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**The Recovery of Damages for Non-Pecuniary Loss  
in the United Kingdom; A Critique and Proposal for  
a New Structure Integrating Recovery in Contract  
and Tort**

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**Keywords:** Contract, Tort, Damages, Non-pecuniary Loss

## **Abstract**

**This paper seeks to give an integrated and critical account of the availability of damages for non-pecuniary loss in England and Wales across contract and tort. In the past the availability of such damages in the law of obligations has been addressed in the context of separate discussions of available remedies for either breach of contract or the commission of a tort. The proposal in this paper is structured around a variation of a six fold classification which has received recent endorsement by the English Court of Appeal in the important and remarkable, but mostly unnoticed, case of *Simmons v Castle* (2012).**

## INTRODUCTION

This article aims to give an integrated account of the availability of damages for non-pecuniary loss (NPL) in the UK across both contract and tort. This approach is not the one typically taken by the authors of the most detailed expositions of this area of law which, in almost all cases, is contained in books limited to either contract or tort<sup>2</sup>. Where books take as their subject the complete topic of damages for non-pecuniary loss both the most current and detailed<sup>3</sup>, though not the most original<sup>4</sup> treatments subdivide their exposition into separate sections dealing with contract and tort.

Perhaps surprisingly, it may be the higher judiciary who have pointed the way toward expressing the limits of recovery of damages for non-pecuniary loss (DNPL) in a unified way. The recent Court of Appeal decisions in *Simmons v Castle*<sup>5</sup> are remarkable in a number of ways. The case is the most recent chapter of a story which has recorded a substantial, upward, trend in the level of damages DNPL awarded in cases of personal injury. The rest of that

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<sup>2</sup> Eg Peel *Treitel Law of Contract* (13<sup>th</sup> edn, Sweet and Maxwell, 2011), Beale ed *Chitty on Contracts*, (31<sup>st</sup> edn, Sweet and Maxwell, 2014), Peel and Goudkamp *Winfield and Jolowicz Tort*, (19<sup>th</sup> edn, Sweet and Maxwell, 2014), Jones, Dugdale and Simpson eds, *Clerk and Lindsell on Torts* (21<sup>st</sup> edn, Sweet and Maxwell, 2014).

<sup>3</sup> Eg *McGregor on Damages* (19<sup>th</sup> ed, Sweet and Maxwell, 2014) (*McGregor*) Chap 5

<sup>4</sup> Ogus *The Law of Damages* (Butterworths, 1973).

<sup>5</sup> *Simmons v Castle* [2012] EWCA Civ 1288. The Court of Appeal gave two judgments in this case which were reported together. Traditional citation does not allow us to distinguish the two judgments so I will refer to the first judgment as *Simmons* July and the second as *Simmons* October.

story is related below<sup>6</sup> but in this introduction I want to emphasise several unusual features of the case.

Simmons involved a relatively minor personal injury sustained when the claimant was knocked off his motorcycle as a result of the defendant's careless driving. Liability was admitted and total damages of less than £25k were awarded. The legal issue in Simmons was not contentious; the Court of Appeal was asked simply to approve the compromise of an appeal in a straightforward personal injury case. The case became remarkable because the Court of Appeal somewhat 'opportunistically'<sup>7</sup> used it as a vehicle to announce a 10% uplift in the level of damages for NPL as proposed in the Sir Rupert Jackson's Final Report on Civil Litigation Costs<sup>8</sup> (the Jackson Report) . The case involved the exercise by the Court of Appeal of its general jurisdiction to set<sup>9</sup> and maintain<sup>10</sup> appropriate levels of damages in cases of personal injury. The rationale for the Jackson Report's proposal has two bases. First there is the general sense that damages awards for NPL were too low.<sup>11</sup> Second it was a necessary response to other procedural changes<sup>12</sup> introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPOA 2012). In short the uplift in DNPL is intended to offset the fact that one of the changes introduced in the 2012 Act<sup>13</sup> removed the former

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<sup>6</sup> See **PAIN AND SUFFERING** below

<sup>7</sup> *McGregor* 51-044

<sup>8</sup> December 2009

<sup>9</sup> '... with its considerable caseload of appeals in personal injury actions...[the Court of Appeal is] generally speaking, the tribunal best qualified to set guidelines for judges trying such actions, particularly as respects non-economic loss' *per* Lord Diplock in *Wright v British Railways Board* [1983] 2 AC 773, 78 A-B

<sup>10</sup> 'It is clear that Lord Diplock also intended the Court of Appeal to have the responsibility for keeping guidelines up to date' *per* Lord Woolf MR in *Heil v Rankin* [2001] QB 272.

<sup>11</sup> [10] July 2012 and [22] October 2012

<sup>12</sup> The former position was described in more detail as 'A claimant can enter into a conditional fee agreement ("CFA") (also known as "no win no fee" arrangement), which involve his lawyers receiving nothing if the claim fails and an uplift in the lawyers' normal fee, known as a "success fee" (which can currently be up to 100% of their normal fee), if the claim succeeds; if the claim succeeds, the whole of the success fee is recoverable, subject to assessment by a costs judge, from the defendant in addition to the claimant's lawyers' normal fee; in addition, the claimant can take out so-called after the event insurance ("ATE") against any liability he might have to pay the defendant's costs; if the claim succeeds, \*1245 the defendant has to pay the ATE premium as part of the claimant's costs, but if the claim fails, the premium is effectively nil.' *Per* Lord Judge CJ in *Simmons v Castle* [2012] EWCA Civ 1288 at [8] 10<sup>th</sup> October 2012

<sup>13</sup> S 44(4)

entitlement of successful claimants to recover from defendants the extra ‘success fee’ (of up to 100%) which the claimant became liable to pay to his lawyer under a conditional fee arrangement (CFA also known as a ‘no win, no fee’ arrangement). In order to ensure that the uplift is only available to claimants who are not also entitled to recover the ‘success fee’, the uplift is technically available to all claimants that fall outside LASPOA 2012 S 44(6). The method of enactment is complex but the practical effect is that in any case where the claimant entered into a CFA before April 2013 he recovers the success fee as part of his costs but does not get the 10% uplift; in all other cases the claimant will receive the uplift but not the success fee.

There were in fact two separate judgments delivered in *Simmons*.<sup>14</sup> A remarkable feature of the first hearing was that no argument was heard from counsel on the issue of increasing the general level of damages.<sup>15</sup> As the 10% uplift was proposed ‘as an integral part’<sup>16</sup> of the ‘Jackson Reforms’ which were themselves ‘unconditionally endorsed and supported by the judiciary publicly’<sup>17</sup> the Court of Appeal concluded that it was not ‘...appropriate, let alone necessary’ to hear argument on the matter and declared that the 10% uplift was applicable with effect from 1<sup>st</sup> April 2013 to:<sup>18</sup>

...the proper level of general damages for (i) pain, suffering and loss of amenity in respect of personal injury, (ii) nuisance, (iii) defamation and (iv) all other torts which cause suffering, inconvenience or distress to individuals

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<sup>14</sup> See n5 above for citation.

<sup>15</sup> *CF Heil v Rankin* [2001] QB 272

<sup>16</sup> [15]

<sup>17</sup> *ibid*

<sup>18</sup> [20]

Within a few weeks the Association of British Insurers petitioned the court to ask whether the uplift should apply more restrictively.<sup>19</sup> Oral submissions were also heard on behalf of two other ‘interested’ parties: the Association of Personal Injury Lawyers and the Personal Injuries Bar Association. The judgment of the Court of Appeal in this second episode of litigation confirmed the 10% uplift and its date of application but, with a few changed words, greatly expanded its applicability. In para 50 they declared that (emphasis added):

The proper level of general damages **in all civil claims...** will be 10% higher than previously

Two aspects of this important decision have not been fully appreciated by contract scholars.<sup>20</sup> The first is the extension of the uplift to ‘all civil claims’<sup>21</sup> ie to all contract and tort claims<sup>22</sup>; the second is the endorsement of a particular classification of DNPL ‘in relation to both contract and tort’<sup>23</sup> as comprising:

(i) pain and suffering, (ii) loss of amenity, (iii) physical inconvenience and discomfort, (iv) social discredit, or (v) mental distress...<sup>24</sup>

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<sup>19</sup> Ie only to cases where the claimant’s funding arrangements in respect of legal costs were agreed after 1<sup>st</sup> April 2013 at [2] October..

<sup>20</sup> With the notable exception of *McGregor* especially chap 5.

<sup>21</sup> The first formulation was widely interpreted as applying only to tort cases. This is a result of the unhelpful convention of textbook writers regarding the topic of damages for personal physical injury as most appropriately examined in tort textbooks. While the underlying cause of action will often be the tort of negligence it may also of course be contractual eg breach of an employer’s contractual duty of care towards his employee, breach of a contractual duty of care owed by a ‘private’ ie non NHS doctor to a patient etc. Once this is acknowledged it is clear that even the courts first formulation applies to some contractual causes of action.

<sup>22</sup> In *Chawla v Hewlett Packard Ltd* [2015] UKEAT 427/13/2505, the Employment Appeal Tribunal (EAT) followed an unreported EAT decision and held that the 10% uplift does not apply to injury to feelings awards in the employment tribunal. The reason for this is that the justification for the 10% uplift, the loss of the right to recover the ‘success fee’ from an unsuccessful defendant does not apply to Tribunal proceedings where costs are rarely awarded. Cf the earlier and contrary EAT decision in *The Sash Window Workshop Ltd, Mr R Dollar v Mr C King* [2014] UKEAT/0058/14.

<sup>23</sup> [48] October

<sup>24</sup> [50] October. This classification in turn derives from a four fold classification used by *McGregor* though as noted above n3 *McGregor* does not integrate the discussion of damages in contract and tort.



This paper will build upon a slightly modified version of this most recent and authoritative scheme of categorisation. This is a categorisation of compensatory damages and so does not include exemplary damages, which aim at punishment rather than compensation.<sup>25</sup> In contrast many commentators would agree<sup>26</sup> that so called ‘aggravated damages’ are compensatory but will reflect the mental distress and injured feelings of a victim as a result of the manner in which the wrong was inflicted.<sup>27</sup> Aggravated damages, like exemplary damages, are not available in a purely contractual action<sup>28</sup> or, in any case, where the claimant is a company.<sup>29</sup> Aggravated damages have been awarded in the following torts: trespass to the person<sup>30</sup> and to land<sup>31</sup>, malicious prosecution<sup>32</sup>, deceit<sup>33</sup>, misfeasance in public office<sup>34</sup> and the ‘statutory’ torts of discrimination.<sup>35</sup>

## **PAIN AND SUFFERING**

Originally it was suggested that if ‘pain’ is the impact of the injury, felt immediately, upon the nervous system and brain then ‘suffering’ refers to indirect distress that results.<sup>36</sup>

However pain and suffering (PS) is now used a single phrase with no differentiation. The intensity and duration of the pain are the main factors. It is accepted that pain and suffering is

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<sup>25</sup> *Kuddus v CC Leicestershire* [2001] UKHL 29, [2002] 2 AC 122 at [50] *per* Lord Nicholls.

<sup>26</sup> There is some disagreement. See Murphy ‘The Nature and Domain of Aggravated Damages’ [2010] *Camb LJ* 353. The continuing difficulty of distinguishing exemplary from aggravated damages is demonstrated by the tort case of *Ketley v Gooden* (1997) 73 P & CR 305 where a modest award of £6,650 included an element for exemplary damages but was upheld by the Court of Appeal on a compensatory basis.

<sup>27</sup> Aggravated damages ‘describ[e] an award that aims at compensation, but takes full account of the intangible injuries...’ *per* McLachlin CJ and Abella J in *Fidler v Sun Life Assurance of Canada* [2006] 5 LRC 472 at [51] (Supreme Court of Canada)

<sup>28</sup> *Addis v Gramophone Co Ltd* [1909] AC 488, HL; *Kralj v McGrath* [1986] 1 All ER 54 at 61 *per* Woolf J; and *Levi v Gordon* (12 November 1992, unreported).

<sup>29</sup> *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2013] EWCA Civ 1308 (the requirement that the defendant’s conduct impacts upon a claimant’s feelings precludes any claim brought by a company).

<sup>30</sup> *W v Meah* [1986] 1 All ER 935

<sup>31</sup> *Joliffe v Wilmet* [1971] 1 All ER 478.

<sup>32</sup> *Thompson v Metropolitan Police Commissioner* [1998] QB 498.

<sup>33</sup> *Archer v Brown* [1985] QB 401.

<sup>34</sup> *Muuse v Sec State for Home Dept* [2010] EWCA 454 Civ.

<sup>35</sup> *Prison Service v Johnson* [1997] ICR 275.

<sup>36</sup> The analysis is attributed to McCormick *Damages* (1938) by *McGregor* para 5-004.

likely to be greater immediately after the injury.<sup>37</sup> The claim will survive victim's death for the benefit of his estate but it appears that a de minimis principle operates. No PS damages were awarded case when the victim lost consciousness only a few seconds after the injury began and died within five minutes.<sup>38</sup>

Damages for PS and for loss of amenity (LA) may form part of an award of damages in tort or for breach of contract.<sup>39</sup> Such claims are brought to compensate for inter alia the non-pecuniary effects of bodily harm. However they may also be brought in respect of so called 'psychiatric injury'<sup>40</sup> which is analogous to bodily injury.<sup>41</sup> In the tort of nuisance where invasive noise and fumes<sup>42</sup> might occur, damage to health will be compensable. Similarly damage to health has always been recoverable in the tort of false imprisonment<sup>43</sup> which is often combined with a claim for assault. In such cases assault may seem a more appropriate vehicle for the recovery of damages for pain and suffering and false imprisonment for loss of amenity.<sup>44</sup> However in most personal injury cases the categories of PS and LA are aggregated into a single award in respect of NPL usually termed general damages or PSLA.<sup>45</sup> The leading reference works for practitioners which seek to assist with the computation of appropriate award of general damages make ghoulish reading with chapter headings that correspond to a rather disturbing list of human injuries. This approach is also followed in the

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<sup>37</sup> *Foulds v Devon County Council* [2015] WL 113617 QB [63] – [65] damages for PS also reflected the victims premature death from a cause unrelated to the tortious injury.

<sup>38</sup> *Hicks v Chief Constable of S Yorks Police* [1992] 2 All ER 65.

<sup>39</sup> See above n 21.

<sup>40</sup> Use of the phrase 'nervous shock' has been criticised by Bingham LJ in *Attia v British Gas* [1988] QB 304, 317 per Bingham LJ preferring 'psychiatric harm' which was also endorsed by the Law Commission in the title of their *Liability for Psychiatric Illness* Law Com No 249 (1998). For a recent application see *Less v Hussein* [2012] EWHC 3513 (QB).

<sup>41</sup> *Wilkinson v Downton* [1897] 2 QB 57. *Dulieu v White* [1901] 2 KB 669, *McLoughlin v O'Brian* [1983] 1 AC 410, *Page v Smith* [1996] AC 155, *White v Chief Constable for the South Yorkshire Police* [1999] 2 AC 592, *W v Essex County Council* [2001] 2 AC 592. For a recent application see *Less v Hussain* [2012] EWHC 3513 (QB).

<sup>42</sup> *Halsey v Esso* [1961] 1 WLR 683, 702-3 (noise, smells and vibration from an oil distribution facility). *Anslow v Norton Aluminium Ltd* [2012] EWHC 2610 QB. (smells coming from aluminium factory)

<sup>43</sup> *Petit v Addington* (1791) Peake 87

<sup>44</sup> See below **LOSS OF AMENITY**

<sup>45</sup> See below **LOSS OF AMENITY** for cases where they must be disaggregated.

‘official’ Guidelines for the Assessment of General Damages in Personal Injury Actions (the JC Guidelines), now in its 12<sup>th</sup> edition of 2013, published by the Judicial College<sup>46</sup> which are discussed further below. This slim volume of 90 pages provides guidance for virtually every medical condition though very occasionally litigation throws up a condition or context that has not been provided for.<sup>47</sup> Examples from the most recent edition of the JC Guidelines are<sup>48</sup>: Tetraplegia (also known as Quadriplegia) - £262,350-£326,700; Loss of One Arm, Arm Amputated at the Shoulder - Not less than £110,880; Severe Post traumatic Stress Disorder - £48,400-£81,400; Loss of Thumb - £28710-£44330; Less Serious Leg Injuries - £14520-£22440. The method of the JC Guidelines is to provide for each type of injury defined bands within which awards may be made, the bands being accompanied by descriptions of the severity of injury that would justify an award in that band. An economist would be surprised that the victim’s own wealth is irrelevant to the calculation of non-pecuniary damages within these bands. Money is said to have a diminishing marginal utility. The first amount of money we receive is more valuable to us because it will be used to satisfy our most pressing needs; the next received to meet less urgent wants etc. If a claimant is wealthy a tariff award might amount to little more than a symbolic gesture of public sympathy; if she was poor the same sum may transform her financial situation and so be very valuable to him.

The level of awards recorded in the latest edition of the JC Guidelines above has increased significantly in recent years. The 10% uplift applied in *Simmons v Castle*<sup>49</sup> was the latest in a series of factors that have caused an increase in awards of DNPL in personal injury actions. The most significant factor was the impact of the changes introduced in the earlier Court of

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<sup>46</sup> Formerly the Judicial Studies Board. The first edition was published in 1992.

<sup>47</sup> *Woodward v Leeds Teaching Hospitals trust* [2012] EWHC 2167 QB (‘acromelagic gigantism’) *ABB v Milton Keynes Council* [2011] EWHC 2745 QB (childhood sexual abuse)

<sup>48</sup> The injuries have been re-arranged in order of descending recovery and include the ‘uplifts’ effected by both *Simmons v Castle* and *Heil v Rankin*, for the latter see further below.

<sup>49</sup> [2012] EWCA Civ 1288.

Appeal decision of *Heil v Rankin*.<sup>50</sup> In this important decision for which, exceptionally, a five strong Court of Appeal was assembled the Court of Appeal (CA) endorsed a ‘tapered’ increase in the level of general damages in personal injury actions. Significantly the CA did not implement the level of increases which had been recommended by the Law Commission’s Report *Damages for Personal Injury: Non-Pecuniary Loss*.<sup>51</sup> In *Heil* the CA did not make any change to awards under £10k (the Law Commission had proposed the same, but only for awards under £2k). The CA was most impressed by the argument that awards in cases of catastrophic injuries ie at the very top of the scale were too low and so increased the level of these awards by a third. The Law Commission had proposed to increase awards between £2-3k by up to 50% and those above £3k by 50-100%.<sup>52</sup> The CA implemented a different approach for intermediate cases; they proposed that the increase should be tapered from one third for the most serious cases to nothing for those valued at less than £10k. The result of this taper means that an award of about £100k will be increased by approximately one fifth.

The reasons for the CA’s rejection in *Heil* of the Law Commission’s proposed level of uplift are instructive. The CA was apparently impressed by the response of many Law Commission consultees urging that the level of DNPL were too low<sup>53</sup> and especially by evidence of increased life expectancies for those who suffer very serious injury.<sup>54</sup> The CA questioned the relevance of two empirical surveys relied upon by the Law Commission.<sup>55</sup> These surveys involved asking victims of accidents, in more or less sophisticated ways, whether they were satisfied with their compensation. In most cases, surely unsurprisingly, a negative answer was

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<sup>50</sup> [2001] QB 272.

<sup>51</sup> Law Com. No 257 (1999)

<sup>52</sup> *Ibid* para 5.8.

<sup>53</sup> Para 91

<sup>54</sup> Para 92-4

<sup>55</sup> *Genn Personal Injury Compensation: How Much is Enough* (1994) Law Com 225 and Office for National Statistics Survey reproduced in *Non-Pecuniary Loss*

given. However this response might be prompted by many emotional factors that are not necessarily relevant to the issue of compensation. The extent of the Law Commission's reliance upon the second survey was criticised on account of its limited scope<sup>56</sup> and its failure to adequately inform subjects about the cost of increasing damages for non-pecuniary loss.<sup>57</sup>

Unlike the Law Commission, the CA in *Heil* felt that it was important to take account of the economic consequences of their recommendations. There was evidence before the court in *Heil* that the cost to the insurance industry of a 100% increase DNPL would be in excess of £2M in the first year<sup>58</sup> and that there would be '...a significant effect on the overstretched resources of the NHS'<sup>59</sup> (which effectively funds many awards where hospitals are sued for negligence). The CA concluded that 'this [financial] impact should not be ignored' and the inevitable cost consequences of the 'very large increase proposed [by the Law Commission] should not have been so extensively discounted'.<sup>60</sup> The more modest uplift proposed by the CA was thought to balance these concerns more evenly.<sup>61</sup>

A further reason for the general increase in DNPL awards in personal injury cases is the widespread reliance upon the JC Guidelines. Their republication every two years with indicative awards increased in line with the Retail Prices Index<sup>62</sup> has assisted claimants by

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<sup>56</sup> Paras. 65 and 90.

<sup>57</sup> Para. 87. Apparently accepting D's suggestion that (para. 66) '... there can be a world of difference between answering a question, however skilfully crafted, and having to pay out the extra insurance premiums or tax which is necessary.'

<sup>58</sup> Para.15.

<sup>59</sup> Para 11. Compensation for clinical negligence cost the NHS £11m in 1996-7, and at the time of the judgment in *Heil* was expected to rise to £278m in 1999-2000. This increase was largely attributable to changes made by the House of Lords decision in *Wells v Wells* [1999] 1 AC 345 to the method for calculating damages for future pecuniary loss. For a dramatic illustration of the effect of different methods of calculation see *Simon v Helmot* [2012] UKPC 5.

<sup>60</sup> Para. 95

<sup>61</sup> A further criticism of the Law Commission's approach is that their proposals are insufficiently sensitive to the wider context of victim compensation particularly the parallel provision made by the social security system. To the extent that accident victims now receive improved state benefits over those available in the past this might weaken the argument for an increase in damages for non-pecuniary loss. See the evidence presented by Harris and Atiyah considered in paras. 3.67-3.71..

<sup>62</sup> As recommended in *Heil* para 100

‘..remov[ing] some of the uncertainty that traditionally clouds the negotiation process’.<sup>63</sup> It has been suggested that Insurers’ promotion<sup>64</sup> of the use of a database that uses values derived from settled claims as well as the few that have been judicially determined is itself evidence of their concern that awards are increasing considerably.<sup>65</sup>

The general and relentless increase in the level of DNPL in personal injury cases has a disproportionate impact upon total compensation payments. This is because DNPL represents by far the largest proportion of overall personal injury damages awards. This fact is obscured by the fact that reported decisions often involve very serious injuries. In a very recent case<sup>66</sup> involving serious brain injuries damages for PSLA comprised only £275k of a £10.135M claim. Such cases of catastrophic injuries are however untypical; the vast majority of cases involve awards of less than £5000<sup>67</sup> where the claimant suffers little, if any, financial loss. The Pearson Commission<sup>68</sup> found that over 66% of total damages awarded by the tort system are DNPL.

## **A Critique**

A commitment to compensation for NPL is often thought to be an inevitable corollary of the more general commitment to full compensation expressed in the well known statement of Lord Blackburn in *Livingstone v Raywards Coal*<sup>69</sup> that an award of damages in tort should be

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<sup>63</sup> Lewis ‘Compensation culture reviewed: incentives to claim and damages levels’ [2014] *Journal of Personal Injury Law* 209, 222.

<sup>64</sup> Association of British Insurers, Evidence to the Transport Committee.

<sup>65</sup> See Lewis above n 63..

<sup>66</sup> *Miss Eva Rose Totham v King’s College Hospital NHS Foundation Trust* [2015] EWHC 97 (B)

<sup>67</sup> *Insight Delivery Consultancy, No Win No Fee Usage in the UK, Appendix 5 of the Access to Justice Action Group, Comments on reforming Civil Litigation* <http://www.accesstojusticeactiongroup.co.uk/home/wp-content/uploads/2011/05/NWNF-research.pdf> accessed 6/5/2015.

<sup>68</sup> *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978) Cmnd 7054. Vol 2 Table 107. In the US it is about 50%. *Viscusi Reforming Products Liability* (Harvard University Press, 1991) 102-4.

<sup>69</sup> (1880) 5 App Cas 25,39that

the sum of money required to restore the claimant to his pre-tort position. This ostensible<sup>70</sup> commitment to full compensation is sometimes abbreviated to the 100% principle. Some idea of the pervasiveness of this idea can be conveyed by referring to the most important and the most recent judicial decisions on damages for personal injury. Almost every significant case on this topic heard by the UK's highest appellate court affirms this commitment<sup>71</sup> and so dictates the approach of Trial Judges.<sup>72</sup>

The commitment to full compensation which reaches beyond the question of DNPL is often stated in a manner that seems to deny any alternative approach. The Law Commission quickly dismissed any suggestion that DNPL should be abandoned.<sup>73</sup> In particular such recovery is denied in some socialist and Islamic jurisdictions.<sup>74</sup> Several Australian states have imposed upper limits or thresholds upon the recovery of non-pecuniary losses arising from certain types of accident.<sup>75</sup> Compensation for non-pecuniary loss which had hitherto been part of the New Zealand no fault accident compensation scheme was abolished in 1992 following concern about the increasing size and so cost to the scheme of such awards<sup>76</sup> though, since 2001, modest lump sums have been available up to a maximum of NZ\$100K. Indeed there has been some recognition of the non-inevitability of this approach by one of the UK's most reflective senior judges. In *Wells v Wells*<sup>77</sup> Lord Steyn said:

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<sup>70</sup> Cf Tony Weir's characteristic counterblast 'All or nothing' (2003-4) *Tulane Law Review* 512 describing a trend in the common law towards awarding partial recovery in many types of claim.

<sup>71</sup> *BTC v Gourley* [1956] AC 185, 197; *Dews v NCB* [1988] AC 1, 12, *Hodgson v Trapp* [1989] AC 807, 826 and *Wells v Wells* [1999] AC 345, 363, 382-3, 394, 398. For a typical and most recent endorsement by a Trial Judge

<sup>72</sup> E.g. *Miss Eva Rose Totham v King's College Hospital NHS Foundation Trust* [2015] EWHC 97 (QB) (£10.135M stating that the 'correct approach' was '... to put Eva in the position she would have been in had the [defendant] not negligently injured her'.

<sup>73</sup> Para 2.1-2

<sup>74</sup> See Amin 'Law of Personal Injuries in the Middle East' [1983] *LMCLQ* 446.

<sup>75</sup> See Mullany 'A New Approach to Compensation for Non-Pecuniary Loss in Australia' (1990) 17 *MULR* 714, 721-727.

<sup>76</sup> It was replaced by a modest disability pension. See Palmer 'New Zealand's accident compensation scheme: Twenty years on' (1994) 44 *Univ Tor LJ* 223.

<sup>77</sup> [1999] 1 AC 345

‘It must not be assumed that the 100% principle is self evidently the only sensible compensation system’.

The most powerful argument against the award of damages for non-pecuniary losses is that there is no convincing rationale for such awards. Where the claimant’s loss is financial there is no conceptual, as opposed to arithmetic, difficulty in converting this loss into a lump sum award of damages. However as Lord Woolf observed in *Heil v Rankin* :<sup>78</sup>

‘There is no simple formula for converting the pain and suffering, the loss of function, the loss of amenity and disability which an injured person has sustained, into monetary terms.’

English courts are said to adopt a ‘diminution in value’ approach which seeks to value what the victim has lost irrespective of the use to which the damages will be put.<sup>79</sup> This approach itself has two variants depending upon whether the victims’ loss is valued objectively or subjectively. The former has usefully been labelled a conceptual approach and the latter a personal one.<sup>80</sup> The difference between the conceptual and personal approaches is most marked when the case of an unconscious victim is considered. A conceptual approach would allow full recovery. If a personal approach were followed the victim would recover nothing if he had no awareness of his condition.<sup>81</sup> Under English law an unconscious claimant is not entitled to damages for PS but may recover in respect of LA. Commitment to the diminution in value approach permits the development of a conventional tariff of damages for different injuries. This tariff is authoritatively recorded in the JC Guidelines. The alternative functional

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<sup>78</sup> [2000] 2 WLR 1173. See further Dickson J in *Andrews v Grand & Toy Alberta Ltd* (1978) 83 DLR (3d) 452.

<sup>79</sup> Cf the ‘functional’ approach followed in Canada *Thornton v Board of School trustees of School District No 57* (1978) 83 DLR (3d) 480. See also in Australia Windeyer J in *Skelton v Collins* (1966) 115 CLR 94, 131-133

<sup>80</sup> Ogus ‘Damages for Lost Amenities: For a Foot, a feeling or a Function’ (1972) 35 MLR 1

<sup>81</sup> In their initial Consultation Paper *Damages for Personal Injury: Non-Pecuniary Loss* No 140 (1995) the Law Commission preferred the personal approach, see para 4.15. Following consultation they were persuaded to favour the apply the conceptual approach see paras 2.19 and 2.44.



approach is hostile to such development as the level of awards depends on what substitute pleasures are suitable for particular victims. The tariff based approach ensures consistency and so relative justice between awards.

The Law Commission sought to answer this problem by considering the underlying basis of the law of tort. They assert that the law of tort is founded upon the principle of corrective justice rather than deterrence or compensation per se.<sup>82</sup> Corrective justice in relation to pecuniary losses is simple to state but complex to effect<sup>83</sup> requiring a value judgment<sup>84</sup> as to what particular injuries 'are worth'. A further logically prior problem is to identify who should make that value judgment.

Economists who usually value things by reference to a market have tried sought to provide a policy justification for the award of damages for non-pecuniary loss. This is made difficult for them because there is no developed market for the sale of body parts. In some countries blood may legally be sold by donors; elsewhere there may be an unofficial market for duplicated body parts such as kidneys but nowhere is there an established, legal and general market for such purchases and sales. So economists have developed approaches whereby human behaviour can be analysed in a way that which reveals information about how individuals value these things e.g. by comparing salary rates in industries with different risks of physical injury.<sup>85</sup> This will reveal the amount that an individual will accept to assume a certain risk. Such techniques tend to produce valuations that are higher than those used in the courts. A different method examines the willingness of parties to insure against non-

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<sup>82</sup> Dewees, Duff and Trebilcock *Exploring the Domain of Accident Law: Taking the Facts Seriously* (1996) p.8 .

<sup>83</sup> See generally Harris, Campbell and Halson *Remedies in Contract and Tort*, 2<sup>nd</sup> ed 2002 pp342-371.

<sup>84</sup> The appellate courts are best positioned to make this judgment according to the Law Commission, *Non-Pecuniary Loss* para 3.24

<sup>85</sup> Martin and Psacharopolous 'The Reward for Risk in the Labour Market' 90 J Pol Econ 827 (1982).

pecuniary loss. An American study<sup>86</sup> suggested that damages for non-pecuniary loss are not justified because consumers would not in theory, and do not in practice effect insurance against such losses: ‘there is no market for pain and suffering insurance in any society in the world’. Unfortunately the economic literature is not decisive<sup>87</sup> and so does not fill the conceptual need we identified.

## LOSS OF AMENITY

In cases of physical injury this refers to the victim’s inability to do the things which before the accident he was able to do. It is an award for his inability to fully participate in normal activities and so is based upon victim’s post accident life expectancy.<sup>88</sup> Damages under this head are assessed objectively; the award is not dependent upon an awareness of deprivation.

The award of DNPL for the tort of false imprisonment i.e. the direct and intentional imprisonment of the claimant,<sup>89</sup> may be better captured as damages for loss of amenity than as damages for pain and suffering as the restriction of freedom is of the essence of the tort. The Court of Appeal<sup>90</sup> have restated the remedial consequences of false imprisonment and effectively introduced a judicial compensation tariff for actions against the police in torts such as false imprisonment and malicious prosecution. For false imprisonment ‘basic’ awards start at about £500 (not adjusted for subsequent inflation) for the first hour, £3000 for the first day with a reducing rate thereafter for continued detention. Despite the promulgation of this

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<sup>86</sup> E.g. Priest ‘The Current Insurance Crisis and Tort Law’ 96 Yale LJ 1521, (1987) at 1547

<sup>87</sup> Some idea of its inconclusiveness is given by Avraham’s introduction to his article ‘Putting a Price on Pain-and-Suffering Damages’ 100 Northwestern University Law Rev 87(2006).

<sup>88</sup> *Nutbrown v Sheffield Health Authority* (1993) 4 Med LR 188 (claimant, 72 with a life expectancy of 82 received £25000 damages – Judge said claimant would have received twice as much if he was 30

<sup>89</sup> see *R (on the application of Lumba) v Sec State for the Home Department* [2011] UKSC 12 at [65].

<sup>90</sup> *Thompson v Metropolitan Police Commissioner* [1998] QB 498.

tariff undifferentiated ‘global’ awards are sometimes preferred.<sup>91</sup> Controversially and unjustifiably, it might be inferred that the award in some cases seemed to take account of the claimant’s character.<sup>92</sup> Some very large awards have resulted from false imprisonment in especially horrific circumstances.<sup>93</sup>

*Dobson v Thames Water Utilities Ltd*<sup>94</sup> involved claims in nuisance brought by occupiers of properties affected by smells and mosquitoes from the defendant’s sewage works. The CA emphasised the loss to the land, rather than the loss to the occupiers, that was central to the claim in nuisance; it was a proprietary, not a personal, loss of amenity that was key.<sup>95</sup> The case was remitted to the Trial Judge for the assessment of damages which were quantified by reference to the reduced rental value of the affected properties attributable to the loss of amenity caused by the nuisance.<sup>96</sup> Similarly cases involving invasive tree roots have consistently involved awards of modest DNPL.<sup>97</sup> In *Dobson* an alternative claim was advanced on the basis of a breach of Article 8 of the European Convention on Human Rights (ECHR). The Court of Appeal held that an award of damages for the breach of ECHR would

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<sup>91</sup> *Takitota v A-G* [2009] UKPC 11 where PC remitted to CA Bahamas for re-assessment an award in respect of 8 years confinement in poor conditions which had been calculated on a per day basis), *R (on the application of Mehari) v Sec State for the Home Department* (£4k award to asylum seeker of good character for 7 days wrongful detention).

<sup>92</sup> *Lunt v Liverpool Justices* [1991] CA Transcript No 158 referred to by McGregor para 40-14 (£25k awarded for imprisonment lasting 42 days the entirety of which was unjustified and *Mehari* above CF *R v Governor of Brockhill Prison Ex P Evans (No2)* [2001] 1 AC 19 ( ‘only’ £5k awarded to prisoner who was properly convicted but released 59 days late)

<sup>93</sup> *Lawson v Glaves-Smith* [2006] EWHC 2865 QB (£78500 awarded to multiple rape victim who was confined by violent threats for 3 days, award focusing mainly on sexual assault), *AT,NT,ML,AK v Dulghieru* [2009] EWHC 225 QB (women were deceived into coming to the UK and then separated, confined and forced into frequent unwanted sexual activity for over 2 months received awards of £82k- £125k)

<sup>94</sup> [2009] 3 All ER 319 CA

<sup>95</sup> McGregor para 37-020

<sup>96</sup> [2011] EWHC 3253 TCC. See also *Arroyo v Equion Energia Ltd (formerly B P Exploration (Columbia) Ltd)* [2013] EWHC 3173 (TCC) [67]. ‘...general damages for loss of amenity may be awarded to a Claimant in circumstances where the application of conventional principles for measuring damage to land might lead to under-compensation’..

<sup>97</sup> *E.g. Berent v Family Mosaic Housing* [2012] EWCA Civ 961

not be made unless, taking account of any other relief including the award of damages in nuisance, it was necessary to achieve just satisfaction.

Damages for loss of amenity have occasionally been awarded in actions for breach of contract not involving personal injury: for a builder's defective tiling<sup>98</sup> and a landlord's failure to provide leisure facilities to tenants of a block of flats.<sup>99</sup> Loss of amenity was proffered by Lord Lloyd as a possible alternative explanation of the award made by the trial judge and left in place by the House of Lords in *Ruxley Electronics v Forsyth*<sup>100</sup> where a swimming pool was constructed 9 inches shallower than the contractual specification. In *Demarco v Perkins*<sup>101</sup> no damages for pecuniary loss were awarded against a solicitor whose negligence deprived a client of the chance to enter voluntary arrangement with creditors but the Court of Appeal increased the judge's award of DNPL from £2,000 to £6,000. Cases where such modest sums are in issue will not often be appealed or reported. Nonetheless it is likely that, routinely, such small awards will be made in proceedings brought in the county court and before Deputy Judges acting as arbitrators.<sup>102</sup>

## **PHYSICAL INCONVENIENCE AND DISCOMFORT**

The term 'physical inconvenience' more frequently features in contract, than in tort, cases. This long established category of recovery may be uncontroversial because the claimant is, in an action for breach of contract, 'merely' seeking the protection of his reliance, rather than expectation, interest; the claimant is seeking restoration to his pre-contract position rather than the protection of expectations excited by the contract. The claimants in *Hobbs v London*

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<sup>98</sup> *G W Atkins Ltd v Scott* (1980) 7 Const LJ 215.

<sup>99</sup> *Newman v Framewood Manor Management Co* [2012] EWCA Civ 159

<sup>100</sup> [1995] 3 All ER 268 at 289–290, HL.

<sup>101</sup> [2006] EWCA Civ 188.

<sup>102</sup> See below **Mental Distress**

and South Western Rly C.<sup>103</sup> were forced to walk over four miles to their home when the train failed to follow the advertised route. The DNPL awarded were described as compensation for: ‘personal inconvenience’, ‘inconvenience’, ‘real physical inconvenience’ and ‘not ... mere vexation, but ... physical inconvenience’. Such awards have been made in many circumstances including<sup>104</sup> an action by a sailor<sup>105</sup> who, as a consequence of a breach of contract alighted from a vessel, a passenger who experienced an uncomfortable and distressing voyage<sup>106</sup>, as well as actions against: contractors employed to refurbish a home<sup>107</sup> and install damp-proofing<sup>108</sup>, a landlord in breach of a covenant to maintain premises<sup>109</sup>, a travel agency which booked inferior accommodation<sup>110</sup> a solicitor who failed to recover possession of his client's home<sup>111</sup>, a film company who damaged a property being used as a location<sup>112</sup>, an airline that lost baggage<sup>113</sup> and numerous claims against surveyors whose negligence has resulted in the inconvenience of repairs being carried out<sup>114</sup>. In 2001 Hobbs was applied by the House of Lords in *Farley v Skinner*, an action by the purchaser of a large house near to an airport who had specifically asked the surveyor to investigate the risk of excessive aircraft noise. The property was purchased in reliance upon the surveyor’s negligent assurance that it was not affected by intrusive noise levels the house was in fact situated beneath an area where aircraft circled while awaiting permission to land. Damages for inconvenience was supported as a second and alternative justification for upholding the

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<sup>103</sup> (1875) LR 10 QB 111. respectively at 115 per Cockburn CJ, at 120 per Blackburn J, at 122 per Mellor J and at 124 per Archibald J.

<sup>104</sup> See generally Furmston ed, *The Law of Contract* (5<sup>th</sup> edn, Lexis Nexis,, 2015) forthcoming paras 8.68-8.69.

<sup>105</sup> *Burton v Pinkerton* (1867) LR 2 Exch 340.

<sup>106</sup> *Milner v Carnival plc* [2010] EWCA Civ 389, [2011] 1 Lloyd’s Rep 374.

<sup>107</sup> *Piatkus v Harris* [1997] CLY 1747.

<sup>108</sup> *Rawlings v Rentokill Laboratories* [1972] EGD 744.

<sup>109</sup> *Southwark London Borough Council v Bente* [1998] CLY 2986.

<sup>110</sup> *Stedman v Swan’s Tours* (1951) 95 SJ 727

<sup>111</sup> *Bailey v Bullock* (1950) 66 TLR (Pt 2) 791; *Woolfson v Gibbons* [2002] All ER (D) 69 (Jan).

<sup>112</sup> *Haysman (Glen) v Mrs Rogers Films* [2008] EWHC 2494 (QB), [2008] All ER (D) 271 (Oct).

<sup>113</sup> *O’Carroll v Ryanair* (2009) SCLR 125. .

<sup>114</sup> E.g. *Perry v Sidney Phillips & Son* [1982] 3 All ER 705, [1982] 1 WLR 1297, CA; *Patel v Hooper & Jackson* [1999] 1 All ER 992, [1999] 1 WLR 1792, CA.

judge's award of £10,000 damages for non-pecuniary loss<sup>115</sup> To recover damages there must be more than 'mere annoyance at the failure of the other party to honour his contractual undertaking: "disappointment" would serve as a sufficient label for those mental reactions which in general the policy of the law will exclude'.<sup>116</sup>

Damage awards under this head tend to be modest and conventional with £750 described as 'the norm' in 2003<sup>117</sup> though larger awards are exceptionally upheld. In *Farley* the House of Lords emphasised the expectation that such awards would not be large<sup>118</sup> but did not reduce the award of £10,000 made by the first instance judge. In *Milner v Carnival plc*<sup>119</sup> the Court of Appeal made awards of £4,000 and £4,500 following a ruined cruise. In *Farley* the House of Lords, and in *Milner* the Court of Appeal, did not draw a distinction between damages for physical inconvenience and compensation for consequent mental distress. Therefore it seems that the latter, previously distinct head of claim,<sup>120</sup> may<sup>121</sup> have been subsumed by the expansion of the former.

Although a different vocabulary is sometimes used it is clear that losses of the kind recoverable in contract and discussed above are also recoverable in tort. In the torts of false imprisonment and nuisance this category would seem to overlap with pain and suffering and

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<sup>115</sup> [2001] UKHL 49 [2002] 2 AC 732 at [30], per Lord Steyn, Lord Browne-Wilkinson agreeing, at [38]–[39], pp per Lord Clyde, at [57] per Lord Hutton and at [106] per Lord Scott..

<sup>116</sup> [2001] UKHL 49 at [2002] 2 AC 732, at [35] per Lord Clyde, [58], per Lord Hutton and [85], per Lord Scott. See also *Hobbs v London and South Western Rly Co* (1875) LR 10 QB 111 at 122 excluding a 'purely sentimental' reaction per Mellor J, at 124 per Archibald J quoted above, *Bailey v Bullock* [1950] 2 All ER 1167 at 1170–1171 per Barry J and *Wapshott v Davis Donovan & Co* [1996] PNLR 361 at 378 per Beldam LJ.

<sup>117</sup> *Watts v Morrow* [1991] 4 All ER 937, [1991] 1 WLR 1421, CA, per Ralph Gibson LJ at 1442 and per Bingham LJ at 1445, Sir Stephen Brown agreeing, *Boynton v Willers* [2003] EWCA Civ 904 at [34] (evidence of inconvenience suffered was described at para 37 as 'fragmented and unreliable' so only £500 was awarded), *Woolfson v Gibbons* [2002] All ER (D) 69 (Jan) (£750 each damages for inconvenience awarded to wife, husband and child for surveyor's failure to note defects in house they purchased).

<sup>118</sup> [2001] UKHL 49 at [28], [2002] 2 AC 732, [2001] 3 WLR 899 at p 911 per Lord Steyn, [38], p 915 per Lord Clyde, [61], p 923 per Lord Hutton and [110], p 932 per Lord Scott, Lord Browne Wilkinson agreeing with Lords Steyn and Scott.

<sup>119</sup> [2010] EWCA Civ 389, [2011] 1 Lloyd's Rep 374.

<sup>120</sup> *Eg Cross v David Martin and Mortimer* [1989] 1 EGLR 154; *Bigg v Howard Son & Gooch* [1990] 1 EGLR 173, *Watts v Morrow* [1991] 1 WLR 1421

<sup>121</sup> Cf *Channon v Lindley Johnstone* [2002] EWCA Civ 353, [2002] Lloyd's Rep PN 342, [2002] All ER (D) 310 (Mar) (damages for non-pecuniary loss refused in action against solicitor acting in divorce proceedings).

loss of amenity which have already been examined. In other cases such as *Mafo v Adams*<sup>122</sup>, where a tenant's action in deceit against his landlord who had induced him to give up 'protected' premises and status.

### **SOCIAL DISCREDIT (AND REPUTATIONAL MATTERS)**<sup>123</sup>

A distinction between pecuniary and non-pecuniary loss in actions involving social discredit and reputational matters is easier to state than to define. To the extent that the loss for which compensation is sought is the financial consequences of a damaged reputation, the claim is pecuniary; to the extent that damages are claimed for the loss of reputation per se, the claim is for non-pecuniary loss. Lord Nicholls has acknowledged the practical difficulty: 'Sometimes, in practice, the distinction between damage to reputation and financial loss can become blurred'<sup>124</sup>. Further, damage to reputation may consist of a failure to enhance the reputation of the claimant when it will form part of a claim to be advanced, so far as an award of money can, to the position he would have been in if the contract had been performed, ie as part of the expectation measure of damages. Alternatively, it may involve damage to existing reputation when it will form part of a claim to be restored, so far as an award of money can, to the position he was in before he entered the contract, ie as part of the reliance measure of damages.<sup>125</sup> Unfortunately, in this context, these distinctions, particularly between the expectation and reliance measures of damages, are not always observed by the courts.

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<sup>122</sup> [1970] 1 QB 548.

<sup>123</sup> I have added 'Reputational Matters' to the title of this category to better capture the two distinct types of contractual action described below ie a failure to enhance, as opposed to damage to existing, reputation.

<sup>124</sup> *Malik v BCCI* [1997] 3 All ER 1 at 10, HL per Lord Nicholls.

<sup>125</sup> A distinction I developed in *The Law of Contract* 4<sup>th</sup> ed 2010 chap 8

The class of persons who have been held entitled to recover damages from a defendant whose breach of contract has resulted in a failure to enhance their reputation is limited to: actors<sup>126</sup> and authors<sup>127</sup> and damages are often described as being for ‘loss of publicity’<sup>128</sup>. Further analogies are a claim brought by an apprentice in respect of the premature termination of his training where damages are recoverable for the consequent disadvantage in future employment prospects<sup>129</sup> and damages for loss of business awarded following the defendant's failure to publish an advertisement in a newspaper<sup>130</sup>. Although such claims are often described as being for financial loss<sup>131</sup>, the difficulty of computation must leave a suspicion that an element of the award comprised compensation for non-pecuniary losses.

Damage to existing reputation has traditionally been regarded as recoverable in a number of cases. A ‘trader’ has long been entitled to recover substantial damages for loss of business reputation without proof of actual damage<sup>132</sup>. Where such damages are awarded for the wrongful failure by a bank to honour a cheque ‘[t]he appropriate bracket is wide and is... between £10,000 and £20,000’<sup>133</sup>. Similar damages have been recovered in other disparate circumstances such as a disrupted remembrance service.<sup>134</sup>

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<sup>126</sup> E.g. *Marbé v George Edwardes (Daley's Theatre) Ltd* [1928] 1 KB 269, CA; *Herbert Clayton v Oliver* [1930] AC 209, HL..

<sup>127</sup> *Tolnay v Criterion Film Productions Ltd* [1936] 2 All ER 1625; *Joseph v National Magazine Co* [1959] Ch 14

<sup>128</sup> *Herbert Clayton & Jack Waller Ltd v Oliver* [1930] AC 209 at 419, HL per Lord Buckmaster.

<sup>129</sup> *Dunk v George Waller & Son Ltd* [1970] 2 QB 163, CA. See also *Lizzy Disney v France Luxury Group SA, Jaques Fath SAS* [2004] EWHC 2303 (fashion designer deprived of opportunity to enhance reputation – appeal against refusal of leave to appeal).

<sup>130</sup> *Marcus v Myers and Davis* (1895) 11 TLR 327.

<sup>131</sup> Perhaps, strategically, to circumvent the restrictions on recovery laid down in *Addis v Gramophone Co Ltd* [1909] AC 488, HL. See below

<sup>132</sup> *Rolin v Steward* (1854) 14 CB 595; *Wilson v United Counties Bank Ltd* [1920] AC 102, HL; and *Davidson v Barclays Bank Ltd* [1940] 1 All ER 316. The restriction to ‘traders’ resulted in some strange distinctions eg *Bank of New South Wales v Milvain* (1884) 10 VLR 3 (farmer not a trader), *Davidson v Barclays Bank* [1940] 1 All ER 316 (bookmaker is a trader) but has now, sensibly, been abandoned *Kpohraror v Woolwich Building Society* [1996] 4 All ER 119, CA, departing from *Gibbons v Westminster Bank* [1939] 2 KB 882 and *Rae v Yorkshire Bank Ltd* [1988] BTLC 35, CA

<sup>133</sup> *Nicholson v Knox Ukiwa & Co* [2008] EWHC 1222 (QB) at [92].

<sup>134</sup> *Aerial Advertising v Batchelors Peas Ltd* [1938] 2 All ER 788.



In *Malik v BCCI*<sup>135</sup> the appellants, senior employees of a bank who were made redundant after its collapse following extensive fraudulent trading (of which they were not aware) sought damages from their former employer for breach of contract for ‘stigma compensation’ as, following their redundancy, they were unable to secure alternative employment allegedly because of their association with the bank. It was held that the bank had breached an implied term of the contract of employment by conducting business in a way likely to seriously damage the relationship of confidence and trust with its employees. If it was a reasonably foreseeable consequence of breach that the employee's future employment prospects would be adversely affected<sup>136</sup> then damages were recoverable. There was nothing contrary to principle in the recovery of damages for loss of reputation caused by a breach of contract although in subsequent litigation ex-employees of BCCI failed to prove that they had suffered financial loss as a result of the ‘stigma’ caused by their association with the fraudulent bank.

The *Malik* case was not strictly a case about the recovery of DNPL; the damages were sought for continuing financial losses<sup>137</sup>. However, importantly, a number of restrictions upon the availability of damages for non-pecuniary loss were considered, particularly the troublesome old case of *Addis v Gramophone Co Ltd*<sup>138</sup> where an employee was not allowed to recover DNPL on account of the ‘harsh and humiliating’<sup>139</sup> way in which he was dismissed. Though not formally overruled, *Addis* was interpreted narrowly in *Malik*<sup>140</sup>. Perhaps the most distinctive feature of the approach of the House of Lords in *Malik* is that the recovery of so-called ‘stigma compensation’ was to ‘... be assessed in accordance with ordinary contractual

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<sup>135</sup> [1997] 3 All ER 1, HL.

<sup>136</sup> The case proceeded upon the basis of an agreed set of facts. However the liquidators did not admit the accuracy of these facts: [1997] 3 All ER 1 at 4, HL per Lord Nicholls. For further recognition in different circumstances of the availability in principle of so called ‘stigma’ damages, see *Chagger v Abbey National Plc* [2009] EWCA Civ 1202 at [98], [2010] ICR 397, [2010] IRLR 47 (employee may be entitled to damages against employer who unfairly dismissed him for unlawful stigmatisation by future employers who are unwilling to employ person who sued his former employer).

<sup>137</sup> Per Lord Nicholls at 7 and per Lord Steyn at 19, Lords Goff, Mackay and Musill agreeing.

<sup>138</sup> [1909] AC 488, HL.

<sup>139</sup> See 493

<sup>140</sup> Per Lord Nicholls at 9 and per Lord Steyn at 19–20, Lords Goff, Mackay and Mustill agreeing.

principles'<sup>141</sup>. This rejection of old categories and restrictions in relation to a novel claim for financial loss combined with a restrictive interpretation of the *Addis* case suggested a willingness to base the recovery of damages for non-pecuniary losses upon broader principles, or at least a desire to expand the pre-existing categories of recovery. The House of Lords have subsequently considered directly the award of DNPL for breach of contract in a small number of recent cases and re-assessed the status and ambit of the supposed prohibition laid down in *Addis*. These cases include *Johnson v Unisys*<sup>142</sup> where Lord Steyn emphasised that the decision in *Johnson* did not endorse or expand the restrictive approach of *Addis*: 'The reasoning of the majority in *Johnson* did not reinvigorate the corpse of *Addis*'.<sup>143</sup> In *Eastwood v Magnox Electric plc, McCabe v Cornwall CC*<sup>144</sup> Lord Nicholls noted that the *Addis* case had '... cast a long shadow over the common law'<sup>145</sup> and held that it did not operate to exclude<sup>146</sup> actions in respect of employee's rights that accrued prior to dismissal.<sup>147</sup> Similarly in *Johnson v Gore Wood & Co (No 1)*<sup>148</sup> Lord Goff noted a 'softening of this principle in

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<sup>141</sup> Per Lord Nicholls at 9 and per Lord Steyn at 21 and 22, Lords Goff, Mackay and Mustill agreeing.

<sup>142</sup> [2001] UKHL 13, [2003] 1 AC 518, [2001] 2 WLR 1076 Lord Steyn dissenting.

<sup>143</sup> At [48]. Lord Steyn's judgment is powerful critique of the decision of the majority in *Johnson*.

<sup>144</sup> [2004] UKHL 35, [2005] 1 AC 503 per Lord Nicholls at [1]. Applied in *Sean Fryers v Belfast Health and Social Care Trust* [2008] NIQB 123 and *Triggs v GAB Robins (UK) Ltd* [2008] EWCA Civ 17, [2008] STC 529, [2008] IRLR 317.

<sup>145</sup> *Eastwood v Magnox Electric plc, McCabe v Cornwall CC* [2004] UKHL 35, [2005] 1 AC 503 per Lord Nicholls at [1].

<sup>146</sup> Such actions are said to fall outside the '*Johnson* exclusion area'. See generally the discussion of Lord Nicholls in *Eastwood v Magnox Electric plc, McCabe v Cornwall CC* [2004] UKHL 35, [2005] 1 AC 503 at [27]-[32] and also the Supreme Court's recent discussion in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, [2012] 2 AC 22.

<sup>147</sup> Eg where the employer was in breach of an implied term to refrain from conduct likely to destroy or seriously damage the trust and confidence with his employee by, in *Eastwood*, a campaign to demoralise the defendant prior to dismissal or, in *McCabe*, failing to investigate or inform a suspended employee about allegations made against him. See also the Court of Appeal's decision in *Gogay v Hertfordshire County Council* [2000] IRLR 703, CA (suspended employee recovered £9,000 general damages and £4,800 for private psychotherapy); *King v University Court of the University of St Andrews* [2002] IRLR 252, Ct of Sess; and *GAAB Robins (UK) Ltd v Triggs* [2008] EWCA Civ 17.

<sup>148</sup> [2002] 2 AC 1, [2001] 2 WLR 72, HL (property developer alleged his solicitor's negligence was 'such as to injure his pride and dignity').

certain respects<sup>149</sup>, and in a dissenting judgment Lord Cooke questioned the ‘permanence’ of Addis in English law.<sup>150</sup>

Reputation is protected by several torts including false imprisonment and malicious prosecution where awards of damages may reflect damage to reputation and social discredit. It has been said that ‘false imprisonment does not merely affect a man’s liberty; it also affects his reputation’<sup>151</sup> and in the leading authority on malicious prosecution that one of the three types of damage that might result is ‘...damage to a man’s fame as if the matter wherof he is accused be scandalous...’.<sup>152</sup> However the most obvious protection<sup>153</sup> is of course provided by the tort of defamation where, according to Sir Thomas Bingham MR, the successful claimant is entitled, by way of compensation, to:<sup>154</sup>

That sum [which will] compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused

In its latest major review of the tort in *Cairns v Modi*<sup>155</sup> the Court of Appeal said that these three purposes, reputational reparation, vindication and compensation for distress will be relevant in all cases but that ‘... the emphasis to be placed on each will vary from case to case.’ A statement is defamatory if it has the effect of bringing a person into ‘hatred, contempt or ridicule’<sup>156</sup> or where it tends to lower the person in the minds of right thinking

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<sup>149</sup> [2002] 2 AC 1, [2001] 2 WLR 72 at 101, HL, but cf 97 where Lord Bingham's approach is endorsed.

<sup>150</sup> [2002] 2 AC 1, [2001] 2 WLR 72 at 107–109, HL.

<sup>151</sup> Per Lawrence LJ in *Walter v Alltools* (1944) 61 TLR 39, CA, at 40

<sup>152</sup> Per Lord Holt in *Saville v Roberts* (1699) 1 Ld Rayn 374 at 378.

<sup>153</sup> In *Lonrho v Fayed (No 5)* [1993] 1 WLR 1489 CA at 1504E Stuart Smith LJ seemed impliedly to rule out recovery outside the torts listed here.

<sup>154</sup> *John v MGN* [1997] QB 586 at 607..

<sup>155</sup> [2012] EWCA Civ 1382 at [22]

<sup>156</sup> *Parmiter v Coupland* (1840) 6 M & W 105.

members of society.<sup>157</sup> Such tests may possibly be under-inclusive if they do not also capture accusations that might arouse pity rather than hatred eg that a person is insane or insolvent.

In the 1980's there was a concern that awards of damages in defamation cases were excessive. The Courts and Legal Services Act 1990 s8 empowered the Court of appeal to substitute an award of damages where the amount awarded by a jury was excessive (or inadequate). There was some residual concern that these awards were still high when compared to those for personal injuries.. Significant awards though not adjusted for inflation have included:

- *Rantzen v Mirror Newspapers*<sup>158</sup> - £110k for newspaper allegation that famous broadcaster who promoted the protection of minors had herself protected a child abuser
- *Aldington v Tolstoy Miloslavsky*<sup>159</sup> £1.5M for accusation that claimant was knowingly involved in sending very large numbers of Yugoslavians who had fought for Germany to certain death by order of Stalin.
- *John v MGN*<sup>160</sup> - £25k for newspaper allegation that singer followed unusual practices to control weight.

Two significant recent developments will, in combination, ensure that awards for defamation are even more consistent and proportionate. In *Cairns v Modi*<sup>161</sup> the Court of Appeal said that the ceiling upon awards will be the upper limit of damages for pain and suffering and loss of amenity which at that time was approximately £275k. Consistency is in turn assured by section 11(1) of the Defamation Act 2013 which requires defamation cases to be heard

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<sup>157</sup> Per Lord Atkin in *Sim v Stretch* (1936) 52 TLR 669.

<sup>158</sup> [1993] EWCA Civ 16 award reduced by CA from £250k.

<sup>159</sup> Subsequently declared excessive by the European Court of Human Rights *Tolstoy Miloslavsky v UK* [1995] 20 EHRR 442

<sup>160</sup> [1997] QB 586, reduced on appeal from £75k. There was a further award of £50k exemplary damages, itself reduced from £275K.

<sup>161</sup> [2012] EWCA Civ 1382 at [25]

without a jury unless the court orders otherwise. In effect this signals the practical end of jury involvement in the law of defamation.<sup>162</sup>

## MENTAL DISTRESS

In this paper I have already described several categories where DNPL have been recovered in the torts of defamation, false imprisonment and malicious prosecution which might also be categorised as compensation for mental distress. The Equality Act 2010 has brought together the ‘statutory torts’ based on discrimination which previously derived from separate regimes dealing with sex, race and age discrimination. Section 119(4) provides that damages for discrimination ‘may include compensation for injured feelings’ and following guidelines laid down in *Vento v Chief Constable of West Yorkshire Police*<sup>163</sup> £15,000–£20,000 was<sup>164</sup> regarded as the appropriate range in statutory claims for injured feelings caused by lengthy campaigns of discriminatory racial or sexual harassment. Outside these categories it has been held that mental distress alone is not actionable.<sup>165</sup>

In simple actions for breach of contract the recovery of damages for mental distress alone was considered exceptional and in the past considered to be excluded by the House of Lords decision in *Addis v Gramophone Co Ltd*<sup>166</sup>. However, following the critique of *Addis* it is suggested that where the recovery of non-pecuniary loss is permitted it should simply be considered as a part of the recovery of the expectation and reliance measure of damages and the recognised categories of recovery best presented within the general framework of the

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<sup>162</sup> See also the Defamation Act 2013 section 1(1) (a statement is not defamatory unless its publication ‘has caused or is likely to cause serious harm to the reputation of the claimant’).

<sup>163</sup> [2002] EWCA Civ 1871, [2003] IRLR 102 at [50] per Mummery LJ

<sup>164</sup> These are 2002 figures. In *Da Bell v NSPCC* UKEAT/62271 they were updated to £18-30k. If the 10% *Simmons* uplift applies this would have become £19.8-33k. The applicability of the *Simmons* uplift is a to damages for the statutory torts is not yet settled see n 22 above.<sup>164</sup> [48] October

<sup>165</sup> *Rothwell v Chemical & Insulating Co Ltd* [2008] AC 281 (compensation denied to patients exhibiting ‘pleural plaques’ ie symptomless scarring of the lungs which is nonetheless associated with malignant mesothelioma)

<sup>166</sup> [1909] AC 488, HL.

expectation and reliance measures of damage.<sup>167</sup> Such an approach makes explicit the interest of the claimant which is being protected, facilitates comparison between the recovery of non-pecuniary and pecuniary losses and helps identify any potential overlap between the distinct heads of non-pecuniary loss. This approach also reflects the result, if not always the rhetoric, of a number of key recent cases also analysed above where the House of Lords have minimised the impact of older restrictions upon the availability of such damages and so expanded their availability.

In *Farley v Skinner*<sup>168</sup> the House of Lords upheld an award of £10,000 DNPL which was justified on two alternative bases<sup>169</sup>: either as compensation for ‘inconvenience and discomfort’<sup>170</sup> which category of recovery was examined above or because a major or important object of the contract with the surveyor was to ‘... give pleasure, relaxation or peace of mind’<sup>171</sup>. In *Farley* this latter category of DNPL, which will be examined in this section, was developed in three important respects.. First, damages for disappointment and mental distress are now definitively not confined to cases where the provision of enjoyment (or peace of mind) was the only object of the contract.<sup>172</sup> Second, implicitly, it recognised that awards of damages for non-pecuniary loss may be quite large, even though they will routinely be more modest<sup>173</sup>. Third the case also held that recovery in respect of non-

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<sup>167</sup> A scheme developed in Halson Chap 8 in Furmston ed, *The Law of Contract* (5<sup>th</sup> ed, 2015) forthcoming. Cf the approach in Canada: *Honda Canada Inc v Keays* (2008) SCC 39, Sup Ct (Can) (the defendant is entitled to damages for mental distress subject only to the usual limitations of remoteness etc).

<sup>168</sup> [2001] UKHL 49, [2002] 2 AC 732, [2001] 3 WLR 899.

<sup>169</sup> In *Haysman (Glen) v Mrs Rogers Films Ltd* [2008] EWHC 2494 (QB), [2008] All ER (D) 271 (Oct) (£1k DNPL supported in same way)

<sup>170</sup> [2001] UKHL 49 at [30], [38]–[39], [59]–[61] and [108], [2002] 2 AC 732, [2001] 3 WLR 899 at 911, 914, 923 and 931, Lord Browne-Wilkinson agreeing.

<sup>171</sup> [2001] UKHL 49 at [24], [2002] 2 AC 732, [2001] 3 WLR 899 at 910 and at [39] per Lord Steyn, Lord Browne-Wilkinson agreeing, (‘damages for disappointment’) per Lord Clyde.

<sup>172</sup> This is in line with the suggestion I made in Furmston ed *The Law of Contract* (1999) para 8.60

<sup>173</sup> *Woolfson v Gibbons* [2002] All ER (D) 69 (Jan) at [89]; *Boynton v Willers* [2003] EWCA Civ 904, [2003] All ER (D) 61 (Jul) at [34] per Potter LJ; *Eiles v Southwark London Borough Council* [2006] EWHC 1411 (TCC), [2006] All ER (D) 237 (Jun) (£1,000 award for inconvenience of five years' occupancy of house with cracks in the walls); *Iggleden v Fairview New Homes* [2007] EWHC 1573 (DCC) (£750 pa awarded for continuing inconvenience of ‘snagging’ defects in interior and driveway of house); and *Haysman (Glen) v Mrs Rogers Films Ltd* [2008] EWHC

pecuniary losses was not necessarily excluded because the defendant's contractual undertaking was only to use reasonable care in the provision of a service rather than having guaranteed the achievement of any result.

There are two related sub-categories of contracts in respect of which DNPL are available.

**Contracts for the provision of enjoyment** In *Jarvis v Swans Tours*<sup>174</sup> the Court of Appeal departed from earlier authority and awarded modest<sup>175</sup> damages for disappointment and mental distress in respect of the breach of a contract to provide a 'package' holiday.

According to Lord Denning, such damages may be awarded for the breach of a 'contract to provide entertainment and enjoyment'<sup>176</sup>. The availability of such damages in relation to contracts to provide holidays is now well settled<sup>177</sup>. Similar damages have been awarded against those who have contracted to provide transport<sup>178</sup>, photographic services<sup>179</sup>, entertainment<sup>180</sup>, clothing<sup>181</sup> or accommodation<sup>182</sup> for weddings<sup>183</sup>. The principles have also been applied by analogy in a case concerning the negligent storage of semen, on the basis that the object of the storage arrangements, to maintain the possibility of the claimants becoming

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2494 (QB), [2008] All ER (D) 271 (Oct) per Sweeting QC (sitting as deputy judge) at [31]–[33] (non-pecuniary damages of £1,000 awarded for anxiety and distress arising from the poor condition a film company left his house in).

<sup>174</sup> [1973] QB 233, CA

<sup>175</sup> £125 (contract price £63.45).

<sup>176</sup> [1973] QB 233 at 238, CA.

<sup>177</sup> *Jackson v Horizon Holidays* [1975] 3 All ER 92, [1975] 1 WLR 1468, CA; *Newell v Canadian Pacific Airlines Ltd* (1976) 74 DLR (3d) 574; *Kemp v Intasun Holidays Ltd* [1987] 2 FTLR 234, CA. *The Mikhail Lermontov* [1991] 2 Lloyd's Rep 155 (Supreme Court of New South Wales); *Milner v Carnival plc* [2010] EWCA Civ 389, [2011] 1 Lloyd's Rep 374. Compensation may also be payable under the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288 inter alia in respect of reliance upon 'misleading information' (reg 4). For a recent application see *Moore v Thompson Holidays* [1998] CLY 1425. Note that international carriage by air is governed by the Montreal Convention, with damages restricted to monetary loss: see *Cowden v British Airways plc* [2009] 2 Lloyd's Rep 653; cf *O'Carroll v Ryanair* (2009) SCLR 125.

<sup>178</sup> *Chande v East African Airways Corpn* [1964] EA 78, and *Cole v Rana* [1993] CLY 1364.

<sup>179</sup> *Diesen v Samson* 1971 SLT 49 (Sheriff Court of Lanark at Glasgow – recovery was apparently only restrained by principles of remoteness); *Wilson v Sooter Studios* (1989) 55 DLR (4th) 303.

<sup>180</sup> *Dunn v Disc Jockey Unlimited Co Ltd* (1978) 87 DLR (3d) 408.

<sup>181</sup> *Hardy v Losner Formals* [1997] CLY 1749.

<sup>182</sup> *Morris v Britannia Hotels Ltd* [1997] CLY 1748.

<sup>183</sup> Cases in Canada have allowed recovery in a wider range of circumstances, eg *La Fleur v Cornelis* (1979) 28 NBR (2d) 569 (failed cosmetic surgery).

fathers, bore close similarity to contracts for the provision of enjoyment<sup>184</sup>. Cases involving the disruption of wedding arrangements have been said to justify a higher level of award than those concerning ruined holidays<sup>185</sup>.

This head of recovery of DNPL was examined by the House of Lords in *Farley v Skinner*. Lord Steyn said that damages for disappointment and mental distress were available when it was ‘... a major or important object of the contract to give pleasure, relaxation or peace of mind’<sup>186</sup>, Lord Hutton endorsed a similar, though perhaps broader, principle.<sup>187</sup> and Lord Scott said that such damages would be awarded where the claimant ‘... was deprived of the contractual benefit to which he was entitled’<sup>188</sup> Notwithstanding the different formulations it is clear that damages under this head of recovery are not only available where the provision of an amenity, however defined, is the sole object of the contract. In *Farley* a decision to this effect, relied upon by the Court of Appeal was overruled<sup>189</sup> and a case where non-pecuniary damages were awarded to the purchaser of a car whose holiday was ruined when it broke down was approved<sup>190</sup>. As a car may be used for many and mixed purposes this case was recognised as proceeding upon a more generous test of recovery than that propounded in

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<sup>184</sup> *Jonathan Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37 at [57]. There is some confusion in the case as to whether the analogy is with contracts for the provision of enjoyment or peace of mind. .

<sup>185</sup> *Morris v Britannia Hotels Ltd* [1997] CLY 1748 confirming *Cole v Rana* [1993] CLY 1364. This might not be the case where the holiday is itself out of the ordinary; see *Milner v Carnival plc* [2010] EWCA Civ 389, [2011] 1 Lloyd’s Rep 374 where a 106-day cruise was held out as ‘a legendary experience’ where the passengers were guaranteed ‘star treatment’ (total damages for non-pecuniary loss of £8,500 awarded to two claimants).

<sup>186</sup> [2001] UKHL 49 at [24], [2002] 2 AC 732, [2001] 3 WLR 899 at 910 per Lord Steyn, Lord Browne-Wilkinson agreeing, and at para 39 (‘damages for disappointment’) per Lord Clyde. Cf *Cowden v British Airways plc* [2009] 2 Lloyd’s Rep 653 at [21], which states the requirement more strictly as that ‘...the relevant contract has its *main purpose* the provision of... pleasure’ (emphasis added), and is to that extent wrongly decided (*Farley v Skinner* was not considered). For a succinct, but obiter, summary of this evolution see *Jonathan Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 1 (discussing action in tort and bailment against sperm bank which caused loss of donors’ samples).

<sup>187</sup> [2001] UKHL 49 at [51], [2002] 2 AC 732, [2001] 3 WLR 899 at 920.

<sup>188</sup> [2001] UKHL 49 at [106], [2002] 2 AC 732, [2001] 3 WLR 899 at 931, Lord Browne-Wilkinson agreeing.

<sup>189</sup> *Knott v Bolton* (1955) 11 Const LJ 375.

<sup>190</sup> *Jackson v Chrysler Acceptances* [1978] RTR 474. The claimant had specifically informed the vendor that he intended to take the car abroad on holiday. See to similar effect *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All ER 220 (new car broke down on motorway after 140 miles) which was not referred to by the House of Lords. See also the Canadian case of *Wharton v Tom Harris Chevrolet Oldsmobile Cadillac Ltd* [2002] 3 WWR 629.



Jarvis v Swan Tours. Nonetheless damages for loss of enjoyment will continue to be inappropriate for purely commercial contracts where ‘contract-breaking is treated as an incident of commercial life which players in the game are expected to meet with mental fortitude’<sup>191</sup>. In a recent case Rix LJ commented that ‘A Hepplewhite chair, much as it might delight its owner by its uniqueness, irreplaceability or beauty ... once [its] value has been found is not to be made the subject of a further head of damage ... depending on whether it is ... more or less loved’<sup>192</sup>. Consequently damages for disappointment and mental distress have been refused in actions against solicitors retained to convey business premises<sup>193</sup> and advise on economic matters<sup>194</sup> or ancillary relief in matrimonial proceedings<sup>195</sup>, and the sale of dental<sup>196</sup> and physiotherapy<sup>197</sup> practices.

**Contracts to provide peace of mind or freedom from distress** Where it is a major or important part of a contractual undertaking that the claimant thereby secures peace of mind or freedom from distress the breach of that contract may be compensated by an award of DNPL<sup>198</sup>. Contracts which fall within this category include the employment of a surveyor<sup>199</sup>, the retention of a solicitor to obtain a non-molestation order<sup>200</sup> or to obtain orders prohibiting the removal of children from the claimant's care<sup>201</sup>, or to advise on criminal proceedings<sup>202</sup>, a

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<sup>191</sup> *Johnson v Gore Wood & Co* [2002] 2 AC 1, [2001] 2 WLR 72 at 108 per Lord Cooke. To similar effect see *Hayes v James & Charles Dodd* [1990] 2 All ER 815 at 823, CA per Staughton LJ.

<sup>192</sup> *Voaden v Champion* [2002] EWCA Civ 89, [2002] 1 Lloyd's Rep 623, [2002] All ER (D) 305 (Jan) at [100].

<sup>193</sup> *Hayes v James & Charles Dodd* [1990] 2 All ER 815, CA. approved by Lord Scott in *Farley v Skinner*:

<sup>194</sup> *Clare v Buckle Mellows* [2005] EWCA Civ 1611, [2005] All ER (D) 331 (Dec).

<sup>195</sup> *Channon v Lindley Johnstone (a firm)* [2002] EWCA Civ 353, [2002] Lloyd's Rep PN 342, [2002] All ER (D) 310 (Mar).

<sup>196</sup> *Bloxham v Robinson* [1996] 2 NZLR 664n.

<sup>197</sup> *Anderson v Davies* [1997] NZLR 616.

<sup>198</sup> *Watts v Morrow* [1991] 1 WLR 1421, CA, as interpreted in *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732, and applied in *Voaden v Champion* [2002] EWCA Civ 89, [2002] 1 Lloyd's Rep 623. CF *Hamilton Jones v David & Snape (a firm)* [2003] EWHC 3147 (Ch), [2004] 1 All ER 657 at [57] where Neuberger J appears to favour a lower threshold test.

<sup>199</sup> *Watts v Morrow* [1991] 4 All ER 937, [1991] 1 WLR 1421, CA; *Farley v Skinner* [2001] UKHL 49, [2001] 4 All ER 801.

<sup>200</sup> *Heywood v Wellers* [1976] QB 446, CA.

<sup>201</sup> *Hamilton Jones v David & Snape (a firm)* [2003] EWHC 3147 (Ch), [2004] 1 All ER 657.

<sup>202</sup> *Boudreau v Benaiiah* (1999) 182 DLR (4th) 569.

contract to provide disability<sup>203</sup> or other insurance,<sup>204</sup> contracts to provide burial services,<sup>205</sup> a contract with an airline when baggage was delayed<sup>206</sup>, a contract to use the claimant's house as a film location<sup>207</sup>, and a bailment of semen to a sperm bank<sup>208</sup>. Contracts for the provision of enjoyment are clearly related to contracts for peace of mind or freedom from distress; the former are concerned with the provision of pleasure, and the latter with the avoidance of displeasure. However, they are nonetheless distinct, with neither description capturing the essence of the other. Would anyone describe a contract with a lawyer or a cemetery as a contract for the provision of enjoyment?

## CONCLUSION

Three major conclusions emerge from this study. First the area of DNPL in contract and tort exhibits a strong and increasing preference for tariff based awards. This trend gained considerable momentum after the publication of the first version of the current JC Guidelines in 1992. However this wider study of DNPL has been able to trace this preference through the development of conventional tariffs used in the tort of false imprisonment and in relation to discrimination claims. The most developed category of DNPL in contract, damages for physical inconvenience, displays a similar approach with an accepted conventional norm while the developing categories of recovery in contract (ie where a major part of the contract is the provision of pleasure or peace of mind) also display a growing concern with modest predictable awards. The predictability of tariff and conventional sum based recovery helps encourage out of court settlements.

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<sup>203</sup> *Warrington v Great-West Life Assurance Co* (1996) 139 DLR (4th) 18.

<sup>204</sup> *Beird v Westinghouse Canada Inc* (1999) 171 DLR (4th) 279.

<sup>205</sup> *Lamm v Shingleton* 55 SE 2d 810 (1949) and *Mason v Westside Cemeteries* (1996) 135 DLR (4th) 361.

<sup>206</sup> *Haysman (Glen) v Mrs Rogers Films Ltd* [2008] EWHC 2494 (QB), [2008] All ER (D) 271 (Oct).

<sup>207</sup> *O'Carroll v Ryanair* (2009) SCLR 125.

<sup>208</sup> *Jonathan Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 1 at [56]–[57] applying contractual principles.

Second, the kind of lateral comparisons which this type of study facilitates encourages consistency between different categories of recovery. This mirrors existing pressures with our remedial law e.g. the justification for the recent reduction in the level of damages for defamation arose from an unfavourable comparison with damages for personal injury. An important, but as yet incomplete, aspect of this pursuit of consistency is the escape from the restrictive effect of anomalous old restrictions such as the *Addis* case upon the availability of DNPL in contract. The critique of the case developed supports its overruling..

The third conclusion is to recommend a way forward. It is suggested that the law on DNPL should be developed in a holistic way based upon the modified general categories of recovery outlined above which have their basis in the classification recently endorsed in the *Simmons* case. The case is described in the extended introduction to this paper which was written to remedy the lack of recognition that has been accorded to this remarkable and important decision. It is been further suggested that in the future any restrictions upon the availability of DNPL should arise from the limitations applicable to damages generally eg principles of remoteness etc and in this way the recovery of DNPL should be assimilated within the general interest (expectation, reliance and restitution) based classification of damages recovery. Such an approach will provide authoritative endorsement for the wider availability of DNPL as a head of damages for breach of contract.<sup>209</sup> Interestingly such an approach is consistent with: attempts to promulgate voluntary contract ‘codes’ which conspicuously fail to include any restriction upon the availability of DNPL<sup>210</sup> and ‘the real life of our lower courts’<sup>211</sup> where modest DNPL are ‘regularly awarded’ absent any theoretical debate.

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<sup>209</sup> *Hamilton Jones v David & Snape (a firm)* [2003] EWHC 3147 (Ch), [2004] 1 All ER 657 at [63]: ‘... the tendency over the past few years has been to extend, rather than restrict, the exceptions to the general principle in *Addis*’s case...’.

<sup>210</sup> eg Unidroit Principles for International Commercial Contracts 2004.

‘7.4.2 Full Compensation

(1) The aggrieved party is entitled to full compensation for harm as a result of the non-performance...

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(2) Such harm may be non-pecuniary and includes, for instance physical suffering or emotional distress.’  
(The original 1994 Unidroit Principles were republished in expanded form in 2004. They are non-binding but cast in a form which it is hoped will attract their adoption. They are frequently adopted in commercial arbitrations.)

<sup>211</sup> *Farley v Skinner* [2001] UKHL 29 at [20] per Lord Steyn.