Texas Wesleyan Law Review

Volume 11 | Issue 2 Article 15

3-1-2005

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DOI: https://doi.org/10.37419/TWLR.V11.I2.14

THE COMMON-LAW HISTORY OF NON-ECONOMIC DAMAGES IN BREACH OF CONTRACT ACTIONS VERSUS WILLFUL BREACH OF CONTRACT ACTIONS

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I. INTRODUCTION

If one word could be used to describe the historical common-law philosophy of awarding damages before the mid-nineteenth century, it would be "discretion." If one word could be used to describe the common-law philosophy of awarding damages after the mid-nineteenth century, it would be "limitation." In an era in which courts are creating many limitations on the recoverability of damages in general, one particularly interesting area of law is the recoverability of non-economic damages in breach of contract actions. For purposes of this Article, non-economic compensatory damages primarily include an award for mental or emotional distress, but can also include any other type of damages awarded to make a party whole, absent some pecuniary or economic loss, such as humiliation, embarrassment, or loss of ability to enjoy life. The limiting rules and so-called guidelines adopted by modern American courts regarding the recoverability of non-economic damages in breach of contract actions are disorganized and contradictory at best. How did the law governing this concept become so entangled?

This Article traces the common-law history of the general damages laws of the Anglo-Saxon peoples from 600 A.D. to the more limiting laws regarding recoverability of non-economic damages in breach of contract actions in the United States today. It also explores the progression of courts' control over juries, and the courts' attempt to provide meaningful guidance to juries charged with assessing damages. A common thread running throughout the centuries is how to best control verdicts with awards of excessive or inadequate damages in breach of contract actions. While the common law has certainly progressed from the early days of criminally punishing jurors who "incorrectly" assessed damages, it has created a modern maze of legal tangles and confusion for scholars and practitioners alike.

In order to properly understand how the American courts established the myriad of rules governing the assessment of non-economic damages in breach of contract actions, it is important to first explore the more general history of awarding damages under the common law.

II. THE HISTORICAL DEVELOPMENT OF ANGLO-AMERICAN DAMAGES ACTIONS

A. *Early Development of Anglo-American Damages in General*

The Anglo-American history of awarding compensation for a loss can be traced as far back as 600 A.D., when the Anglo-Saxon peoples published a schedule of payments "fixing the prices at which the wrongdoer should make *bot*, or compensation for various kinds of in-

juries."[1] This compensation varied from three shillings "[i]f anyone strike another with his fist on the nose," to twenty shillings for one who breaks the chin bone of another.[2] Although these laws fixing the scale of *bot* payments were set forth in terms of shillings, "the actual payment was ordinarily made by delivering cattle or goods at valuations established by custom."[3] The payment also included "[t]he wergild, or blood-money for the death of a man" as part of its system of compensation.[4] Some believe the scarcity of coined money in England helped to delay a more flexible approach to awarding money damages as a remedy.[5] Others believe the schedule for *bot* was set by legislation or by the courts.[6]

By 1166, the Anglo-Saxon peoples had created an action in trespass, based on a Roman model, which is credited with being the root from which most of the modern law of damages evolved.[7] Out of the action of trespass arose a practice of awarding damages, as assessed by a jury, for loss of crops and goods taken from the land.[8] Scholars believe this development of Anglo-Saxon damages law borrowed from the practice used in Roman law.[9] At least one scholar believes that there is "a substantial probability that the remedy of damages came first into English practice at about the same time that English courts began to use juries, and was, like the jury itself, a foreign importation."[10] "Trial by jury . . . [was] an aid to the [K]ing's Courts in attracting suitors who might otherwise have sought relief elsewhere, [and] was far from being restricted or emasculated by the justices. They were anxious to transfer to the jurors as many as possible of the more difficult problems presented."[11]

B. *The Court's Control Over the Role of the Jury in Assessing Damages*

Since the beginning of the practice of awarding damages in the King's Court, it was typically the role of the jury to assess the damages as best it saw fit.[12] There was no need to develop a law governing the

1. CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 22 (1935) (emphasis in original).
2. *Id.* (quoting ROSCOE POUND & THEODORE F.T. PLUCKNETT, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW 46–47 (3d ed. 1927)).
3. *Id.* at 23 n.2.
4. *Id.* at 22 n.1.
5. *Id.* at 23.
6. George T. Washington, *Damages in Contract at Common Law* (pt. 1), 47 LAW Q. REV. 345, 345 (1931).
7. MCCORMICK, *supra* note 1, at 23 (citing George E. Woodbine, *The Origins of the Action of Tresspass*, 33 YALE L.J. 799, 807 (1924)).
8. *Id.* at 23.
9. *Id.*
10. *Id.* at 24 (footnote omitted).
11. Washington, *supra* note 6, at 346.
12. MCCORMICK, *supra* note 1, at 24.

assessment of damages because the jurors were free to set the amount of the award at their own discretion.[13] However, courts soon began to widen their control over the actions of jurors, which helped to create a new body of law governing the assessment of damages.[14] This widening of control stemmed from the desire to place limits on the jury's power to assess damages so it could be better controlled and corrected.[15] Initially, it was the role of the jury to find the amount of damages as a matter of "fact."[16] Jurors were chosen from the neighborhood where the transaction occurred, and they made their damages assessments based on the oath of their personal knowledge.[17] Around the 1300s, a proceeding called the *attaint* was developed wherein a grand jury of twenty-four knights would retry cases in which the amount of damages awarded by the initial jury was excessive.[18] If the oath of the first jury was found "false," those jurors were severely punished, and the verdict was annulled. One publication from approximately 1468 detailed the punishment:

> Every one of the first Jury shall be committed to the King's prison, their goods shall be confiscated, their possessions seized into the King's hands, their habitations and houses shall be pulled down, their wood-lands shall be felled, their meadows shall be plowed up and they themselves ever thenceforward be esteemed, in the eye of the law, infamous.[19]

Due to the severity of the *attaint* and the complexity of the matters that came before the jurors, judges attempted to mitigate the harshness of the *attaint* by allowing it to be used only to reduce damages awards, or "[i]f the first jury kept within the amount claimed by the plaintiff, no attaint [would] lie for excessiveness."[20] In addition to its harshness, the *attaint* had other problems: because the *attaint* grand jury was not permanent, "[t]here was no opportunity for [the system] to build up a [set] of customary rules and practices."[21] Further, it had the ability to disregard any instructions it was given by the court—"[t]here could be no attaint against an attaint."[22]

By the early 1400s, judges began to assert more control over jury awards by simply changing the amount of the award in clear cases.[23]

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13. *Id.*
14. *Id.*
15. Washington, *supra* note 6, at 346.
16. McCORMICK, *supra* note 1, at 24.
17. *Id.* at 24–25 (citing JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE OF THE COMMON LAW at cc. II, III (1808)).
18. *Id.* at 25; *see also* Washington, *supra* note 6, at 346–47.
19. *Id.* at 25 (quoting FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE at c. 26 (about 1468)).
20. *Id.* (citing Anon., Dyer 369 b., 73 Eng. Rep. 828 (1580)).
21. Washington, *supra* note 6, at 349.
22. *Id.* at 350.
23. McCORMICK, *supra* note 1, at 26 (citing George T. Washington, *Damages in Contract at Common Law*, 47 LAW Q. REV. 351, 352 (1931)).

By the sixteenth century, the *attaint* was finally obsolete.[24] Because of the danger in the *attaint*, the true successor to the *attaint* was the procedure of setting aside the jury's verdict and granting a new trial before a second jury.[25] As stated by Lord Mansfield in 1757:

> Trials by jury, in civil causes, could not subsist now, without a power, somewhere, to grant new trials.
>
> . . . .
>
> Most general verdicts include legal consequences, as well as propositions of fact: in drawing these consequences, the jury may mistake, and infer directly contrary to law.
>
> . . . .
>
> If unjust verdicts, obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory. It is absolutely necessary to justice, that there should . . . be opportunities of reconsidering the cause by a new trial.[26]

Still, the courts initially acted only in cases where their information was certain and where the complainant gave consent. This practice lasted until roughly the middle of the seventeenth century.[27] Gradually, the courts began to change damages awards in debt actions, replevin actions, and trespass actions.[28] It is apparent that the courts of equity, by granting relief against unjust verdicts, forced the common-law courts to follow suit.[29] "And of all the ways in which equity might have intervened, the one chosen was to grant a fresh trial at law. Stimulated by this competition, the Courts in the Commonwealth period imitated the action of equity and began to grant new trials . . . ."[30] By granting new trials, the courts attempted to "create a new and milder form of *attaint*, based on certain old cases in which verdicts had been set aside because the jurors had violated the procedural rules . . . ."[31] It became of the practice to set aside verdicts based on the merits of the case, rather than because of some misconduct of the jurors.[32] Eventually, by 1726, the King's Bench became even more liberal by granting new trials for excessive damages based only on the court's discretion.[33]

> The English courts used various formulations of the test[s] for excessiveness and did not differentiate between compensatory and punitive damages for these purposes. The reported decisions also use similar terminology when analyzing economic and noneconomic

24. Washington, *supra* note 6, at 350.
25. McCormick, *supra* note 1, at 26.
26. Bright v. Eynon, 97 Eng. Rep. 365, 366 (K.B. 1757).
27. Washington, *supra* note 6, at 356.
28. *See id.* at 354.
29. *Id.* at 358.
30. *Id.* (footnote omitted).
31. *Id.* (emphasis added).
32. *Id.* at 362.
33. *Id.* at 363.

> compensatory damages, although the courts quickly recognized that reviewing these various types of damages involved very different inquiries and afforded greater deference to verdicts involving noneconomic damages. American decisions followed these English precedents, eventually settling into a pattern of reviewing all types of damages for "passion or prejudice" or inquiring whether the verdict "shocks the conscience."[34]

However, in 1763, some courts attempted to control the judge's power to grant new trials on damages awards.

> [T]he Common Pleas use[d] its tradition against new trials on damages to justify its refusal to disturb large verdicts in the civil liberty case . . . and ma[de] its distinction between contract cases where the damages are "matter of account" and tort cases where the jury's verdict will not be disturbed unless "excessive and outrageous."[35]

However, in the 1763 English case of *Huckle v. Money*, the court rejected the plaintiff's proposed absolute rule against review of damages amounts. Instead, it noted that only when the damage awards are "outrageous" and "all mankind at first blush must think so," should a court grant a new trial for excessive damages.[36] "By the second half of the eighteenth century it is thus quite evident that a fresh stage in the law of damages ha[d] begun. The amount of recovery, in contract . . . [began] to be regarded as a question of law" rather than of fact.[37] "By the close of the eighteenth century, the proposition that courts had the power to review damages awards for excessiveness and to order new trials under appropriate circumstances had gained wide acceptance in the English courts."[38] Likewise, by the mid-1900s, the American courts "began to acknowledge their role in reviewing damages awards for excessiveness."[39]

III. Placing Limits on the Jury's Assessment of Damages in Breach of Contract Actions

Looking over the historical development of the law of damages, "discretion" was the key word that embodied the philosophy of the time. After the system of *bot*, it was in the jury's discretion to assess damages, it was in the *attaint* jury's discretion whether the amount assessed was excessive, and it was within the court's discretion to determine whether to set aside a verdict and to grant a new trial.[40] But

34. Paul DeCamp, *Beyond* State Farm*: Due Process Constraints on Noneconomic Compensatory Damages*, 27 Harv. J.L. & Pub. Pol'y 231, 235–36 (2003).

35. McCormick, *supra* note 1, at 27 (quoting Sharpe v. Brice, 96 Eng. Rep. 557 (1774)) (footnote omitted).

36. Huckle v. Money, 95 Eng. Rep. 768, 769 (K.B. 1763).

37. Washington, *supra* note 6, at 366.

38. DeCamp, *supra* note 34, at 239–40.

39. *Id.* at 243.

40. George T. Washington, *Damages in Contract at Common Law* (pt. 2), 48 Law Q. Rev. 90, 90 (1932).

this system was less than ideal as it provided no reasoned set of rules or procedures to guide the jury in making its determination.[41] In an English legal treatise published in 1826, Chitty noted that, unless the parties had set forth liquidated damages within their contract, "it is, in general, entirely the province of the jury to assess the amount, with reference to all the circumstances of the case."[42] But at the same time the courts were exerting the power to set aside jury awards only in cases of excessiveness, the judges began the practice of giving the juries advance guidance regarding their findings of damages in accordance with set standards.[43] Initially, although the amount of damages was a fact

> as to which the judge would at first presumably have offered suggestions merely; . . . as standards of damages are gradually worked out for the different forms of action, particularly the contract actions, the advice [took] on the tone of instruction. We may be sure that this practice of advising the jury upon the measure of their award, even more than exercise of the power to change or set it aside, provided the main vehicle for the formulation of the rules and standards of damages.[44]

The possibility of granting a new trial made the court's instructions to the jury of much greater importance.[45] "The trial judge could now be sure, as he could not have been in the past, that his advice to the jury was of weight. And judges slowly came to use this new power to exert a greater control over the *quantum* of recovery."[46] "As decisions multiplied, and additions were made to the growing body of rules governing the assessment of damages . . . the stage was set for an attempt to state some general unifying principle."[47]

A. *Limiting Rules in Contract Law:* Hadley v. Baxendale *and Its Effect*

It is a fundamental principle of contract law that damages, generally, seek to place the non-breaching party in the position he or she would have been in had the contract been performed as promised. This principle contrasts with tort law, where the primary purpose in awarding damages is to compensate the injured party so as to place that person in the condition he or she would have been in had the tort not occurred. Although the courts cite this distinction often, the "wide generalizations" do not provide adequate guidance for juries in

41. *Id.*
42. Richard Danzig, Hadley v. Baxendale*: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249, 255 (1975) (citing J. CHITTY, A PRACTICAL TREATISE ON THE LAW OF CONTRACTS 768 (4th ed. 1850)).
43. MCCORMICK, *supra* note 1, at 27.
44. *Id.* at 27–28 (footnote omitted).
45. Washington, *supra* note 40, at 91.
46. *Id.*
47. *Id.* at 97.

attempting to apply standards of compensation or regulating the amount of damages to be given for torts and breaches of contract.[48] Therefore, the courts developed limitations on the extent of damages a party can be liable for in a contract case, and "[o]f these [limitations], the most constantly used [is] the principle which in contract cases restricts the damages to those which were in the 'contemplation' of the parties when the contract was made . . . ."[49]

Before 1854, there were a few special rules governing damages for particular types of contract actions, including rules by some courts that indicated "damages must be the 'natural' or 'necessary' result of the breach." However, by and large, "one who failed to carry out his contract was, so far as legal theory went, liable for any and all resulting loss sustained by the other party, however unforeseeable such loss may have been."[50]

But in 1854, the law of damages in contract actions took on a more limiting role that has lasted for over 150 years in both England and the United States. The 1854 English case of *Hadley v. Baxendale*[51] is hailed as the leading case on limiting damages in breach of contract actions to those damages that were within the contemplation of the parties at the time of contracting. This limitation on the measure of damages in breach of contract actions is clearly an outgrowth of the widened control by the English judges over the jury.[52] Judges first began to exert their control by changing jury awards, then by granting new trials for excessive awards, and, finally, by giving juries advice and instruction on the matter of damages, as expressed in rules and doctrines.[53] The rule of *Hadley v. Baxendale* is a prime example of the court's willingness to exert control over the jury's power to assess damages.

Indeed, the *Hadley* decision recognized the importance of the court's role in placing limitations on the jury's ability to assess damages immediately before pronouncing its famous rule regarding the foreseeability of damages. The court set forth this principle:

> [W]e deem it to be expedient and necessary to state explicitly the rule which the Judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages. It is, indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice.[54]

48. McCormick, *supra* note 1, at 561.
49. *Id.* at 561–62.
50. *Id.* at 563–64 (footnote omitted).
51. 156 Eng. Rep. 145 (Ex. 1854).
52. McCormick, *supra* note 1, at 562.
53. *Id.*
54. *Hadley*, 156 Eng. Rep. at 150.

Indeed, Richard Danzig, in his famous article about *Hadley v. Baxendale*, stated that the judge's statements in the *Hadley* decision were remarkable because they held "that the trial judge, and in case of his error, the appellate judge, ought to preempt a local jury in determining commercial error, even though the issue appears to be one of fact and not one of law."[55] Danzig went on to note, "These latter propositions serve to underscore an important, although generally less noticed, procedural innovation corresponding to the substantive change effected by *Hadley v. Baxendale*: the case not only modifies instructions to juries, it also directs judges to keep some issues from the jury."[56]

Thus, after setting forth that the court's proper role is to guide the jury by pronouncing rules upon which the jury should base its decision regarding damages, the *Hadley* court expressed its most famous rule of contract damages:

> Now we think the proper rule in such as case as the present is this: - 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. 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.[57]

Some scholars propose that the source of the *Hadley* rule came from the influence of a scholar named Pothier, who was of great influence during this period and who developed the contemplation theory, as well as scholars named Chitty, Kent, and Baron Parke, the latter of

55. Danzig, *supra* note 42, at 254.

56. *Id.*

57. *Hadley*, 156 Eng. Rep. at 151.

whom had actually articulated the contemplation theory before *Hadley*.[58]

Nonetheless, *Hadley* was immediately recognized as being a leading authority on contract damages law.[59] From this rule, many cases have attempted to articulate exactly for what the decision in *Hadley* should stand. One particularly insightful English case set forth six propositions that grew out of the *Hadley* decision and its progeny. In 1949, the English case of *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*,[60] stated the six propositions. First, although it is well settled that the governing purpose of damages is to place the non-breaching party in the position he would have been in had the contract been observed, "[t]his purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable."[61] This, observed the court, "is recogni[z]ed as too harsh a rule."[62] Second, in cases of breach of contract, the non-breaching party may only recover for the loss actually resulting from circumstances that were reasonably foreseeable at the time of contracting.[63] Third, what is reasonably foreseeable at the time of contracting will depend on the knowledge the parties possess.[64] Fourth, knowledge the parties "possess" can mean either imputed or actual. As a reasonable person, parties are assumed to know the ordinary course of things and, therefore, what loss may result from a breach of contract in that ordinary course.[65] "This is the subject-matter of the 'first rule' in Hadley v. Baxendale."[66] But there may also be special circumstances, outside the ordinary course of things, "that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable."[67] Fifth:

> In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate, not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result . . . .[68]

58. Washington, *supra* note 40, at 103 n.72, 104; *see* Danzig, *supra* note 42, at 257.
59. Washington, *supra* note 40, at 104.
60. [1949] 1 All E.R. 977 (C.A.).
61. *Id.* at 1002.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 1003.
68. *Id.*

And finally, in order to be recoverable, it is not necessary to prove that the breach must "necessarily" result in the loss.[69] Rather, it is enough to foresee that it was "likely" to result.[70]

B. *Adopting the* Hadley *Rule in the United States*

Not long after the *Hadley* decision was announced in England, news of the decision swept to the United States. Although adoption of the rule was nearly universal, it did garner some initial criticism in the American courts. In 1883, the Alabama Supreme Court criticized the rule and stated of the *Hadley* decision:

> We are aware that the language, or phrase we have been criticising, has been repeated and re-repeated in many judicial opinions. It has come to be almost a stereotyped phrase; so general, that it may appear to be temerity in us to question its propriety. We think, however, it is in itself inapt and inaccurate, and that its import has been greatly and frequently misunderstood. It is often employed in apposition to, or as the synonym of that other qualifying clause—*the natural result of*, or *in the usual course of things*. We think this a great departure from the sense in which Baron Alderson intended it should be understood. Altogether, we think it obscure and misleading, and that an attempt to install it as one of the canons, has caused many, very many erroneous rulings.[71]

However, the Alabama decision proved to be the exception rather than the rule regarding the adoption of the *Hadley* principle. In the United States, "[t]here has been but little variation of the original phraseology in the . . . formula that damages are limited to the 'natural and probable consequences' and those which in light of the facts of which they had knowledge, were 'in the contemplation' of the parties."[72] Indeed, "[t]he same idea is occasionally expressed more simply and directly by stating that damages may be given only for those consequences of the breach which were 'reasonably foreseeable at the time the contract was entered into as probable if the contract were broken.'"[73]

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69. *Id.*
70. *Id.*
71. Daughtery v. Am. Union Tel. Co., 75 Ala. 168, 177–78 (1883) (emphasis added).
72. McCormick, *supra* note 1, at 567 (footnote omitted).
73. *Id.* at 567–68.

IV. EXAMPLES OF THE TANGLED WEB OF AMERICAN NON-ECONOMIC DAMAGES DECISIONS IN BREACH OF CONTRACT ACTIONS

A. *How Did* Hadley *Influence Non-Economic Damages in Breach of Contract Actions in the United States?*

It is clear that the rules limiting damages awards grew piecemeal out of the *Hadley* decision.[74] Our courts have taken a successive series of steps since that time "limiting the damages for breach of contracts so as to satisfy the desires of the business man without unduly sacrificing the interests of his customers . . . ."[75] Because of the piecemeal nature of the decisions, American courts have struggled to come up with consistent and uniform rules governing damages actions in general. More specifically, the courts have needlessly complicated the rules governing non-economic damages awards in breach of contract actions. There are distinct challenges to the courts in reviewing non-economic damages awards.[76] Juries are often not given proper guidance on how to "value intangible harms," except where it comes from their own personal experiences.[77] Therefore, the development of a disorderly set of rules has occurred in American courts, often adopted on an ad-hoc basis.

While there is a legal presumption in a typical breach of contract action that the aggrieved party will suffer some sort of economic or pecuniary loss, the same is not legally presumed if the breach of contract claim is for mental or emotional distress.

> Most contracts which come before the courts are commercial contracts. The pecuniary interest is dominant. When such a bargain is made, it may well be contemplated that, if one party fails to carry it out, financial loss may be inflicted on the other, and that he will sustain disappointment and mental suffering therefrom. Nevertheless, the courts will uniformly deny recovery for mental distress caused merely by such a business or financial loss. This is a rule of policy defining the limits of business risk.[78]

"It is foreseeable that the aggrieved party will often be unhappy after a breach and the breach may even cause some mental pain and suffering. Notwithstanding such foreseeable results, courts have been particularly reluctant to allow damages for emotional distress in contract actions."[79] "Courts have long recognized the challenges posed by noneconomic damages, particularly with respect to reviewing those damages for excessiveness. Unlike economic damages, . . .

74. *Id.* at 581.
75. *Id.*
76. DeCamp, *supra* note 34, at 257.
77. *Id.*
78. MCCORMICK, *supra* note 1, at 592–93 (footnote omitted).
79. JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 123 (4th ed. 2001).

noneconomic damages necessarily involve considerations beyond the facts of a given case."[80]

Therefore, the general rule regarding mental or emotional distress in breach of contract actions is that such awards are not allowable. Some courts have stated that the justification for such a rule is the "potential for fabricated claims."[81] Other commentators have explained the rule as limiting the potential for large damage claims that are wholly disproportionate to the "modest consideration" exchanged between the parties[82] or because recovery would result in disproportionate compensation.[83] And while other "courts have reached this result because such damages are too remote to have been within the contemplation of the parties, it seems apparent that the courts have forged 'a rule of policy defining the limits of business risk.'"[84]

However, this "policy" of not allowing emotional distress in breach of contracts "may not seem just . . . even though that loss was foreseeable and has been proved with reasonable certainty."[85] Therefore, the "generalization in this form is probably too sweeping to be useful, and perhaps it might properly be limited."[86] Consequently, when the plaintiff's interest is not merely pecuniary, but involves the plaintiff's personal comfort, aesthetic interests, or family relations, "then the considerations of policy are different, and the courts are less uniform in their treatment of the problems."[87] Furthermore, the courts have carved out exceptions to the general rule when the breach is willful or wanton in nature or if the breach causes bodily harm. Thus, courts have frequently allowed non-economic damages in breach of contract actions, despite forging the limiting rule, and clearly "have not applied it inflexibly."[88]

B. *Examples of How the Exceptions May Have Swallowed the Rule*

As Professor Douglas J. Whaley stated, "Surveying all of the cases dealing with emotional distress recovery in contract actions, one comes to the uncomfortable result that a majority rule does not exist."[89] In fact, Whaley noted that the doctrinal confusion about when to apply the exceptions to the general rule "has led to sloppy analysis,

80. DeCamp, *supra* note 34, at 257.
81. Picogna v. Bd. of Educ., 671 A.2d 1035, 1037 (N.J. 1996).
82. E. ALLAN FARNSWORTH, CONTRACTS § 12.17 (3d ed. 1999).
83. *Id.*
84. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 14.5 (5th ed. 2003) (quoting CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 145 (1935)) (footnote omitted).
85. FARNSWORTH, *supra* note 82, § 12.17.
86. MCCORMICK, *supra* note 1, at 592.
87. *Id.* at 593.
88. FARNSWORTH, *supra* note 82, § 12.17.
89. Douglas J. Whaley, *Paying for the Agony: The Recovery of Emotional Distress Damages in Contract Actions*, 26 SUFFOLK U. L. REV. 935, 946 (1992).

bad policy, and results that are indefensible using a 'person on the street' fairness test."[90] In an attempt to show the disarray in the cases, below is a limited survey of a few cases involving non-economic damages in breach of contract actions.

1. The Willful Exception

In 1932, Professor McCormick proposed, "Our rules should sanction, as our actual practice probably does, the award of consequential damages against one who deliberately and wantonly breaks faith, regardless of the foreseeability of the loss when the contract was made."[91] Escape from the harshness of the general rule lies "in the suggestion that, where the breach of contract is wanton or reckless, damages for distress may be given . . . . This exception at some future day may come to swallow up the rule."[92]

A recent decision that gives an insightful discussion of non-economic damages involving the willful breach of an insurance contract came from the Colorado Supreme Court in 2003. In *Giampapa v. American Family Mutual Insurance Co.*,[93] the court clarified that non-economic damages are available when an insurer willfully and wantonly breaches its insurance contract. In that case, the insured suffered serious injuries in an automobile accident, including spinal fractures, head injuries, and severe numbness in his arms and legs.[94] The insured had purchased a "deluxe" insurance policy, paying higher premiums that entitled him to additional benefits.[95] His physicians recommended intensive physical therapy, including hydrotherapy, treadmill walking, and strengthening exercises, all of which required him to drive approximately sixty miles, three to five days a week, to attend the sessions.[96] When the strain of the commute to physical therapy became intolerable, his physicians recommended he receive therapy at home, including a special therapeutic chair and a hot tub.[97]

The insurance company was advised of the physicians' medical opinions regarding the home medical equipment, but it repeatedly refused to pay for it.[98] Additionally, the insurance company failed to pay Giampapa's medical bills and paid others late, and, as a result, Giampapa received numerous collection notices concerning his failure to pay for services.[99] Consequently, Giampapa was required to con-

90. *Id.* at 954.
91. MCCORMICK, *supra* note 1, at 581.
92. *Id.* at 598 (footnote omitted).
93. 64 P.3d 230 (Colo. 2003) (en banc).
94. *Id.* at 234.
95. *Id.*
96. *Id.*
97. *Id.* at 234–35.
98. *Id.* at 235.
99. *Id.*

tinue the sixty-mile drive to physical therapy, to take large amounts of pain medications, and to endure substantial side effects.[100]

After suing for breach of contract and tortious bad faith breach of contract, the jury found that the insurance company had willfully and wantonly breached its contract with Giampapa, and it awarded him $900,000 in special damages.[101] The award of special damages was three times the amount of the medial equipment and three times the amount of the actual cost of the unpaid medical bills.[102] Eventually, the $900,000 award was vacated, and, at retrial, the jury awarded Giampapa $125,000 on the sole issue of mental anguish.[103]

Giampapa appealed the case again, eventually reaching the Colorado Supreme Court, which granted certiorari to determine whether the willful-and-wanton rule of contract law should stand, and if so, whether the entire array of non-economic damages would be available.[104] In its decision, the court noted that the state's willful-and-wanton rule dated back to the early twentieth century, "when the court of appeals first held that mental distress damages alone, meaning mental distress damages unaccompanied by physical or pecuniary loss, are available when a promisor's breach is accompanied by 'willful, insulting or wanton conduct.'"[105] In upholding the principle, it found that the willful-and-wanton rule adhered to basic contract law in that all contract damages, "whether general or special, economic or non-economic, are recoverable only if the damages were the foreseeable result of a breach at the time the contract was made."[106] It noted that the availability of non-economic damages is properly limited to "extraordinary contractual circumstances where such damages are in fact foreseeable at the time of contracting."[107] It further noted that in a typical commercial contract, non-economic damages are ordinarily "not foreseeable because only pecuniary loss is at stake."[108] However,

> [I]t is plainly foreseeable at the time of contracting that if the insurer later decides to intentionally and wrongfully abandon its agreement after the insured is seriously injured . . . physical pain and mental anguish will be probable results of the breach. Under these circumstances, it is within the clear contemplation of both parties that a breach will cause damages beyond those caused by mere economic loss. If these foreseeable non-economic damages are

100. *Id.*
101. *Id.*
102. It also awarded him an additional $300,000 in economic and non-economic damages for the tort action. Further, the jury awarded an additional $300,000 in punitive damages. Neither amount duplicated the special damages under the breach of contract claim. *Id.*
103. *Id.* at 236.
104. *Id.*
105. *Id.* at 239 (quoting Hall v. Jackson, 134 P. 151, 152 (Colo. Ct. App. 1913)).
106. *Id.* at 240.
107. *Id.*
108. *Id.*

> proven with reasonable certainty and the insurer's conduct is in fact willful and wanton, the breaching insurer will be held liable for those damages. This conclusion honors the parties' expectation interests and is therefore consistent with fundamental contract principles.[109]

Citing to courts in Hawaii, New Mexico, and New Hampshire, the Colorado court noted that other states also allow recovery of non-economic damages in breach of contract actions "so long as the non-economic damages were foreseeable at the time of contracting."[110]

The insurance company argued that the willful-and-wanton rule was no longer necessary because tort remedies have expanded over the decades.[111] But the court rejected the insurance company's argument, noting that the separate tort and contract remedies serve entirely different purposes.[112] Under tort law, the willful-and-wanton rule is designed to punish the wrongdoer and to encourage more socially responsible behavior by compensating the injured party.[113] However, under contract law, the willful-and-wanton rule seeks to give the parties the benefit of their bargain—it "serves the separate and distinct purpose of providing non-economic damages where they are necessary to return the parties to the position they would have been in had the contract been performed according to the parties' expectations."[114] Therefore, the court concluded that the rule under contract law had not been rendered unsound merely because of the "growing availability of tort law remedies."[115]

In reaching its conclusion, the court looked at the scope of the willful-and-wanton rule and determined that it allowed not only damages for mental anguish, but the full array of non-economic damages. Therefore, it allowed recovery of mental anguish, humiliation, distress of mind, embarrassment, and even physical pain.[116] The court stated:

> For purposes of determining a non-economic damage award, we simply find no principled method of separating "mental suffering" and "emotional distress" damages from those damages incurred by "physical pain" or "physical stress," because "mental anguish" is commonly evidenced by physical manifestations of that same anguish.[117]

Consequently, the court allowed the "full range of non-economic damages" to be recoverable in a willful breach of contract claim.[118]

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109. *Id.*
110. *Id.* at 241.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 242.
117. *Id.*
118. *Id.*

The concurrence noted that it could not overemphasize the "uniqueness" of Colorado's willful-and-wanton rule. It stated: "[W]ith the possible exception of New Jersey, Colorado is the only state to permit the recovery of noneconomic damages for a willful and wanton breach of contract."[119] The concurrence did point out, however, that a few other states may also require the breach to be willful and wanton, "but this is usually coupled with other requirements, such as that the plaintiff suffer a bodily injury."[120]

Some judges have criticized the willful-and-wanton rule because it blurs the distinction between contract law and tort law. As the concurrence in the *Giampapa* case noted regarding the willful-and-wanton rule: "The rule still focuses on the conduct of the defendant at the time of the breach, thereby blurring the distinction between contract and tort."[121] The court further noted that the laws of contract and tort reflect different policy goals, and each recognizes different remedies.[122]

> The differences between the goals of tort and contract explain the differences between the damages recoverable under each. Under tort law, liability is typically premised upon the defendant's wrongful conduct. In contrast, in contract, breach is not always thought to be a morally reprehensible action.[123]

Further, some judges and scholars propose that there are appropriate occasions where breach of contract is economically and socially beneficial, such as with the theory of "efficient breach."[124] The theory of efficient breach posits that certain breaches are not only permitted, but desired so as to reach the most economically desirable result for both parties. There is no doubt that a rule such as the willful-and-wanton rule, which focuses on the type of breach, cuts at the very heart of the efficient breach theory. As the *Giampapa* concurrence noted:

> Using a standard of culpability such as willfulness to determine liability in a contract case undermines the doctrine of efficient breach. In contract, parties are supposed to be allowed to weigh the costs of performance against the costs of breach. The costs of breach are generally calculated by considering the expectations of the parties at the time of contract. If the breaching party's gains exceed the injured party's losses, then the breach is thought to be desirable. However, the willful and wanton rule discourages a party form en-

119. *Id.* at 247 (Bender, J., concurring) (citing Gagliardi v. Denny's Rests., Inc., 815 P.2d 1362, 1370 (Wash. 1991)).

120. *Id.* at 247 n.2. (Bender, J., concurring).

121. *Id.* at 249 (Bender, J., concurring).

122. *Id.* at 250 (Bender, J., concurring).

123. *Id.* at 250–51 (Bender, J., concurring).

124. *Id.* at 251 (Bender, J., concurring).

gaging in such a balancing test because it punishes intentional breaches.[125]

As can be seen by the supporters and critics of the rule, the willful-and-wanton exception is still unsettled law. Perhaps one of the most challenging thoughts regarding the willful-and-wanton exception is whether it truly adheres to the *Hadley* rule regarding foreseeability. Supporters of the rule have argued that it is consistent with *Hadley* principles because the rule properly focuses on foreseeability at the time of contracting—that is, non-economic damages would be foreseeable if the parties contemplated that one side would willfully breach the contract.[126] Thus, although the supporters look at the nature of the breach, they do so in the context of imagining such a breach at the time of contracting. If imagining a willful breach at the time of contracting would result in foreseeable non-economic damages, then such damages should be recoverable under the willful-and-wanton exception to the rule. Critics argue, however, that the rule necessarily focuses on the nature of the breach, not on the foreseeable consequences of a breach at the time of contracting. Therefore, regardless of *how* the breach took place, the only recoverable damages are those that are foreseeable when the contract was entered into. Critics further argue that by focusing on the nature of the breach, the courts undermine the theory of efficient breach. The willful exception would subject a party to increased damages even if the motivation for breaching the contract was to make an economically sound decision. Perhaps, this is why the law remains unsettled—there is no true resolution to this debate so long as there are scholars who believe in the efficient breach theory of contracts and those who do not.

2. The Bodily-Harm Exception

In addition to the willful-and-wanton exception, there is an exception to the general rule that non-economic damages are non-recoverable in breach of contract actions: the bodily-harm exception. Both the first and second Restatements of Contract Law permit recovery of non-economic damages in breach of contract actions where the emotional disturbances result in bodily harm.[127] However, the conflict remains over the precise nature of the action—the first Restatement notes that the breach must be wanton or reckless in addition to resulting in bodily harm, while the second Restatement notes that where bodily harm results, the action is almost always in tort.[128] Restate-

125. *Id.* at 251–52 (Bender, J., concurring). It is important to note that not all scholars agree with the economists' theory of efficient breach.

126. *Id.* at 240 (Bender, J., concurring).

127. RESTATEMENT OF CONTRACTS § 341 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a (1981).

128. RESTATEMENT OF CONTRACTS § 341; RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a.

ment (Second) of Contracts section 353 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."[129] As contracts scholars have noted, this exception can be troubling because the second Restatement does not indicate whether an independent tort must accompany the breach of contract, especially where many courts do not require the plaintiff to classify the harm or specify the nature of the action.[130] Further, some courts have held that even though there may be a physical injury, recovery of non-economic damages may only be allowable if the particular injury was within the parties' contemplation at the time of contracting.[131]

One example where the court refused to grant non-economic damages absent physical injury was in a 1990 Oregon Supreme Court case. In *Keltner v. Washington County*,[132] a fourteen-year-old girl learned the details of the murder of a nine-year-old girl, including who the murderer was and where the murder weapon was located.[133] She was reluctant to give the information to police officials because she feared for her safety.[134] Deputies investigating the murder contacted the fourteen-year-old girl, and they orally promised her and her mother that they would not reveal her identity.[135] Thereafter, the girl shared with the police the information she had, but the police identified her as the informant in reports given to the murderer's attorney.[136] The girl and her mother filed a breach of contract suit against the county and the police, seeking damages for mental anguish resulting from the defendants' disclosure of the girl's identity.[137] The plaintiffs did not allege intentional breach, nor did they allege a special relationship with the defendants.[138]

The majority noted that there were no grounds for the court to reconsider its "well-established rule that damages are not recoverable in contract for purely emotional distress."[139] Although the court had allowed a plaintiff to recover non-economic damages in previous cases, the majority noted that those cases were distinguishable because they either dealt with personal injury or physical pain that accompanied the breach of contract claim. The court explained:

129. RESTATEMENT (SECOND) OF CONTRACTS § 353.
130. MURRAY, *supra* note 79, § 123.
131. 24 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 64:7, at 79 (4th ed. 2003) (citing Johnson v. Scandia Assocs., Inc., 717 N.E.2d 24 (Ind. 1999)).
132. 800 P.2d 752 (Or. 1990).
133. *Id.* at 753.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 758.

> "The doctrine that mental suffering accompanying personal injury or physical pain is always the subject of compensation is so firmly implanted in the jurisprudence of the several states of the Union as to become a legal maxim. In most cases, however, the mental anguish should be connected with the bodily injury and be fairly and reasonably the natural consequence that flows from it, and damages for prospective mental anguish are not recoverable as being too speculative.
>
> . . . .
>
> . . . [F]or plaintiff, no action is maintainable for purely mental distress."[140]

In contrast to the Oregon case, the court in a federal case from Illinois held that a person who agreed to be filmed for television, subject to the condition that the person's face not be revealed may sue for emotional distress damages based upon breach of that promise.[141] In that case, the plaintiff did not suffer any bodily harm; however, the court found that nothing in the Restatement (Second)

> requires actual or subjective knowledge of consequential serious emotional disturbance. All it says is the contract must be "of such a kind" that serious emotional disturbance was likely to result from its breach.
>
> That is plainly the case here. By their very nature, contracts not to invade privacy are contracts whose breach may reasonably be expected to cause emotional disturbance.[142]

The court further stated that emotional disturbance is typically the primary result of invasions of privacy claims.[143] And, although "the contract was not explicitly framed in invasion-of-privacy terms," the contract that required the filming company "to refrain from nonconsensual filming" was sufficient to put the company on notice of such a potential claim in the event of its breach.[144] The court concluded that the plaintiff did not have to plead that a "serious" emotional disturbance actually occurred. The plaintiff only needed to plead that the contract was "'of such a kind' that serious emotional disturbance was likely to result."[145]

3. The "Serious Emotional Disturbance Is Likely to Result" Exception

A third major exception to the general rule regarding non-economic damages is when the contract is such a nature that breach of it would likely cause serious emotional disturbance. While there can be many

140. *Id.* at 755 (quoting Adams v. Brosius, 139 P. 729, 730–31 (Or. 1914)) (alteration in original) (citations omitted).
141. Huskey v. Nat'l Broad. Co., 632 F. Supp. 1282, 1285 (N.D. Ill. 1986).
142. *Id.* at 1293.
143. *Id.*
144. *Id.*
145. *Id.*

types of contracts where serious emotional disturbance is likely to result, there are three subcategories where the courts are particularly willing to award non-economic damages in the event of a breach: personal contracts, contracts involving family relations, and miscellaneous contracts where serious emotional disturbance is likely. One court noted the rationale for allowing recovery of non-economic damages in these types of contracts is that generally, contracts are commercial in nature, where pecuniary interests are dominant.[146] However, the general rule is not absolute:

> 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 . . . compensatory damages therefor[e] may be recovered.[147]

Thus, in those limited circumstances, the courts have also allowed a non-breaching party to recover non-economic damages.

a. Personal Contracts

One category of contracts where most courts will award non-economic damages is when the contract is personal in nature.[148] One such example occurred in calculating damages for breach of a contract to supply dresses to a wedding party of a bride who had high social standing.[149] In that case, the court permitted the jury to consider the bride's disappointment and humiliation in not receiving the promised dresses.[150] The court noted that, although the general rule is that damages are assessed according to the amount of pecuniary loss the creditor sustained or by the gain the creditor was deprived, there are some cases where the contract is more personal in nature and damages are still due.[151] The court noted, "A contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts, are objects and examples of this rule."[152] Other examples include recovery of non-economic damages for breach of contract to perform cosmetic surgery,[153] to take photographs, or to develop film.[154]

146. Lamm v. Shingleton, 55 S.E.2d 810, 813 (N.C. 1949).
147. *Id.*
148. *See* McCormick, *supra* note 1, at 593.
149. Lewis v. Holmes, 34 So. 66 (La. 1903).
150. *Id.* at 68.
151. *Id.* at 67.
152. *Id.*
153. Sullivan v. O'Connor, 296 N.E.2d 183 (Mass. 1973).
154. McCreery v. Miller's Grocerteria Co., 64 P.2d 803, 804, 806 (Colo. 1936).

b. *Family Relations*

Another type of contract where serious emotional disturbance is likely to result when the contract involves relations with family members, such as contracts to embalm or transport the corpse of a family member. One example involved a contract where a mortician agreed to provide a hermetically sealed casket for the body of a son's deceased mother and to embalm her so that the body would "keep almost forever."[155] The son repeatedly told the mortician that he wished "to have his mother's body preserved, because she had a horror . . . of bugs and water," and the mortician repeatedly assured the son that "it would last almost forever."[156] However, about two months after the mother's body was buried, the son observed ants crawling around the receiving vault where his mother's body lay.[157] When the vault was opened, the son found that his mother's flesh had disintegrated, and the skeleton was covered with insects.[158] The night after the vault was opened, the son awoke with a terrible pressure, arose, and suffered a cerebral spasm, which caused him to fall to the floor unconscious.[159] The court allowed the son's claim for emotional distress to proceed because this was the type of contract where the "comfort, happiness, or personal welfare of one of the parties" was at stake.[160] The court noted:

> Recovery of such damages is proper . . . "[w]henever the terms of a contract relate to matters which concern directly the comfort, happiness, or personal welfare of one of the parties, or the subject-matter of which is such as directly to affect or move the affection, self-esteem, or tender feelings of that party, he may recover damages for physical suffering or illness proximately caused by its breach."[161]

c. *Miscellaneous Exceptions*

In addition to personal and family relations contracts, many courts have awarded non-economic damages on an ad-hoc basis in cases that do not neatly fit into any one exception. The myriad of cases spans from termite and pest control services contracts,[162] to shipping and transportation contracts,[163] to repairs of Mercedes Benz cars.[164] Clearly, the courts continue to struggle with a consistent rule for allowing recovery of non-economic damages in breach of contract ac-

155. Chelini v. Nieri, 196 P.2d 915, 916 (Cal. 1948) (en banc).
156. *Id.*
157. *Id.* at 917.
158. *Id.*
159. *Id.*
160. *Id.* at 916.
161. *Id.* (quoting Westervelt v. McCullough, 228 P. 734, 738 (Cal. App. 1924)).
162. Orkin Exterminating Co. v. Walters, 466 N.E.2d 55 (Ind. Ct. App. 1984).
163. Austro-Am. S.S. Co. v. Thomas, 248 F. 231 (2d Cir. 1917).
164. Pike v. Stephens Imps., Inc., 448 So. 2d 738, 743–44 (La. Ct. App. 1984).

tions. Consequently, the cases remain in disarray and do not always fit into a clear exception to the general rule. Further, there are so many of these "miscellaneous" cases that it is difficult to find a common theme or thread that connects them.

V. Conclusion

Nothing is certain when it comes to how American courts treat awards of non-economic damages in breach of contract actions. Over the centuries, as the Anglo-American common law has developed, so, too, has the law of contract damages. Specifically, awarding non-economic damages in breach of contract actions has progressed from a general rule discouraging it, to a tangled web of decisions allowing it—those decisions peppering the last 150 years since the decision in *Hadley*. But are all the exceptions necessary? Doesn't *Hadley* obviate the need for any further exceptions? Is not the rule itself the exception: no recovery *unless* the damages are foreseeable?

Is it foreseeable that if you improperly embalm a corpse, it would cause emotional distress to the family? Why carve out a special rule? Is it foreseeable that if you willfully and wantonly refuse to pay health-insurance benefits to a severely injured claimant, it would cause emotional distress to the insured? Why carve out another exception to the rule? Is it foreseeable that if you fail to deliver a wedding dress, it would cause emotional distress to the bride? Again, where is the need for a special exception? The caselaw seems to ignore the rule in trying to articulate what the rule actually means. *Hadley* itself is broad enough to cover all potential scenarios—it is flexible in that it can adjust to what would have been within the contemplation of the parties at the time of contracting.

So what has seemed to be one of the most challenging questions for the modern courts to answer perhaps is one of the simplest: What should the jury instruction be regarding an award of damages in a breach of contract action? Answer: The award should reflect those damages that were within the contemplation of the parties at the time of contracting and that were reasonably foreseeable. No exceptions (and with all due credit to *Hadley*).