have shown, courts generally will not concern themselves with emotional loss, maintaining that a breach of contract is to be met with "mental fortitude."[117]

This part challenges the traditional response and maintains that courts should drop the general rule and forgo the strategy of providing recompense only when a contract fits within a special category. It also argues that the foreseeability approach be modified to pay closer attention to what a contract actually contains, without prejudging what the contract may promise. The approach advocated builds on the reasoning of the *Farley* case[118] and asks the court to treat a claim for intangibles like any other breach of contract claim. Courts should give weight to the promises a contract contains, both economic and emotional, including promises of important intangible benefits such as peace of mind, relaxation, and

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[115]*See* discussion *supra* Part III.

[116]A third approach, which is not explored in this article, asks whether the contract is commercial or noncommercial. This approach has been dismissed as unsound by several courts. *See, e.g.*, Taylor v. Burton, 708 So. 2d 531 (La. 1998). In a suit for breach of a residential construction contract, the court awarded nonpecuniary damages rejecting defendant's argument that "nonpecuniary damages are not available in suits arising from contracts to design and build a residence" and ruling instead that whether the plaintiff's nonpecuniary interest is a significant part of the contract must be determined by the facts of each case. *Id*. at 535. This commercial/noncommercial distinction was also rejected in Canada in *Gill v. Taylor*, [1991] 3 W.W.R. 727 (Alta. Q.B.). One difficulty with this approach is that while certain contracts are clearly noncommercial, others are ambiguous or difficult to categorize as purely commercial or noncommercial. That is, when the subject matter of the agreement could fulfill either a personal or a commercial need, the distinction breaks down. A contract for a horse could be for personal pleasure, or for an investment, or for commercial use. In fact the very same animal could find itself contracted for in each of these situations over the course of its life. Furthermore, as the court points out in *Gill*, even if the contract is clearly commercial, should the plaintiff be denied recovery automatically? The court replies to this question in the negative. For a detailed discussion of how Canadian Courts have approached the question of mental distress, see Shannon Kathleen O'Byrne, *Damages for Mental Distress and Other Intangible Loss in a Breach of Contract Action*, DALHOUSIE L. J. (forthcoming 2005). [1991] 3 W.W.R. 727, 745–47.

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

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

enjoyment. These promises are as worthy of enforcement as any other. If the promise for an intangible is breached, mental distress damages should be recoverable on the same basis that promises for tangible benefits are recoverable, namely on the basis of *Hadley v. Baxendale*.[119] Part VI addresses the question of necessary reforms more specifically.

A. The First Approach: Does the Contract Fit Within a Special Category?

In order to reach a just result, courts have formulated exceptions to the general rule against recovery for mental distress in a breach of contract action. If the contract at bar fits within a special category, damages may be recoverable. For example, mental distress damages associated with a horrible vacation is a category which has been recognized as a well-established exception to the general rule in both the United States and Canada.[120]

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[119]*See* discussion *supra* Part III.

[120]There are numerous examples of disgruntled vacationers receiving mental distress damages. In the United States, an early case in this category is *McConnell v. United States Express Co*., 179 Mich. 522 (1914), in which the defendant's failure to deliver the plaintiff's wardrobe trunk, which the plaintiff planned to take on a cruise, resulted in damages to the plaintiff for mental suffering. *See also* Vick v. National Airlines, Inc., 409 So. 2d 383 (La. Ct. App. 1982) (awarding damages for loss of gratification of the passengers' intellectual enjoyment as a result of an unscheduled stop causing the plaintiffs to miss their flight to the Caribbean); Das v. Royal Jordanian Airlines, 766 F. Supp. 169 (S.D.N.Y. 1991) (ordering the defendant to compensate the passenger for emotional distress as a result of the airline refusing to honor tickets purchased through its agent); Pellegrini v. Landmark Travel Grp., 628 N.Y.S.2d 1003 (1995) (awarding damages for harassment and annoyance due to last-minute cancellation of a tour); Kupferman v. Pakistan Int'l. Airlines, 438 N.Y.S.2d 189 (1981) (awarding damages for, inter alia, the "loss of a refreshing, memorable vacation"); Tuohey v. Trans Nat'l Travel, Inc., No. 6176, 1987 Pa. D. & C. LEXIS 131 (June 22, 1987) (awarding damages for "loss of . . . vacation" when the hotel booked by the travel agent was not habitable). In Canada, see, for example, Smith v. Eaton Travel Ltd., [1982] S.J. No. 45 (Q.B.) (awarding damages for mental distress in relation to a vacation which the court called a "disaster"); Recchia v. P. Lawson Travel, [1990] O.J. No. 2532 (Gen. Div) (awarding mental distress and other damages because the resort failed to have the amenities promised); Fenton v. Sand and Sea Travel Ltd. (1992), 134 A.R. 317 (Prov. Ct. (Civ. Div.)) (awarding damages when the defendant neglected to provide facilities that could accommodate scooters thereby causing distress). *See also* Bratty v. Lloyds World Travel Service of Canada Ltd., [1984] B.C.J. No. 1569 (C.A.); Sokolosky v. Canada 3000 Airlines Ltd., [2002] O.J. No. 3085 (Sup. Ct.) and Pitzel v. Saskatchewan Motor Club Travel Agency Ltd., [1986] S.J. No. 105 (C.A.). For an Australian case on point, see Baltic Shipping v. Dillon (1993), 176 C.L.R. 344 (H.C.). In this latter case, the plaintiff received mental distress and other damages because the cruise ship sank on day ten of a fourteen-day cruise.

Beginning with *Jarvis v. Swan Tours Ltd.*,[121] Canadian courts slowly began to give judicial significance to contracts containing promises of nonpecuniary benefits. In *Jarvis*, the plaintiff had received a decidedly inferior vacation from the one which he had been promised. In awarding damages for mental distress, Lord Denning acknowledged the general rule against recovery but went on to add:

> In the proper case damages for mental distress can be recovered in contract, just as damages for shock can be recovered in tort. One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset and frustration caused by the breach.[122]

Lord Denning focused on the contract's expectation interest and did not insist that it be pecuniary or economic—in marked contrast to the cases cited in the introduction to this article.[123] Lord Denning simply assessed the contract at bar, determined whether it contained promises of intangible benefits and awarded compensatory damages accordingly. In the United States, a court took the same approach to intangible loss in *Taylor v. Burton*.[124] In *Taylor*, the plaintiffs sued their general contractor for substantial defects in their newly constructed home. In addition to monetary damages, they sought compensation for "aggravation, embarrassment, and mental distress."[125] The court stated:

> Damages for nonpecuniary loss may be recovered when the contract, *because of its nature, is intended to gratify a nonpecuniary interest* and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss.[126]

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[121][1973] 1 Q.B. 233 (C.A.).

[122]*Id.* at 237–38.

[123]*See supra* note 4 and accompanying text.

[124]708 So. 2d 531 (La. Ct. App. 1998). *But see* Fiore v. Sears, Roebuck & Co., 364 A.2d 572 (N.J. 1976); Erlich v. Menezes, 981 P.2d 978 (Cal. 1999).

[125]Taylor v. Burton, 708 So. 2d 531, 533 (La. 1998).

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

Courts in both the United States and Canada also recognize breaches of contracts associated with weddings as another exception to the general rule. Cases in which the photographer fails to attend and take the promised photographs often raise the issue of mental distress damages.[127] But even in the context of a wedding-related contract, the outcome is not entirely predictable. For example, in the Canadian case of *Laarakkers v. Executive House Ltd.*,[128] the plaintiff bride and groom were awarded mental distress damages when—in breach of contract—the hotel would not provide them with a room on their wedding night.[129] Yet, in a subsequent case, the court denied mental distress recovery when the defendant caterer arrived five hours late for a wedding reception.[130] In this latter case, the court found that peace of mind was not part of the catering contract and that, therefore, mental distress damages were not recoverable.[131] The wedding-related catering contract did not fall within the special "wedding" category that courts often recognize.

While there is important overlap in the kinds of cases that fit within the special categories of exceptions established by American and Canadian courts, the categories are not totally co-extensive. In Canada, for example, courts have recognized exceptions to the general rule for insurance contracts,[132]

Dream Home Becomes a Nightmare: Should Emotional Distress Be a Compensable Damage in Construction Defect Cases, 3 San Diego Just. J. 297 (1995).

[127]In the United States, see, for example, Mitchell v. Shreveport Laundries, Inc., 61 So. 2d 539 (La. 1952) (awarding mental distress damages for the laundry's loss of the groom's wedding suit); Baillargeon v. Zampano, No. CV90-0308672, 1995 Conn. Super. LEXIS 3275 (Nov. 22, 1995) (awarding compensatory damages for mental distress as well as punitive damages against a wedding photographer who failed to show up, rejecting the photographer's defense that because the marriage ended in divorce the loss of the pictures was of minimal value). *But see* Sidenbach's Inc. v. Williams, 361 P.2d 185 (Ok. 1961) (reversing damage award for mental anguish, humiliation, and embarrassment resulting from nondelivery of the wedding dress to the bride because the bride proceeded on a breach of contract theory). In Canada, see, for example, Wilson v. Sooter Studios Ltd. (1988), 33 B.C.L.R. (2d) 241 (C.A.) (awarding $1,000 to the plaintiff for mental distress caused by the defendant's failure to attend the wedding in question and take the contracted-for photographs).

[128][1987] B.C.J. No. 2817 (S.C.).

[129]*Id.*

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

[131]*Id.* at para. 25.

[132]*See Warrington*, (1996) 139 D.L.R. (4th) 18 (B.C.C.A.); Fidler v. Sun Life Co. of Canada (2004), 239 D.L.R. (4th) 547 (B.C.C.A.) (leave to appeal to S.C.C. granted); D.E. Unum Life

lawyer–client contracts,[133] contracts for luxury goods,[134] and fiduciary contracts.[135] American courts have not allowed exceptions in these areas but do offer a distinct category of their own, namely a contract in relation to a Caesarean section.[136]

Insurance Co. of America) (1999), 177 D.L.R. (4th) 738 (B.C.C.A.); Fowler v. Maritime Life Assurance Co. (2002), 217 D.L.R. (4th) 473 (Nfld. S.C.T.D.); LeBlanc v. London Life Insurance Co. [2000] I.L.R. 1-3750 (Ont. Sup. Ct.). Particularly in the insurance area, courts may refer to mental distress under the generic term of "aggravated damages." According to *Warrington, supra* at para. 16, mental distress is properly characterized by that term. In the United States, insurance contracts are regarded as specialized but present a more complicated matter to summarize. As in Canada, peace of mind is considered part of what the insured is contracting for and therefore mental distress damages are recoverable in some jurisdictions when an insurance company breaches the contract by wrongly refusing to settle a claim. *See, e.g.*, Tan Jay Int'l Ltd. v. Canadian Indemnity Co., 243 Cal. Rptr. 907 (1988). In other states, by way of contrast, no damages for mental distress are recoverable in the absence of tortious bad faith breach. *See, e.g.*, Vincent v. Blue Cross-Blue Shield of Alabama, Inc., 373 So. 2d 1054 (Ala. 1979).

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

[134]In *Wharton* v. *Tom Harris Chevrolet Oldsmobile Cadillac Ltd.*, the plaintiffs received mental distress damages for "loss of enjoyment of their luxury vehicle and for inconvenience." [2003] 3 W.W.R. 629 at para. 15 (B.C.C.A.). In this case, the sound system in the vehicle failed to function properly over a period of several years. *Id*. at para. 2. See also *Vavra v. Victoria Ford Alliance Ltd.*, where the plaintiff was awarded damages for frustration and anxiety because she had been sold a vehicle with deficient towing capacity [2003] B.C.J. No. 1957 at para. 58 (S.C.).

[135]*See* Stewart v. Canadian Broadcasting Corp (1997), 150 D.L.R. (4th) 24 (Ont. Gen. Div.). *See also* Eric Myles, *Claims for 'Mental Suffering': An Enquiry into Canada's Judicial Response* (1997–98) 19 Health L. Can. 42 n.92. Myles explains that the lawyer-fiduciary in *Stewart* appealed the court's decision against him (for causing emotional distress to the plaintiff, a former client, by participating in a television program concerning that client) but that the parties came to an out-of-court settlement before the Court of Appeal issued its judgment.

[136]See the court's analysis in *Stewart v. Rudner*, 84 N.W.2d 816 (Mich. 1957). In this case, the court affirmed an award of damages for mental anguish caused by the physician's breach of a contract to perform a caesarian section operation. The court cited with approval the following language:

Cases discussed in this section of the article indicate that some courts are prepared to eschew the classical contract law perspective that contracts go to financial interests only. These courts scrutinize the contract to see if it contains promises of nonpecuniary benefits and enforce those promises but only provided that the contract at bar fits within a special category.[137] As noted in the introduction,[138] a recent case from England goes beyond these tentative steps taken by North American courts to enforce a contract's intangible content. Indeed, Lord Steyn in *Farley v. Skinner*[139] embraced a much more expansive view of such matters. Most important, Lord Steyn decided against being constrained by a priori categories. He also declined to follow a rigid interpretation of the precedent of the English Court of Appeal in *Watts v. Morrow*.[140] *Watts* held that recovery for mental distress in England is limited to circumstances when "the *very object* of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation."[141] Lord Steyn expanded recovery for mental distress and ruled that a plaintiff could prevail if "a major or important object of

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

Id. at 824–25 (citing Lamm v. Shingleton, 55 S.E.2d 810, 813 (N.C. 1949)).

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

[137]For an excellent analysis of contract law with respect to market versus nonmarket transactions, see Joseph P. Tomain, *Contract Compensation in Nonmarket Transactions*, 46 U. PITT. L. REV. 867, 909 (1985). Professor Tomain argues that, similar to contracts for which specific performance is an appropriate remedy, the "value of non-pecuniary contracts to the promisee is idiosyncratic. Because the market does not offer a substitute, contracts law should support a cause of action in nonmarket situations based on a moral or fairness approach." *Id.*

[138]*See supra* note 12 and accompanying text.

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

[140]Watts v. Morrow, [1991] 1 W.L.R. 1421.

[141]*Id.* at 1445 (emphasis added). Note that the Supreme Court of Canada in *Wallace v. United Grain Growers* [1997] 3 S.C.R. 701, at para. 7 has recently endorsed the proposition, consistent with *Watts*, that—in the ordinary course—mental distress damages will be awarded only where "peace of mind is the very matter contracted for."

the contract is to give pleasure, relaxation or peace of mind."[142] Lord Steyn was motivated to interpret the *Watts*[143] precedent so expansively to ensure that contracts containing promises of important, nonpecuniary benefits be fully and properly enforceable. Lord Steyn was particularly persuaded by the following analysis by David Capper:

> A ruling that intangible interests only qualify for legal protection where they are the "very object of the contract" [per *Watts*[144]] is tantamount to a ruling that contracts where these interests are merely important, but not the central object of the contract, are in part unenforceable. It is very difficult to see what policy objection there can be to parties to a contract agreeing that these interests are to be protected via contracts where the central object is something else. If the defendant is unwilling to accept this responsibility he or she can say so and either no contract will be made or one will be made but including a disclaimer.[145]

This approach, favored by Lord Steyn and Professor Capper, persuasively sidelines the classical view that contract law recognizes financial loss and pecuniary interests only. It is a reality of the marketplace that defendants *do* make promises which go to nonpecuniary or intangible interests. These kinds of promises should not be less worthy of enforcement than their pecuniary counterparts.

The potential reach of *Farley* in North America is as yet unknown. There is no Supreme Court of Canada decision on point. The most recent pronouncement from the Ontario Court of Appeal has been in accord with the stricter *Watts* interpretation and related precedent.[146] That is, unless peace of mind is the very matter contracted for, there can be no

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[142]*Farley,* [2001] 3 W.L.R. 899 (H.L.) at para. 24. On this basis, Lord Steyn permitted the plaintiff to recovery for mental distress because the defendant surveyor did his job incompetently when stating that the residential, rural property that the plaintiff was proposing to purchase was not affected by aircraft noise. In fact, it was located close to a navigational beacon for the Gatwick airport and was very much affected by aircraft noise.

[143]*Watts*, [1991] 1 W.L.R. 1421.

[144]*Id.*

[145]*Farley*, [2001] 3 W.L.R. 899 (H.L.). at para. 24 (quoting David Capper, *Damages for Distress and Disappointment—the Limits of* Watts v. Morrow 116 L.Q.R. 553, 556 (2000)).

[146]Turczinski v. Dupont Heating & Air Conditioning Ltd., (2004), 246 D.L.R. (4th) 96 (C.A.) at para. 26, 27; *application for leave to appeal to the S.C.C. refused* [2004] S.C.C.A. No. 581. Note that this case also considers mental distress under the remoteness principle and would permit recovery where mental distress is specifically contemplated by the parties as a likely consequence of breach. *Id*. at para. 30.

recovery.[147] According to the court, the contract at issue—one for home improvements—was not such a contract[148] and it therefore reversed the trial judge's award for mental distress.[149] The British Columbia Court of Appeal, by way of contrast, commented favorably on Lord Steyn's expansive reading of *Watts*.[150]

The categories approach to recovery for mental distress is an important development in North American contracts law because it works to avoid application of the general rule in the more extreme cases. Contracts in relation to vacations, weddings, and new homes, to name a few examples, demonstrably relate to the plaintiff's personal interests and emotions.[151] They cater to inherently nonpecuniary concerns, which also form a critical part of the contract's expectancy. Part of what makes recovery of mental distress in such contracts particularly compelling is that, in the face of breach, there is little the plaintiff can do to mitigate. For example, while a wedding might be "re-staged" because photos were never delivered as promised, the special quality of the event is lost.[152] Likewise, time spent on a vacation, once taken, can never be replaced and a new vacation may be as far as one year away.[153] The plaintiff's peculiar vulnerability if the defendant breaches the contract signals that the nonpecuniary aspects of the contract are both real and potentially momentous. Put another way, if what has been

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[147]*Id.*

[148]*Id.* at para. 29.

[149]*Id.* at para. 30.

[150]*See Wharton*, [2003] W.W.R. 629 (B.C.C.A.) at paras. 52–57 (concerning the sale of a luxury automobile in which the sound system consistently failed to work). *See also* Bontorin v. Greenway Land Corp. (2004) 25 R.P.R. (4th) 21 (B.C.S.C.) (holding that the plaintiff was entitled to compensation for mental distress because a portion of the contract was to give him peace of mind). Here, the court refers to damages for mental distress as aggravated damages.

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

[152]This is assuming that such a remedy would even be awarded. Note that in *Wilson v. Sooter Studios Ltd.*, the British Columbia Court of Appeal refused to award damages to the plaintiff for the cost of reconstituting the wedding party so that photographs could be taken. (1988) 33 B.C.L.R. (2d) 241, 243 (C.A.).

[153]Lord Denning recognized this fact in *Jarvis v. Swan Tours Ltd.*, [1973] 1 Q.B. 233, 238 (C.A.).

lost by virtue of breach cannot be replaced in the marketplace, restricting the plaintiff to pecuniary loss amounts to a grave injustice.

The categories approach is a "hit and miss" effort, with conflicting decisions even within a given category.[154] It is also unsatisfactory because it requires more than simple foreseeability in allowing damages for intangible loss.[155] By way of contrast, Lord Steyn's more expansive, less technical approach in *Farley*[156] has much to recommend it. Instead of treating contracts with nonpecuniary interests as contractual misfits or pariahs that must fall within an exceptional category, the *Farley* approach requires that a court scrutinize the plaintiff's expectation interest and award mental distress damages when intangibles are an important part of the contract and have not been delivered.

B. The Second Approach: Is Mental Distress Reasonably Foreseeable?

Courts in both the United States and Canada have sometimes declined to apply the special categories approach to recovery for mental distress, requiring only that the *Hadley* rule of foreseeability be met. While some courts maintain that mental distress would almost always be foreseeable and therefore lead to an opening of the floodgates,[157] courts discussed in this section of the article prove to be more open-minded about this approach. This section will show that courts in Canada use a foreseeability analysis more often than courts in the United States do. American courts are inclined, instead, to establish recovery for mental distress through tort analysis, rather than in contract.

The distinction between the foreseeability approach to recovery of mental distress and the special categories approach discussed in the previous section is subtle but nonetheless important: Under the special categories approach, the courts award mental distress damages because part of the contract's expectation interest relates to a nonpecuniary benefit in a recognized class of contracts. The defendant has therefore expressly or by implication *agreed* to be liable for intangible loss as part of the plaintiff's expectation interest. On this basis, and only if the contract fits within an

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[154]*See* discussion of wedding-related contracts, *supra* notes 127–31 and accompanying text.

[155]*See* Gill v. Taylor, [1991] 3 W.W.R. 727, 746 (Alta. Q.B.).

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

[157]*See* discussion *infra* at text accompanying notes 184–87.

exception, are mental distress damages compensable. Under the foreseeability approach, which relies on the *Hadley* test of foreseeability,[158] no special categories apply. The objective is simply to determine whether mental distress was a reasonably foreseeable consequence of breach regardless of the subject matter of the contract. Although the foreseeability approach has a strong following in Canada, there are also examples of a foreseeability model being used in the United States. In *Hanumadass v. Coffield, Ungaretti & Harris,*[159] for example, at issue was the conduct of an attorney representing a physician in a malpractice claim. The attorney neglected to advise the physician that he had settled the claim. As a result, the physician needlessly worried about the lawsuit for six years before learning it had been settled. In response to the plaintiff's claim for intangible loss, the court awarded damages for mental distress based on foreseeability alone:

> In determining the range of compensable damages under the law of contracts, Illinois follows the rule in *Hadley v. Baxendale* . . . that recoverable damages are those which naturally result from the breach, or are the consequence of special or unusual circumstances which are in the reasonable contemplation of the parties when making the contract. . . . . Recovery for mental distress is 'excluded unless . . . the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.'[160]

The leading Canadian case that relies on the foreseeability approach is *Newell v. Canadian Airlines Ltd*.[161] In this case, the court awarded mental distress damages when the defendant failed to transport the plaintiffs' pets in a safe manner on a flight to Mexico. One dog arrived dead and the other comatose because they had been inadvertently packed beside dry ice.[162] According to Judge Borins:

> [T]he question that must be asked is this: Was the contract such that the parties must have contemplated that its breach might entail mental distress, such as frustration, annoyance or disappointment? I would answer the question in the affirmative. The contract was to safely carry the plaintiffs' pet dogs from

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[158]For the full *Hadley* test, see note 46 and accompanying text.

[159]724 N.E.2d 14, 18 (Ill. 1999).

[160]*Id*. at 18 (quoting Doe v. Roe, 681 N.E.2d 640, 650 (Ill. 1997)).

[161](1977), 14 O.R. (2d) 752 (Co. Ct.). *See also* Weinberg v. Connors (1994), 21 O.R. (3d) (Ont. Gen. Div.) (awarding the plaintiff $1,000 for distress caused by the defendant's failure to keep the plaintiff apprised of the location and condition of an adopted animal, in violation of the animal adoption contract signed by the two parties).

[162]*Newell*, (1977), 14 O.R. (2d) at 755.

> Toronto to Mexico City. On the evidence it is abundantly clear that the defendant was aware of the plaintiffs' concern for the welfare of their pets. . . . I find that the contract was such that the plaintiffs and defendant must have contemplated that if injury or death were to befall the dogs this might result in the plaintiffs' suffering mental distress. The plaintiffs are therefore entitled to recovery of general damages. . . .[163]

This approach foreshadows Lord Steyn's analysis in *Farley*[164] but is not as expansive. While Judge Borins pays some attention to the content of the contract in order to apply the foreseeability test, he does not appear to acknowledge that a contract may contain promises relating to nonpecuniary interests. That is, Judge Borins characterizes the contract as one providing for the safe passage of two little dogs and concludes that breach of this covenant would lead to mental distress based on *Hadley*. Lord Steyn would likely characterize the contract somewhat differently, recognizing that it was infused with a promise to provide the plaintiffs with peace of mind. The difference in analysis may be subtle but it is also tremendously important. Lord Steyn's analysis allows the plaintiff's claim in through the front door by relating the distress to a breach of a term going to a promised state of relaxation and confidence. Judge Borins offers a side entrance. That is, according to Judge Borins' analysis, the defendant has not promised to provide the plaintiff with a state of relaxation. The focus of his analysis is that the breach of the contract of transport brings with it some foreseeable, emotional consequences.

In 1996, the Alberta Court of Appeal followed an even more generalized foreseeability approach than that evidenced in *Newell*. In *Kempling v. Hearthstone Manor Corporation*,[165] at issue was the plaintiff's mental distress which arose when the defendant wrongfully terminated a contract with the plaintiff for the purchase of a residential condominium. In assessing the claim for mental distress, Justice Picard agreed with the dissent in *Vorvis*[166] because it rejected "*a priori* and inflexible categories of damages."[167] Adopting that dissent, Justice Picard ruled that once the plaintiff has

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[163]*Id*. at 770–71.

[164][2001] 3 W.L.R. 899 (H.L.).

[165](1996), 137 D.L.R. (4th) 12 (Alta. C.A.).

[166]Vorvis v. Insurance Corp. of British Columbia, [1989] 1 S.C.R. 1085.

[167]*Id*. at 301, *cited in* Kempling, (1996), 137 D.L.R. (4th) 12 at para. 67.

established a breach, the only hurdle to recovery of damages should be meeting the test imposed by *Hadley v. Baxendale* and that no special rules need apply to recovery for mental distress. Justice Picard observed:

> My conclusion is that the determination of a claim for mental suffering or distress in a breach of contract suit must begin with the application of the rule in *Hadley v. Baxendale*. The rule has within it the means to test and limit liability where the claim arises through special circumstances, which will be the usual case with mental suffering or distress. The contract must be made on the basis of those special circumstances being known to the parties and the plaintiff having communicated them to the defendant.[168]

The Ontario Court of Appeal recognized the *Hadley* approach as controlling in *Turczinski v. Dupont Heating & Air Conditioning Ltd.*[169] Although the contract in question did not fit within a special category (and therefore would not ordinarily permit recovery for mental distress), the appellate court went on to state that "where mental distress is specifically contemplated by the parties as a likely consequence of a breach of contract" mental distress damages may be recoverable under *Hadley v. Baxendale*.[170]

In *Mason v. Westside Cemeteries Ltd.*,[171] the *Hadley* foreseeability approach was also employed. The plaintiff sued the cemetery for breach of a bailment contract. The defendant had misplaced the cremated remains of the plaintiff's parents. In ordering recovery for mental distress, the Ontario court did not analyze the content of the contract—which is more commensurate with the special categories approach[172]—but rather focused on *Hadley v. Baxendale*,

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[168]*Kempling*, (1996), 137 D.L.R. (4th) 12 at para. 69. For a contrasting approach, see Novak v. Poirer, (1985) 12 C.L.R. 295 (Ont. Dist. Ct.)

[169][2004] O.J. No. 4510 (C.A.).

[170]*Id.* In this case, the court found that it was not reasonably foreseeable that the plaintiff's mental disorder would be affected by a breach of contract. *Id.* at para. 37. In the court's words, "there was no evidence that . . . [the defendant's representative] knew or should have known or appreciated that the respondent had a mental condition that would be exacerbated or that she would suffer the way she did." *Id.* at para. 36.

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

[172]A U.S. court did just that—treat a similar case as a special categories case. In *Saari v. Jongordon Corp.*, 7 Cal. Rptr. 2d 82 (1992), the defendant entered into a written agreement with the plaintiff's son that upon his death, the defendant would cremate his body, and release his remains to the plaintiff without any religious service. Instead, when the son died, the defendant scattered his ashes at sea, and performed a Christian religious service on his remains. The decedent's long-time companion, his mother, and his sister filed suit for breach of contract claiming damages for emotional distress. In refuting the defendant's argument that

observing that it must have been contemplated that loss of the remains would result in mental distress for the plaintiff.[173]

VI. Suggestions For Reform

Thus far, this article has analyzed the somewhat tortured paths that courts in the United States and Canada have followed in order to award mental distress damages to the deserving plaintiff, namely the special categories approach and the foreseeability approach. In many ways, the foreseeability approach to mental distress damages is an improvement over the special categories approach to the extent that it does not require that the contract in question be of a certain type. In fact, Professor Whaley suggests that the general rule should be set aside by the judiciary in favor of simply applying the rule in *Hadley v. Baxendale*.[174]

Whaley's view is an important contribution to the evolution of contracts law but is only partially successful in protecting the plaintiff's expectation interest. It is important to remember that the rule stated in *Hadley*[175] is about limiting recovery in a breach of contract action. It does not seek to identify the terms of the contract nor determine whether there

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emotional distress damages are not available for breach of contract actions, the court explained:

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

Id. at 86.

[173]*Mason*, (1996) 135 D.L.R. (4th) (Ont. Gen. Div.), at para. 58.

[174]*See* Whaley, *supra* note 10, at 957–58:

> Courts should have no special rules when it comes to the recovery of emotional distress damage in contract actions. Such damages will only rarely be recovered because they will frequently flunk one or more of the tests traditionally used to measure consequential damages in contract, typically the requirement that such damages be foreseeable at the time of contracting. If the proof of emotional distress damages passes these tests, however, recovery should follow.

[175]Hadley v. Baxendale, 156 Eng. Rep. 145 (1854).

has been a breach. All this is assumed.[176] To be effective, the approach advanced by Whaley must be coupled with an understanding of contract law that gives legal significance to the contents of a contract, both pecuniary and nonpecuniary, and whether expressly stated or implied by the context in which the agreement is reached.

Assessing with fresh eyes what a contract may or may not protect is something Whaley is not prepared to do when he states that "emotional distress damages are not normally awarded in contract actions because, for most kinds of contracts, they are not foreseeable at the time of contracting. . . ."[177] This traditionalism leads him right back to limiting recovery to special categories[178] and the restrictive way of thinking that such an approach may promote. Put another way, the unmitigated foreseeability test may produce inherently traditional outcomes in the sense that nonpecuniary interests will remain only exceptions when acknowledged and therefore protected only exceptionally. Ironically, Whaley's approach may lead to many of the same outcomes as if the general rule were left to operate in the first place.

In short, the problem with drawing upon the foreseeability model is that it may lead a court to rely on the "reasonable businessman" model for identifying foreseeable consequences, unless the contract falls within a special category. As discussed in the introduction this approach does not give conscious attention to the nonpecuniary expectation interests that the contract might well contain.

The palliative to this defect is to rely on Lord Steyn's analysis in *Farley* because in it, Lord Steyn pays careful attention to promises contained in the contract and willingly enforces *all* of them, even those going to intan-

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[176]According to Whaley: "[U]nder *Hadley*, the breach is taken as a given. The proper question is this: if at the time of contracting the parties had been told what the breach was going to be, would the damages that resulted be foreseeable?" Whaley, *supra* note 10, at 952.

[177]*See id*. at 952–53.

[178]Whaley remarks:

> [P]eace of mind and freedom from worry are part of the bargain, as the defendant very well knew, and if the defendant breaches these sorts of contracts, the defendant should pay for the agony suffered as an obvious consequence. There is no surprise here; the issue of foreseeability takes care of that. Nor is this rule unfair to the defendant. If the defendant is going to traffic in the kind of contract that risks emotional distress when breached, let the defendant bear that risk.

Id. at 953.

gible interests, provided they are important or significant.[179] This approach is also favored by the Supreme Court of Hawaii in *Francis v. Lee Enterprises, Inc*.[180] As the court in *Francis* explained, in reversing a previous ruling excluding noneconomic damages in contract:

> [I]n deciding whether such damages are recoverable, we shift the focus of the inquiry away from the manner of the breach and *to the nature of the contract*. Thus, damages for emotional distress may be recoverable, but only where the parties specifically provide for them in the contract or where the nature of the contract clearly indicates that such damages are within the contemplation or expectation of the parties. Unlike the [previous] rule, the rule we announce today accords with compensatory objectives relevant to contract law and eschews the imposition of damages for emotional distress to vindicate "social policy" in the setting of private contracts.[181]

The court's decision in *Francis* is helpful for two reasons. First, and most important, it clearly permits recovery for emotional distress damages in a breach of contract action. Second, it eliminates the need, in the United States, for the plaintiff to conjure up a tort claim when he or she has suffered emotional distress as a result of a breach of contract. That said, *Francis* is not a complete repeal of the general law against recovery because one arm of recovery requires that damages for mental distress must be specifically provided for in the contract.[182] For the reasons argued below, this precondition is utterly unnecessary.

The introduction to this article identified a number of policy objections to setting aside the rule against recovery for mental distress damages in a breach of contract action. Courts have suggested that such intangible loss is unforeseeable and therefore not compensable or, alternatively, that such loss is eminently foreseeable and that recovery must be forbidden for fear of opening the floodgates. Courts have also contended that contract law focuses only on the pecuniary interest and does not seek to ensure "emotional tranquility."[183] If we can agree that some contracts *do* promise non-

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[179]Farley v. Skinner, [2001] 3 W.L.R. 899 at para. 24 (H.L.).

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

[181]*Id*. at 713.

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

[183]Hatfield v. Max Rouse & Sons Northwest, 606 P.2d 944 (Idaho 1980). *See supra* notes 1–10 and accompanying text.

pecuniary benefits (which surely must be the case), then several of these policy objections must automatically fail, including the notion that contracts concern economic loss only and that mental distress damages are not foreseeable. This leaves only one serious policy objection to recovery, namely fear of opening the floodgates to minor claims for mental distress and related concerns that plaintiffs may fabricate or exaggerate their suffering.[184]

Fortunately, there are tried-and-true principles of contract law that respond to such apprehension. For example, as Whaley emphasizes, recovery in contract requires certainty.[185] Hence, if the plaintiff cannot prove his or her mental distress or if the claim is too speculative, damages will not be awarded.[186] If the claim concerns a trivial amount of mental distress, the court can award nominal damages or invoke the principle of *de minimus non curat lex*.[187] And while one might anticipate a certain rise in claims should the general rule be judicially repealed, it is unlikely that those who have suffered only minor distress would engage the expensive machinery of litigation.

From the perspective of reform, where does the foregoing analysis leave the courts in the United States and Canada? Instead of searching for an exception to the general rule, courts should ignore the rule entirely. A court should simply ask: "What does the contract promise?" and willingly recognize and measure its nonpecuniary content before moving to questions of foreseeability. As the court recognized in *Farley*,[188] a plaintiff could secure mental distress damages because the defendant's failure to deliver the contract's important, nonpecuniary promises was a breach of contract. In such circumstances, the intangible loss of mental distress is almost certainly to pass the *Hadley* principle. Alternatively, even if the contract did *not* contain promises of nonpecuniary benefits, it is possible, though less likely, that the plaintiff could still recover mental distress dam-

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[184]*See*, *e.g.*, Capper, *supra* note 145, at 553 (noting a policy concern that plaintiffs will exaggerate their distress or even fabricate its entire existence and suggesting ways to obviate such a concern).

[185]*See* Whaley, *supra* note 10, at 953.

[186]*Id*. at 953–54.

[187]As Justice Molloy states in *Mason*, "if the injury suffered is trivial in nature the damages awarded should reflect that fact." *Mason v. Westside Cemeteries Ltd*. (1996), 135 D.L.R. (4th) 361 at 58 (Ont. Gen. Div.). *See also* Elizabeth MacDonald, *Contractual Damages for Mental Distress*, 7 J. Cont. L. 134, 149 (1994); K.B. Soh, *Anguish, Foreseeability and Policy*, 105 L.Q.R. 43, 45 (1989).

[188][2001] 3 W.L.R. 899 (H.L.), at para. 24.

ages based on special circumstances so communicated under the second arm of *Hadley*.

There is no standing on the principle invoked by many courts that contracts go to pecuniary interests only.[189] The centerpiece of the contract in *Farley*[190] was the provision of a survey, a type of contract that does not fit any of the special categories, yet, Lord Steyn attached legal significance to the contract's promises going to an intangible, personal interest, namely peace of mind that the property in question was appropriate to the plaintiff's needs and desires. Based on *Farley*,[191] all a court need do is determine whether relaxation, pleasure, freedom from distress, or other intangibles were an important part of what was promised.[192] It need not approach the question of mental distress with a series of assumptions against permitting such an award.

VII. Conclusion

As this article has illustrated, a person who has suffered mental distress damages in a breach of contract context faces an uncertain legal horizon due to the general rule at play in both the United States and Canada. A plaintiff may seek damages for emotional distress for the manner of breach but success is assured only in the context of extreme behavior by the defendant. The plaintiff may seek recovery of mental distress damages for the fact of breach by trying to fit the case within the patchwork of recovery created by the special categories approach. What is objectionable about this solution is that the special categories approach must contort itself around the general rule and treat all recovery, by definition, as exceptional. As an alternative, the plaintiff could argue for recovery under the principles of foreseeability. But this approach is not accepted by all courts; and furthermore, may lead to marginalization of a contract's nonpecuniary content, granting no more relief than would the categories approach.

The general rule against recovery suppresses the reality of marketplace participants who are not the hypothesized reasonable businessman. The rule begins with the tacit assumption that the contract at bar contains only the

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[189] *See, e.g.*, Lamm v. Shingleton, 55 S.E.2d 810 (N.C. 1949).

[190] [2001] 3 W.L.R. 899 (H.L.).

[191] *Id.*

[192] *Id.* at para. 24.

traditional, pecuniary-based content that the tough-minded businessman discussed in the introduction would bargain for. From such a bargainer, one would anticipate no terms going to feelings, no terms related to emotional outcomes, and no extracted promises concerning sentimental gratification. Given its implicit perspective, the rule does not facilitate exploration of whether the plaintiff's legitimate expectation interest actually relates to the protection or enhancement of an emotional state. In short, the dominating presence of the reasonable businessman who populates contract law—combined with the negative drag of the general rule—belie such an exercise.[193]

Because of its exclusionary foundation, the general rule against recovery may well be the product of "excessive abstraction"[194] because it filters out the nonpecuniary content that a contract might actually contain. In so doing, the general rule violates a central tenet of contract law, namely that courts are to give effect to a contract according to the parties' intent. Indeed, as this article has demonstrated, there are many kinds of contracts which contain promises of nonpecuniary benefits—such as peace of mind, enjoyment, relaxation, and freedom from distress. Why not simply enforce these promises according to ordinary contract law principles and not be burdened by the presuppositions that accompany the general rule?

As discussed in the preceding section, given the chronic problems associated with the general rule, the solution is for courts to decline to follow it. A cornerstone of contracts law is the protection of the plaintiff's expectation interest. There has to be a strong reason, consonant with reality of *all* market participants—and not just in relation to what the imagined businessman would bargain for—to deny that expectation. Instead of requiring the plaintiff in contracts containing nonpecuniary benefits to work around a general rule that denies them recovery for mental distress, contract law would be better advanced by placing such plaintiffs on equal footing with those who pursue exclusively economic interests in their contractual dealings. Those who bargain for important, nonpecuniary benefits should get what they bargained for and be awarded whatever loss they can prove. There is no sound policy reason why not.

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[193]For a leading discussion of gender and contracts law in the context of a casebook, see Mary Jo Frug, *Symposium of Critical Legal Study; Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 Am. U. L. Rev. 1065 (1985).

[194]We borrow this phrase from Robert A. Hillman, who uses it in relation to the feminist critique of contracts law. *See* Robert A. Hillman, The Richness of Contract Law: An Analysis and Critique of Contemporary Theories of Contract Law, 156–57 (1997).