Recoverability of damages for non-pecuniary losses deriving from breach of contract

Zlatin Zlatev*

Abstract: This is the first article that identifies contracts whose breach could cause non-pecuniary losses. It argues that in all cases where the outcome of the promised performance leads to something other than an enhancement of the promisee's financial standing, the breach will cause him non-pecuniary losses. This proposition provides greater consistency in the law of contract damages. It provides a powerful argument against the existing notion of partial recovery of non-pecuniary losses and replaces it with a more principled and comprehensive approach that is more closely aligned with the general conceptual framework of contemporary contract law. If the principles identified in the present article are applied, all damages, including those for non-pecuniary losses, will be recoverable when the promisee's performance interest is not satisfied.
Keywords: damages, non-pecuniary losses, performance interest

1. Introduction

The current[1] position in English law[2] is that damages for non-pecuniary losses are recoverable in two exceptional cases. The first is when the major or important[3] part of the contractual object provides pleasure, relaxation, peace of mind or another non-pecuniary benefit. The second exception is where the breach causes non-pecuniary harms[4] which are manifested in some tangible manner – the promisee suffers injury,[5] psychiatric illness[6] or physical inconvenience and discomfort.[7] It is thought[8] that in other cases the non-pecuniary losses would be typically associated with mere apprehension or dissatisfaction from the breach. In those instances, such losses are irrecoverable. [9]

It seems that the law aims to separate the non-pecuniary losses into two groups. The first includes all harms that appear to be genuine and therefore recoverable. The second group comprises of all speculative[10] or idiosyncratic[11] losses. It is thought that they should not be remedied. The present article argues that this division is unable to achieve its aim. It cannot provide an intelligible, comprehensive, and exhaustive criterion that can distinguish all true non-pecuniary losses from those having speculative or idiosyncratic nature. It will be shown that in some cases vexation or disappointment resulting from the breach of a contract do not have a speculative nature. Equally, the two exceptional instances where damages for non-pecuniary losses are currently recoverable,

* Lecturer at Northumbria University, Newcastle upon Tyne, UK. Email: zlatinzlatev@yahoo.com. I would like to express my gratitude to Charlie Webb, Jonny Hall, and the two anonymous referees for their comments on earlier drafts of this article.

[1] There are no comprehensive studies on the history of the recoverability of damages for non-pecuniary losses in English law, but for earlier positions see WR Anson, *Principles of the English Law of Contract* (Oxford: Clarendon Press, 1879) at 302.

[2] For a comparative analysis of the recoverability of damages for non-pecuniary losses in the common law jurisdictions see JD McCamus 'Mechanisms for restricting recovery for emotional distress in contract' (2008-2009) 42(1) Loyola of Los Angeles Law Review 51, generally for Australia see CJF Kidd 'The Significance of the High Court Decision in Baltic Shipping Company v Dillon' (1994-1995) 18 University of Queensland Law Journal 112, and for North America see R Cohen and S O'Byrne 'Cry me a river: recovery of mental distress damages in a breach of contract action - a North American perspective' (2005) 42(1-6) American Business Law Journal 97.

[3] See *Farley v Skinner* [2002] 2 AC 732 at [18]; compare with the old law in *Watts v Morrow* [1991] 1 WLR 1421 at 1445, where it was required that the very object of the contract was to provide pleasure, relaxation, peace of mind, or freedom from molestation.

[4] In the present work the terms 'harms' and 'losses' are used interchangeably, see J Edelman (ed) *McGregor on Damages* (Sweet & Maxwell, 20th edn, 2019) para 3-010 where similar equivalent usage of these terms seems to be adopted.

[5] *Godley v Perry* [1960] 1 W.L.R. 9.

[6] *Gogay v Hertfordshire CC* [2000] I.R.L.R. 703.

[7] *Stedman v Swan's Tours* [1951] 1 WLUK 10.

[8] E Peel (ed) *Treitel on The Law of Contract* (London: Sweet & Maxwell, 15th edn, 2020) para 20-095.

[9] *Hayes v Dodd* [1990] 2 All E.R. 815.

[10] DJ Whaley 'Paying for the Agony: The Recovery of Emotional Distress Damages in Contract Actions' (1992) 26 Suffolk University Law Review at 953–54.

[11] M Clapton and M McInnes 'Contractual damages for mental distress' (2007) 123(Jan) Law Quarterly Review at 27 and JP Tomain 'Contract Compensation in Nonmarket Transactions' (1985) 46 University of Pittsburgh Law Review at 909.

do not comprise all genuine[12] harms suffered as a consequence of the contractual non-performance. The first exception, where the object of the agreement provides some non-pecuniary gratification to the promisee, endeavours to identify a type of contracts where non-pecuniary losses can be caused. It is submitted that this fails altogether. The object of the contract cannot define the nature of the losses. The second exception includes those non-pecuniary harms, which are manifested in some tangible form. Yet this article argues that the tangible perceptibility of non-pecuniary losses is not their distinctive feature.

This is the first article that provides a mechanism for identifying exhaustively and comprehensively all types of contracts where non-pecuniary losses can be suffered. In doing so, it finds one unifying principle that explains both exceptions to the general impossibility of compensation of damages and adds to them all genuine non-pecuniary losses caused in other instances. This single principle provides a common answer to the three most important questions that the existing scholarship fails to address. The first is what those elements of the contractual relationship, which determine the presence of non-pecuniary losses, are. The second one is what causes the promisee to suffer physical inconvenience and discomfort. The third question is whether it is possible to identify other genuine non-pecuniary losses which are not included in the existing two exceptions to the rules establishing the general irrecoverability of non-pecuniary losses.

The argument in the article proceeds in three sections. The first examines why the current system of indemnification of damages for non-pecuniary losses is not plausible. The following section proposes a new system that can substitute the existing one. It describes a new method that can distinguish all contracts where non-pecuniary losses can be caused. This method is based on a new element of the contractual relationship. This is the promisee's contractual aim – the immediate outcome that follows as a result of the stipulated performance. In all cases where the aim of the contract is to provide something else apart from an enhancement of the promisee's financial position, the breach will cause him non-pecuniary losses. The last section explains how the new system of general recoverability of all damages for non-pecuniary losses can work.

2. The Existing System of Indemnification

Earlier authorities on recoverability of damages for non-pecuniary losses are inconsistent. In two cases the promisee was transported to the wrong railway station. In the first one[13] it was held that the inconvenience of having to walk to his final destination was subject to compensation. In similar circumstances in the second case,[14] damages for the inconvenience of having to arrange an alternative overnight lodging elsewhere were irrecoverable. The present rule, that no compensation for non-pecuniary losses deriving from breach of contract[15] is available, was established[16] in *Addis v Gramophone Co Ltd*.[17] A few decades later it was recognised that there are two exceptions to this general rule. The first is when some part of the contractual object provides a non-pecuniary benefit to the promisee, and the second one is when the losses that he suffers can be perceived in some physical or corporeal manner.

It could be suggested that the aim of these exceptions is to distinguish the genuine non-pecuniary losses from the general dissatisfaction or distress that are felt inevitably when the stipulated subject matter of the contract is not rendered.[18] Yet there are other cases where vexation and disappointment are consequences of the non-performance in some specific agreements.[19] The existing scholarship is unable to determine the type of contracts where these cases can occur and to fit all of them into the existing exceptions where remedies for non-pecuniary

[12] Other authors also note the necessity of distinguishing genuine non-pecuniary losses but do not identify a principle by which this could be achieved. See for example C Mitchell 'Promise, performance and damages for breach of contract' (2003) 2 Journal of Obligations and Remedies 67.
[13] *Hobbs and Wife v The London and South Western Railway Co* (1874–75) LR 10 QB 111.
[14] *Hamlin v The Great Northern Railway Company* (1856) 156 ER 1261, at 410.
[15] For an alternative interpretation of this case where the bar to recoverability of damages for non-pecuniary losses is seen to derive from the manner of breach rather than the fact of breach, see N Enonchong 'Breach of contract and damages for mental distress' (1996) 16 (4) OJLS 617.
[16] Later cases also affirm this rule, see *Watts v Morrow* [1991] 1 W.L.R. 1421.
[17] *[1909] A.C. 488*.
[18] AJ Bowen 'Watts v Morrow and the consumer surplus' (2003) 1 Scots Law Times 1 at 3.
[19] About the disappointment at not receiving an expected benefit see AS Burrows 'Mental distress damages in contract – a decade of change' (1984) LMCLQ 119, at 123 ff.

losses are available. Furthermore, these exceptions seem[20] to have become outdated as they do not take into consideration the wider interests for which contracts are concluded.

This section explains why the current system of limited recoverability of damages for non-pecuniary losses does not achieve its intended aims. The analysis explores the two existing rules establishing exhaustively[21] the cases where an award of damages for non-pecuniary harms is available. The section commences with the first rule in which some part of the contractual object provides a benefit of non-pecuniary nature. It is submitted that this rule is unable to identify the contracts where non-pecuniary losses can be suffered. After that, the second rule is explored.[22] It is suggested that the physical perceptibility of the losses is not their distinctive feature. Finally, this section compares both exceptions and examines other cases omitted by these two rules where it is possible to suffer genuine non-pecuniary losses.

A. Special Type of Contracts

It is currently accepted[23] that there is a special type of contracts where damages for non-pecuniary losses can be awarded.[24] The most commonly cited[25] authority where this was established is *Jarvis v Swans Tours Ltd*.[26] It is stated there that '[i]n a proper case damages for mental distress can be recovered in contract... One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment.'[27] In the same decision it is further clarified that 'a contract of carriage … was entirely different from that of the … present case'.[28] Then a list of the undertakings that the promisor was obliged to provide to the other party follows. This list comprises the subject matter of the contract. This list is also used to demonstrate the affiliation of the agreement from this case to that special type of contracts where the general rule of irrecoverability of damages for non-pecuniary losses does not apply.

Later cases, in an attempt to clarify the type of contracts where damages for non-pecuniary harms can be recovered, adopt different terminology. It was stated in *Watts v Morrow* that compensation was possible '[w]here the very object of a contract is to provide pleasure, relaxation, peace of mind, or freedom from molestation'.[29] It was further asserted that 'damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead'.[30] The meaning of this figurative expression cannot be construed with a sufficient certainty, but similar language is used in other cases as well. In *Farley v Skinner*,[31] it was held that '[i]t is sufficient if a major or important object of the contract is to give pleasure, relaxation or peace of mind'.[32] No further clarification about the meaning of this phrase is supplied. However, it cannot be assumed that the purpose of this formulation is to introduce a new element of the contractual relationship or a new term in the contractual legal theory without explaining its meaning. Thus, it must be concluded that this concept cannot be anything else but the subject matter of the agreement – the obligation that the promisor undertakes to confer to the other party.[33]

---

[20] E McKendrick 'Breach of contract and the meaning of loss' (1999) 52(1) Current Legal Problems 37 at 41–46 and E McKendrick 'The common law at work: the saga of *Alfred McAlpine Construction Ltd v Panatown Ltd*' (2003) 3(2) OUCLJ 145, at 167-73.

[21] *Farley v Skinner* [2002] 2 AC 732 at [14].

[22] Some authors divide this rule into two separate instances where non-pecuniary losses can be recovered: see N Andrews et al, *Contractual Duties: Performance, Breach, Termination and Remedies* (London: Sweet & Maxwell, 2nd edn, 2017) para 22-008.

[23] A Kramer *The Law of Contract Damages* (Oxford: Hart Publishing, 2nd edn, 2017) para 19-06.

[24] Some authors think incorrectly that the cases examined in this subsection are two separate types: where peace of mind was a significant object of the contract and where the defendant failed to deliver a promised benefit – M Clapton and M McInnes 'Contractual damages for mental distress' (2007) 123 LQR, at 27. In fact, English law does not recognise the existence of the latter category of cases – *Farley v Skinner* [2002] 2 AC 732 at [17].

[25] There are earlier cases with similar reasoning, see *Stedman v Swans Tours Ltd (1951) 95 S.J. 727* and *Feldman v Allways Travel Service [1957] CLY 934* and in Australia in *Athens-Macdonald Travel Service Pty Ltd v Kazis [1970] SASR 264*.

[26] *[1973] Q.B. 233*.

[27] *[1973] Q.B. 233* per Lord Denning M.R. at 237 ff.

[28] *[1973] Q.B. 233* per Edmund Davis L.J. at 239.

[29] *Watts v Morrow* [1991] 1 W.L.R. 1421 per Bingham L.J. at 1445.

[30] *Watts v Morrow* [1991] 1 W.L.R. 1421 per Bingham L.J. at 1445.

[31] *[2002] 2 AC 732*.

[32] *Farley v Skinner* [2002] 2 AC 732 per Lord Steyn at [24].

[33] For a similar understanding of the term 'object' see in BS Jackson 'Injured feelings resulting from breach of contract' (1977) 26(3) International Comparative Law Quarterly 502 at 508 and *Treitel on The Law of Contract* (n 8) para 19-059.

The same conclusion seems to be implied by other authors.[34] In many cases there is a clear indication that the term 'object' is understood narrowly and that it includes exclusively the subject matter of the agreement.[35]

This conclusion might seem plausible if the mechanism of causation of losses is examined. The losses result from the non-performance of the covenanted contractual benefit. Hence, it might be thought that certain categories of losses are caused when a specific type of subject matter is not conferred. If the promisor agrees to perform a musical, then his breach will deprive the other party of a pleasurable experience which is highly likely to cause non-pecuniary harms. Conversely, if the contract is for the sale of goods, the promisee is unlikely to suffer such losses. He would only lose his opportunity to use those goods in his commercial affairs. In other words, if the contractual subject matter provides non-pecuniary benefits to the promisee, then the non-performance seems to inflict such type of losses too.

Despite the apparent attractiveness of this approach, it is not a suitable criterion for identifying the cases where non-pecuniary harms could be caused. In *Jarvis*, the promisee arranged a winter holiday in the Alps. Nevertheless, it could be imagined that the circumstances of this journey were different. Thus, the promisee's employer, the local council, might have sent him to the Alps on a business trip where he could have been expected to complete a certain task. The subject matter of this contract could have been the same as the one from the actual case. It might have still included a welcome party on arrival, afternoon tea and cakes for seven days, Swiss dinner by candlelight, a fondue party, and a yodeller evening. All these services would have been needed to provide a suitable environment in which the promisee's assignment could have been completed. However, in such circumstances it does not appear that the promisee could suffer non-pecuniary losses. If the business trip were not successful because of a breach, the promisee's employer would have suffered pecuniary losses only.

If the subject matter of the contract could identify cases where non-pecuniary losses are caused, then in all agreements with identical subject matters the same type of losses will be suffered. Still, this assumption is not true. In contracts where a standard property survey is promised, on one occasion the breach caused non-pecuniary harms,[36] while on another[37] it did not. Non-performance of a contract for delivery of interior doors might be thought to cause non-pecuniary losses only rarely. Nonetheless, the type of losses will depend on the purpose for which these doors are procured. If the promisee purchases the doors because he wants to enjoy their aesthetic qualities or to match them with other elements of the interior of his residence, then a breach of this contract will cause non-pecuniary harms. On the other hand, if the doors are ordered with the purpose of being displayed in a shop for sale, the promisee could hardly justify anything beyond potential loss of profit.[38] Similarly, an agreement for legal representation[39] is not usually associated with a causation of non-pecuniary losses. Yet, there are cases where protection against molestation or other disturbance is sought. The breach of those contracts would lead typically to non-pecuniary harms.[40] Therefore, the contractual subject matter alone cannot be a decisive criterion for the identification of agreements where non-pecuniary losses can be inflicted.

B. Tangibility of Non-Pecuniary Losses

The second rule under which damages for non-pecuniary losses can be awarded presently comprises cases where physical inconvenience and discomfort,[41] personal injury,[42] or psychiatric illness[43] are suffered. This rule seems to

[34] See A Kramer (n 23) paras 19-08 and 19-15, where contracts from this category are referred to their subject matter and A Chandler and J Devenney 'Breach of contract and the expectation deficit: inconvenience and disappointment' (2007) 27(1) Legal Studies 126 at 130 where it is stated that this category of contracts is defined by their subject matter.
[35] See *Knott v Bolton* (1995) 45 Con LR 127 (CA) where it was held that the central object of a construction contract was to design a house, not to provide pleasure to the occupiers of the house; similar conclusion in *Farley v Skinner* [2001] UKHL 49 at [24].
[36] *Farley v Skinner* [2001] UKHL 49.
[37] *Philips v Ward* [1956] 1 W.L.R. 471.
[38] Similar example with a staircase of a house in *Knott v Bolton* (1995) 45 Con LR 127 (CA). This decision has been overruled in *Farley v Skinner* [2001] UKHL 49, at
[39] *Heywood v Wellers (A Firm)* [1976] 2 W.L.R. 101.
[40] For other similar examples see C Webb 'Performance Damages' in Virgo G. and S. Worthington (eds.) *Commercial remedies: resolving controversies* (Cambridge: Cambridge University Press, 2017) at 214.
[41] *Bailey v Bullock* [1950] 2 All E.R. 1167.
[42] *H West & Sons Ltd v Shephard* [1964] A.C. 326.
[43] *Cook v Swinfen* [1967] 1 W.L.R. 457.

include all instances where the harms are manifested in some tangible or corporeal form. The purpose of the requirement of an outward physical manifestation of the losses is not examined in the existing literature.[44] In *Watts* it was held that damages for distress are recoverable only if they are 'caused by physical consequences of the breach of contract'.[45] In *Farley* it was stated *obiter dictum* that what matters is not 'the different types of inconvenience or discomfort … but … the cause of the inconvenience or discomfort'.[46] It is then concluded that only damages for 'inconvenience and discomfort' which have 'sensory experience (sight, touch, hearing, smell etc)'[47] are recoverable.

The requirement of corporeal manifestation of the losses supplements the first rule which is explored in the previous subsection. This requirement applies to cases where the major or important part of the contractual object does not confer a non-pecuniary benefit to the promisee. These cases include commercial contracts or contracts whose object provides to the promisee primarily financial profits. In those cases, the harms that have tangible perceptibility will be remedied. Otherwise no damages for non-pecuniary losses will be awarded. Thus, it was held that no damages could be claimed where the promisee's personal preferences in a construction contract were not respected.[48] On the other hand, if defects in construction works lead to physical inconvenience, like causing damp, the promisee is entitled to damages for non-pecuniary losses.[49]

These two examples illustrate the unfair outcomes that follow from the application of the requirement of tangible manifestation of the losses.[50] In both cases the damages seem to be equally meritorious and there is no principled explanation of their separate treatment. This has not remained unnoticed. In one of the speeches[51] delivered in *Farley* it was clarified that the cause of the physical inconvenience must be sensory. In two other speeches[52] the physical nature of the inconvenience was dismissed altogether. This problem is remarked upon in the legal literature,[53] but the model that is proposed to substitute the existing requirement of tangible perceptibility of the losses does not explain how it is possible to identify contracts where genuine non-pecuniary losses can be caused.

Further objections against the requirement of tangibility of the losses can be raised. There is no direct relationship between the physical manifestation of the breach and the corporeal nature of the losses. The breach might have a physical form of instantiation, but it could inflict losses that do not have any tangible existence at all. Thus, because of contractual non-performance a limb might be broken. The breach would consist of the physical act that leads to the injury, but the losses will not have any corporeal materialisation. They could include the medical expenses that will be incurred and the missed profits that will not be realised, along with all distress, pain, and vexation suffered as a consequence of the injury. In other cases, the non-performance might have intangible form, but the losses that it would cause could have corporeal existence. If a fence needs to be painted, the promisor's failure to do so may not consist in any action of physical nature. Despite that the losses will have a sensory existence. It will be visible that the fence is undecorated. This could deprive the promisee of the purported aesthetic enjoyment of the decorated fence or from an opportunity to sell his property at a higher price that could have been achieved had the contract been performed.

On the other hand, the contractual performance could affect a material object – a house for purchase,[54] a vehicle for repair,[55] or pets for transportation.[56] These objects are not identical with the subject matter of the contractual

[44] See *Treitel on The Law of Contract* (n 8) para 20-092, H Beale (ed) *Chitty on Contracts* (London: Sweet & Maxwell, 33rd edn, 2018) para 26-153 and A Chandler and J Devenney (n 34) at 144, where it is confirmed that the origin of this rule is obscure, but its purpose is explained only in terms of the requirement of foreseeability of losses.
[45] [1991] 1 W.L.R. 1421, per Ralph Gibson, at 1441
[46] [2001] UKHL 49, per Lord Scott of Foscote, at [85].
[47] [2001] UKHL 49, per Lord Scott of Foscote, at [85], and see also at [37] per Lord Clyde.
[48] *Knott v Bolton* (1995) 45 Con LR 127 (CA).
[49] *Rawlings v Rentokill Laboratories Ltd* [1972] EGD 744.
[50] Similar conclusion but without further explanation in D Yates 'Damages for non-pecuniary loss' (1973) 36(5) MLR 535 at 536.
[51] [2001] UKHL 49, per Lord Scott of Foscote, at [85].
[52] [2001] UKHL 49, per Lord Steyn at [30] and per Lord Clyde at [35].
[53] See A Chandler and J Devenney (n 34) at 149 ff, who argue that the requirement of physical inconvenience or discomfort should be applied in view of the rules of remoteness.
[54] *Watts v Morrow* [1991] 1 W.L.R. 1421.
[55] *Jackson v Chrysler Acceptances Ltd* [1978] RTR 474.
[56] *Newell v Canadian Pacific Airlines Ltd* (1977) 14 OR (2d) 752 (Co Ct).

relationship – preparation of a property survey, repair of an automobile, or conveyance to a certain destination. In those agreements, the physical existence of these objects might be confused with the materialisation of the losses which are inflicted if, as a result of the breach, some of these objects are harmed. In *Watts* the promisor had to prepare a property survey. The information in this survey did not have corporeal nature, but there was a material object with regard to which the contract was formed – the house that the promisees wanted to buy. Their inconvenience was caused by the physical works that needed to be done on this object. Even so, the losses that the promisees suffered did not have any tangible materialisation.

C. Relationship Between the Existing Rules

The existing rules on compensation of damages cannot capture all cases where genuine non-pecuniary harms are inflicted. The contemporary legal scholarship is unable to explain why this is so. Most writers[57] believe that both exceptions to the general principle of irrecoverability of damages for non-pecuniary losses supplement each other. Yet there is no unanimity about the nature of the relationship between these two rules and the necessity of their parallel existence. Some authors[58] think that the first rule represents a loss of bargain for a non-pecuniary benefit and that it protects the promisee's expectation interest. The second rule is understood to comprise cases where the breach harms his physical or mental integrity. It is claimed that this affects the promisee's reliance interest.

The understanding that there is more than one[59] separate interest in the performance of the contract has been criticised[60] and, in any case, the model of multiple promisee's interests cannot explain the existing rules of limited recovery of damages for non-pecuniary losses. The different types of interests are not thought[61] to be mutually exclusive. This is not true about the exceptional cases where damages for non-pecuniary losses can be awarded. Both rules establish alternative grounds for compensation. Therefore, the nature of the various contractual interests is different than the nature of the rules of limited recoverability of damages. These rules aim to determine the cases where damages for non-pecuniary losses are available. The various contractual interests are not concerned with the question of the existence of the damages. They purport to determine their scope. This is why the different contractual interests cannot explain the reasons for the partial recoverability of damages for non-pecuniary losses. This is the question that the present work aims to address.

A plausible answer to this question should be able to explain a few types of cases. First, there are some contracts whose subject matter is thought to provide a non-pecuniary gratification to the promisee, but their non-performance does not cause him non-pecuniary losses. This would be the case where the promisee visits an opera concert with the sole purpose of writing a critical review of the performance. Secondly, disappointment, frustration or vexation caused by the breach of purely commercial contracts can lead to nervous breakdown or other psychiatric illnesses. In those cases, no damages for non-pecuniary harm should be recoverable despite the corporeal manifestation of the losses.[62] Lastly, there might be contracts whose subject matter is not thought to provide pleasurable experience, entertainment, or freedom from molestation, but their non-performance can still cause non-pecuniary losses.[63]

English law and the contemporary legal scholarship do not address these instances appositely. The contractual subject matter cannot determine the type of harms that the breach causes. The same is true about the corporeal manifestation of the losses. Their tangibility does not seem to be related to their credibility or genuineness. Furthermore, the relationship between the two rules of partial recoverability of damages is confusing and irrational. While the first rule might be associated with the promisee's contractual entitlement to receive something of non-pecuniary nature, the requirement of corporeal manifestation of the harms, regardless of the ways in which this might be understood, seems to be arbitrary and unjustified. This requirement is not related to

[57] See e.g. D Capper 'Damages for distress and disappointment – the limits of Watts v Morrow' (2000) 116 L.Q.R. 553.
[58] F Dawson 'General Damages in Contract for Non-Pecuniary Loss' (1983) 10 (June 1983) NZULR, at 237.
[59] LL Fuller and WR Perdue Jr, 'The Reliance Interest in Contract Damages' (1936) 46 Yale Law Journal 52 and (1937) 46 Y.L.J. 373.
[60] D Friedmann 'The performance interest in contract damages' (1995) 111 L.Q.R. 628 and C Webb 'Performance and compensation: an analysis of contract damages and contractual obligation' (2006) 26(1) OJLS 41.
[61] *Chitty on contracts* (n 44) para 26-022.
[62] [2001] UKHL 49, per Lord Scott of Foscote, at [85].
[63] *Jackson v Chrysler Acceptances Ltd* [1978] RTR 474.

the inherent nature of the non-pecuniary losses and it cannot be used for identification of genuine harms, inflicted as a result of the contractual non-performance.

3. Contractual Aims

These difficulties are not insurmountable. There is a principle which is able to identify agreements where non-pecuniary losses can be caused. This principle addresses all controversies that have been discovered in the previous section. It explains why the subject matter of the agreement cannot determine the type of losses which are caused by the breach. It distinguishes the mere disappointment and irritation of the breach from the instances where non-pecuniary losses result from the promisee's legitimate entitlement to the stipulated performance. Lastly, it identifies a number of cases which have not been captured by the existing rules of partial recovery, but where genuine non-pecuniary harms can be inflicted. This principle is based on the outcome of the contractual performance. If the promisee, as a result of the conferment of the subject matter of the agreement, aims to achieve something beyond an enhancement of his patrimonial position, then the losses that he suffers are non-pecuniary. In all other instances he suffers pecuniary losses only.

This section of the article explains how the aims which the promisee pursues with the contractual formation can define the nature of the losses that he suffers. This section introduces the notion of contractual aims and provides illustrations of some non-pecuniary aims from popular cases. Then it explains why the contractual aims are important. It is submitted that the contractual aims are the only reason for which the agreement is concluded, and that the promisee would not be interested in the performance of the contract if his aims cannot be achieved. At the end of the section it is explained how the aims can be identified.

A. What Are the Contractual Aims?

Non-pecuniary losses are inflicted only when the contractual subject matter is not rendered to the promisee. However, the nature of the subject matter cannot determine the type of harms that result from breach. Indeed, non-performance of contracts with identical subject matters can cause different types of losses[64] or no losses at all.[65] Therefore, the type of losses does not depend on the contents of the covenanted subject matter. There must be another intermediate element that leads to infliction of harms. This other element is the aim that the promisee pursues as a result of the performance. He does not merely want to receive the stipulated subject matter. He wants to use it for some further purposes. His inability to do so leads to direct causation of losses.

In *Hobbs*[66] the promisee and his companions wanted to receive the agreed railway service not solely because of their desire to be transported to a certain place. They had some consequent purpose – to be able to walk to their house from the destination to which they were promised to be conveyed. They would not had been interested in the transportation to the agreed station if they had not been able to walk to their house from there. In *Hamlin* the promisee was not transported on time to his final destination as the other party did not provide the connecting railways service. As a result of this, the promisee 'was unable to carry on his necessary affairs and business as a tailor'.[67] These were his contractual aims. The conveyance was needed only in so far as it was a necessary step to achieving these aims.

In *Jarvis*[68] *t*he promisee wanted to obtain certain holiday facilities which were the subject matter of the agreement – overnight lodging, skiing, dining, and other daily entertaining services. In case of breach their lack does not automatically and inevitably lead to non-pecuniary losses. The important element which determines the nature of the harms is the specific aim that the promisee wanted to achieve as a result of the stipulated performance – to spend some pleasurable time during his winter holiday. Hence, if the aims of the trip were different, the breach may not have led to non-pecuniary losses. The promisee's disappointment and distress were related to the non-performance, but it is only in conjunction with his aims that the breach caused him those non-pecuniary harms. The intermediate element between the non-performance and the losses were the promisee's aims. The fact that the promisee was not able to achieve these aims caused him harms.

---

[64] Compare *Watts v Morrow* [1991] 1 W.L.R. 1421 to *Farley v Skinner [2002]* 2 AC 732.
[65] For examples of such cases see *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239 (1921).
[66] LR 10 QB 111, at 112.
[67] 156 ER 1261, at 408.
[68] [1973] QB 233, CA, at 236.

In *Watts* the promisees wanted to purchase a property. They requested a survey which had to assess the structural and the general condition of a house they liked.[69] The contractual subject matter was the preparation of that survey, but the aim that the promisees aspired to achieve was something else. They did not merely desire to receive the information incorporated in the survey. They wanted to be able to assess the necessity of modernisation of the house. In *Farley*[70] the promisee desired to buy a tranquil and peaceful house in the countryside. He could choose the most suitable property if he was able to take into consideration the information that he expressly requested in the survey about the aircraft noise levels. Similarly to *Watts*, the subject matter of the agreement was the preparation of that survey. Yet, the promisee would not have been interested in the survey itself if it did not provide him an opportunity to achieve his contractual aim – to choose a suitable property which was not, inter alia, affected by aircraft noise.

In *Ruxley Electronics and Construction Ltd v Forsyth*[71] the promisee specified expressly that a pool with a certain depth was to be built in his house. The contractual subject matter was the construction of this swimming pool. One of the aims that the promisee wanted to achieve was to be able to dive safely there. This case is different from others where non-pecuniary losses were claimed. It is submitted that despite the partial non-performance, the contractual aim was attained, and the promisee did not suffer any non-pecuniary losses. [72] In any case, it could be assumed that the promisee wanted to have a swimming pool to achieve some further aims – to increase the market price of his house, to use it for leisure purposes or to be able to entertain his clients[73] or friends there. A similar conclusion could be reached in all contracts where non-pecuniary losses are suffered. The promisees would be interested in the conferment of the subject matter of the agreement only in so far as this can lead to achievement of their non-pecuniary contractual aims.

B. Why Are the Aims Important?

An agreement is concluded as the promisee wants to obtain its subject matter. The subject matter may vary incredibly – acquiring the ownership of photographs,[74] installation of new windows in a house,[75] booking a luxurious cruise around the world,[76] or having a car repaired.[77] It could not be otherwise, as the principle of freedom of contract[78] allows for liberty of choosing the subject matter of the agreement.[79] None of these contractual subject matters would have any value to the promisee if there was not a further aim that he would obtain as a result of their conferment – remembering the occasion that was photographed, enjoying the enhanced comfort of his house, having pleasurable vacation time around the world, or using his car for transportation during holiday. In all of these instances the contractual aim is achieved when, as a result of the performance, the promisee is able to use some of the purported beneficial qualities of the contractual subject matter.

The promisee might conclude various contracts that could not provide the desired goals directly. For example, the other party might have to explore the real estate market and suggest a suitable property for purchase, to offer overnight lodging in a place with certain facilities that may provide pleasurable experience, or to provide a conveyance to a certain railway station that would be closer to the promisee's final destination. Such obligations can be performed solely with the efforts that the promisor is obligated to provide to the other party. In other words, the promisor's duties are limited to conferment of the stipulated performance only. Then, the contractual aim, following the usual course of things, or an additional assistance of third parties or of the promisee himself, would amount to something more than this.

---

[69] *Watts v Morrow* [1991] 1 W.L.R. 1421, at 1424, *per* Ralph Gibson L. J.
[70] [2002] 2 AC 732 at [2].
[71] [1996] AC 344.
[72] For a similar conclusion based on a different argumentation see B Coote 'Contract damages, *Ruxley*, and the performance interest' (1997) 56(3) C.L.J. 537, at 539.
[73] A similar aim was claimed in *Watts*, [1991] 1 W.L.R. 1421, at 1427.
[74] *Diesen v Samson* 1971 S.L.T. (Sh Ct) 49.
[75] *Mitchell v Durham* [1998] CLY 1375.
[76] *Milner v Carnival plc* [2010] EWCA Civ 389.
[77] *Jackson v Chrysler Acceptances Ltd* [1978] RTR 474.
[78] *Eurico SpA v Philipp Brothers* [1987] 2 Lloyd's Rep. 215 and *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2003] 3 W.L.R. 711.
[79] There are some qualifications on freedom of contract, see *Chitty on contracts* (n 44) para 1-036 – 1-040.

The traditional understanding that could be inferred from the contractual legal theory[80] is that the subject matter exhausts the contents of the agreement. Indeed, the promisor is obliged to provide the contractual result only. He has no further commitment in respect to any subsequent aims that the other party might wish to achieve. However, even in the most simplistic cases, the promisee does not need the subject matter for its mere acquisition. There is always a further aim that he pursues. This aim is attainable as a result of the promised performance. When a material object is obtained, it is because of the promisee's intention to use some of its beneficial qualities or properties. Real estate might be purchased because of the promisee's wish to use it as a place of tranquil abode, because of an access to communal gardens[81] or merely as a good investment. When a service is rendered, it is always because of its advantageous effects on the promisee. If a pianist is hired to play some of Chopin's works, it could be because the promisee would wish to hear these performances either to get aesthetic pleasure from this, to learn how to play and make living of this, or because he might think that this will inspire him to find a solution to a complex business problem.

If viewed from such a perspective, the subject matter of the agreement is never able to satisfy the promisee's performance interest[82] alone. When the promisee achieves his contractual aims, then his performance interest will be fulfilled. This dependency might be derived from the nature of the contractual relationship too. Contractual rights have a dynamic essence. Unlike the proprietary rights, they are conceived so that a certain result is provided to the promisee. The promisee, however, would benefit from this result for a lengthier period after the contract has been performed. The promisee intends to enjoy a property for many years,[83] or to keep fond memories of celebrations long after photographs of them were taken.[84]

The aim and the subject matter of the contract are concepts that are relatively close to each other. They both represent what the promisee would receive after the performance. However, their nature and functions are different. The subject matter is the benefit that the promisor is obligated to provide to the other party. It defines the boundaries of his liability. He has no direct commitment with regard to the promisee's contractual aim. But the relationship between the promised subject matter and the contractual aims is causal – the contractual subject matter is the promisee's chosen means of pursuing the contractual aim and it is the promisor's obligation to provide those means.

It could be objected that the concept of aim introduced in this article is not so different than the notion of object as it might be derived from *Watts v Morrow*[85] or *Farley v Skinner*[86]. Even if there were some truth in this statement, the term suggested in the present article should be preferred. Its connotation is less ambiguous and provides a better opportunity for distinction between contractual subject matter and aim. While 'object' might mean more than one thing,[87] it is much clearer that the term 'aim' refers to some purpose, outcome, or result. In the instances examined in the present article this is the purpose of the contractual subject matter or the outcome of the contractual performance. No such conclusion about the concept of objective can be drawn. This term remains obscure even after a careful examination of its meaning in the above cases.

The other disadvantage of the notion of object is that it is used in a limited number of cases. It is not perceived as an element of the promisee's non-pecuniary performance interest on whose basis it is possible to distinguish all contracts where non-pecuniary losses can be caused.

C. Identification of Contractual Aims

[80] *Treitel on The Law of Contract* (n 8) paras 6-001 and 17-001.
[81] *Herrmann v Withers LLP* [2012] EWHC 1492 (Ch); [2012] P.N.L.R. 28.
[82] For a comparison between the terms 'performance' and 'expectation interest' see D Friedmann (n 60) at 632, who states that '[t]he expectation interest is simply an inappropriate term describing the performance interest'. The question of the nature of performance interest exceeds the scope of the present work. For more details on this see C Webb 'Performance and compensation: an analysis of contract damages and contractual obligation' (n 60) at 41 ff.
[83] *Farley v Skinner* [2002] 2 AC 732 per Lord Steyn at [7].
[84] *Diesen v Samson* 1971 S.L.T. (Sh Ct) 49.
[85] 1 W.L.R. 1421 at 1445.
[86] [2002] 2 AC 732 at [24].
[87] See section 2, subsection B above.

The promisor's obligation does not exceed his duty to provide the stipulated performance to the other party. The contractual aim is the outcome that the promisee would obtain from that performance. It is a consequence of the delivery of the subject matter and in that respect, it is an element of the agreement that is identifiable on the basis of the properties or qualities of the promised subject matter. There are four distinctive ways in which the aim could be identified. Firstly, it might be explicitly or implicitly derivable from the contractual terms. The parties could choose not only to agree on the subject matter that the promisee is entitled to receive, but also on the purposes for which it is to be used. Secondly, the aim could be inferable from the factual circumstances in which the agreement is concluded. Thirdly, it may follow necessarily from the nature of the promised contractual benefit. Lastly, if none of these options supports a decisive conclusion about the content of the aim, the promisee can assert unilaterally what his aim is.

The contractual terms could contain information about the aim pursued by the promisee. The identification of the aim requires interpretation[88] of the whole text of the contract. In *Farley* the promisee's aim to find a tranquil and peaceful country house was explicitly[89] implemented in the terms of the agreement. There are other cases where contractual terms might be implied in law or in fact.[90] An interesting example of a contractual aim that could be implied in law might be discovered in rental agreements. In *Liverpool City Council v Irwin*[91] the tenants' aim was to live in a property with sufficient amenities allowing satisfactory habitation. In contracts to supply goods, digital content or services a 'fitness for purpose' is required.[92]

Sometimes the factual circumstances in which the contract is concluded can reveal in part or in whole the promisee's aims. In these cases, no reference in the terms of the agreement to any of the facts surrounding the contractual formation need have been made. The parties consider that the aim is so apparent that it does not need to be explicitly specified. An interesting example of a case where a non-pecuniary aim was established could be explored in relation to hiring a premise with a good view over a central avenue from which a public event was to be observed.[93] In the terms of the agreement from this case no references to this solemn occasion had been made, but it was decided that the purpose for which the contract had been concluded was none other than the observation of these celebrations.

The contractual aim might also be derivable from the covenanted subject matter. In many cases, despite the lack of any explicit or implied stipulation with regard to the aim that the promisee pursues with the agreement, there will be an apparent goal that he would be able to achieve with the performance. Thus, in *Hobbs*[94] there is no information that at the time when the promisee and his family had bought the railway ticket, the other party had known of their final destination or of any other details about their further travel plans. Nevertheless, it was held later by the court that the aim of the obligation was to convey the promisee and his family to a place from where they could have walked to their house. In deciding so, the court would have been led by the essence of the contractual subject matter. A railway journey at a later time of the evening towards a residential suburban area could prompt the conclusion that the aim which the promisee pursued was to be transported to a closer location from where he could walk to his house or to a place where he could spend the night. An analogous assumption would have been reached if the trip was undertaken in the opposite direction at earlier hours of the day when it would be apparent that the promisee would have wanted to reach a certain destination where his planned daily engagements were.

The promisor may agree implicitly or even unwittingly not to limit the feasible ways in which the contractual subject matter might be used. This would happen if there is no covenant specifying that the subject matter might be used for certain aims only. In these cases, the promisor ought to be obligated to deliver the performance as covenanted and enable the promisee to fulfil any aim that would be consistent with the beneficial qualities and properties of the stipulated contractual benefit. Thus, a railway company operating services to an airport terminal should not be able to object that it was not aware of its customers' plans to continue their onwards journey by plane and therefore prevent them from establishing their suffering of non-pecuniary losses as a result of their

[88] Generally about interpretation, see K Lewison *The Interpretation of Contracts* (London: Sweet & Maxwell, 6th edn, 2015).
[89] *Farley v Skinner* [2002] 2 AC 732 at [2].
[90] See K Lewison (n 84) para 6.01 ff.
[91] *[1977] A.C. 239*.
[92] See for example section 10, Consumer Rights Act 2015.
[93] See for example *Chandler v Webster* [1904] 1 KB 493.
[94] LR 10 QB 111, at 112.

delayed or cancelled railway trip to the airport terminal. The promisee should be able to pursue any aim of his choosing provided that such an aim is attainable as an outcome of the performance. The promisor agrees to provide the contractual subject matter with such specific qualities and features that lead to achievement of certain aims. All these aims might be pursued by the other party. Should the promisor want to limit his liability to fulfilment of specific aims only, he can do so by including a special provision to this effect in his agreement with the other party.[95]

A closer look into the contractual relationship demonstrates that there is no obvious correlation between the nature of the stipulated subject matter and the contents of the losses suffered in the event of breach. Identical subject matters may inflict different types of harms. The relationship between the subject matter and the losses is more complex than previously observed. In the first place, the non-performance of the agreement leads to non-fulfilment of the promisee's aim. This dependency is observed in all cases of breach. Secondly, the non-fulfilment of the promisee's aim leads to infliction of losses, whose nature and extent is determined solely by the aim. This causal relationship can be discovered in all cases where the contractual aim is not achieved.

The importance of the contractual aims has not been examined previously. Their study in the present article reveals that they are the missing element which is able to identify agreements where non-pecuniary losses can be caused. The contractual aims are the beneficial outcomes that the promisee receives as a result of the conferment of the stipulated subject matter of the agreement. In cases where these outcomes lead to something else apart from, or along with, his patrimonial enrichment, then the losses that will be suffered because of the breach, will be of non-pecuniary nature. There are no other elements or special conditions related to formation,[96] or breach[97] of contract which can determine the nature of the harms that are suffered by the promisee.

4. The New System of Indemnification

Traditionally it is thought that non-pecuniary losses do not lead to "subtraction from the promisee's net wealth".[98] Other authors express similar views about the nature of non-pecuniary losses.[99] While in many cases[100] this definition might be correct, it is tautological in its essence, and it is unable to explain the harmful effects of the losses. These problems can be resolved on the basis of the conclusions reached in the previous section of this article. When the type of contracts where non-pecuniary losses are caused is known, it is possible to address three important questions which the existing legal literature has not been able to answer thus far. First, we can define the nature of non-pecuniary losses beyond the tautological statement that they do not affect the promisee's patrimonial wealth. Secondly, a more detailed picture of the injurious impact of these harms is possible. Lastly, a more comprehensive understanding about the scope of the recoverability of non-pecuniary losses is achievable.

At the start of this section, a new concept of non-pecuniary losses is proposed. It is suggested that they are the adverse outcomes of the promisee's inability to achieve his contractual aims. The advantages of this definition are demonstrated in the following two subsections. Firstly, the extent to which the non-pecuniary losses affect the promisee's performance interest is explored. It is concluded that the injurious impact of these harms is related only to the contractual aims that he pursues. The harmful effect of the non-pecuniary losses is associated neither with the value of the promisee's counter-performance nor with the value of the subject matter that he is entitled to receive. The section concludes with a submission that all damages for non-pecuniary losses, identified on the basis of the promisee's contractual aims, should be recoverable. It is explained how the idea of general recoverability proposed in this article address all concerns which the courts and the contemporary legal theory raise against this proposition.

---

[95] The promisor's liability remains always limited by the principle of remoteness of damages for non-pecuniary losses. The relationship between the remoteness and the promisee's contractual aim exceeds the scope of the present work. About the assumption of responsibility, which explains this relationship well, see A Kramer (n 23) para 14-03 ff.

[96] For the requirements of the contractual formation see J Cartwright Formation and Variation of Contracts (London: Sweet & Maxwell, 2nd edn, 2018) para 3-19 ff.

[97] For a different opinion about the relationship between the manner of breach and the nature of losses see E Veitch 'Sentimental Damages in Contract' (1977) 16 UW Ontario L Rev, at 230.

[98] S Rowan *Remedies for Breach of Contract* (Oxford: Oxford University Press, 2012), at 121.

[99] See also E McKendrick and K Worthington 'Chapter 13: Damages for non-pecuniary loss' in N Cohen and E McKendrick (eds) *Comparative Remedies for Breach of Contract* (Oxford: Hart Publishing, 2005), at 303.

[100] For exceptions see ZM Zlatev 'Approaches towards the concept of non-pecuniary losses deriving from breach of contract' (PhD thesis, London School of Economics and Political Science, 2019) available at http://etheses.lse.ac.uk/4065/, at 157.

A. What Are Non-Pecuniary Losses?

The nature of the losses suffered by the promisee is determined by his inability to achieve the contractual aim that he pursues with the agreement. In *Hobbs* the losses suffered by the promisee are described as "the inconvenience to the plaintiffs in having to walk…"[101] too long. He and his family were left at the wrong railway station, from which they had to walk to their final destination. They suffered non-pecuniary loss as a result of their inability to reach their house as planned. There is no direct connection between the subject matter of the agreement and the nature of these harms. The contract was for railway transportation service. It did not contain any covenant that the promisee and his companions would not suffer inconvenience and discomfort nor were there any references to other undertakings in the contractual terms apart from the conveyance. All the same, the scope and the injurious effect of the losses that the promisee and his family suffered was determined by the necessity of having to undertake a long and unpleasant walk in a cold and drizzly night to their house.

One of the reasons for the difficulties[102] that English legal theory encounters when explaining the scope of non-pecuniary losses is due to the lack of inquiry into their relationship with the non-fulfilment of the contractual aim. The courts are attempting to establish a direct connection between the contractual subject matter and the content of the losses. Their efforts are futile because there is no such direct connection. In *Jarvis* the harms that the promisee suffered were defined by the county court as "the difference between the price paid and the value of the holiday in fact furnished, taking into account the plaintiff's feelings of annoyance and frustration."[103] Although this perception was criticised by the Court of Appeal, it is symptomatic of the general inability on the part of the courts to define the nature of these losses. The difficulties in explaining the essence of the non-pecuniary harms is due to the lack of acknowledgement that there does not need to be any direct correspondence between the content of the contractual subject matter and the losses.

The preferable view is that the non-pecuniary losses are consequences of the promisee's inability to achieve his contractual aims. The importance of the relationship between the non-fulfilment of the contractual aim and the resulting non-pecuniary losses can be seen in all cases. In *Watts*, the promisees were not interested in obtaining the property survey in and of itself. Their intentions were to be able to determine whether the country house which they wanted to buy needed substantial renovations. This aim was not fulfilled. The promisees could not establish the true condition of the property. As a result, they were induced to purchase a house where major refurbishments were required. Upon discovery of this fact, the promisees decided to undertake the necessary construction works. This led to a significant disruption of their plans for the use of the house. They suffered "distress, worry, vexation and inconvenience".[104] All these forms of non-pecuniary losses followed as a result of the promisees' inability to attain their contractual aims. It was neither an inevitable consequence of the non-performance of the contract nor was it associated in any other manner with the subject matter of the breached agreement. The only plausible way in which the harms that were incurred in this case can be explained is on their correlation with the promisees' contractual aim.

A similar causal relationship between the non-fulfilment of the contractual aim and the losses inflicted as its result can be seen in *Farley* too. The promisee wanted to purchase a large residence where he planned to enjoy the tranquillity of the Sussex countryside. The breach deprived him of this opportunity. Two feasible chains of events could be identified here. The first concerns the hypothesis of full and exact performance. It has two consecutive elements, which are related causally – delivery of the stipulated subject matter of the agreement and achievement of the aim pursued by the promisee. The other alternative factual setting consists of three successive events which are also linked causally – breach, non-fulfilment of the contractual aim and non-pecuniary losses. The promisor did not explore the level of aircraft noise despite his explicit duty to do so. This breach led to the other party's inability to choose a suitable house for a tranquil and serene retreat, which was the aim that he pursued with the agreement. At the end, the non-fulfilment of this aim led to his diminished enjoyment of the property.[105]

---

[101] LR 10 QB 111, at 120.
[102] See for example E Macdonald 'Contractual damages for mental distress' (1994) 7 JCL, at 141.
[103] *[1973] Q.B. 233*, at 239.
[104] [1991] 1 W.L.R. 1421, at 1427.
[105] [2002] 2 AC 732 per Lord Steyn at [7].

The non-pecuniary losses are all adverse consequences of the non-fulfilment of the promisee's non-pecuniary aims in cases of breach. The accomplishment of the contractual aims as a result of the performance confers a certain benefit, advantage or gain to the promisee. If the breach does not lead to non-attainment of the contractual aim, it causes no harms – the breach itself does not amount to a loss.[106] In the same way in which the promisee is not interested in the performance *per se*, the breach does not injure him directly.[107] The promisee's inability to achieve his contractual aim does so. It deprives him of the advantageous outcome pursued with the agreement. This outcome does not derive from the non-performance of the contract. It is a consequence of the unfulfillment of the promisee's contractual aims.

B. Non-Pecuniary Performance Interest

The question about the promisee's performance interest has attracted significant scholarly attention.[108] For the purposes of the present article it is sufficient to note that the promisee's non-pecuniary performance interest is rooted in the achievement of his contractual aims. He wants to receive the covenanted subject matter only in so far as it allows him to attain the purported further outcomes that are expected to result from the performance. The promisee's interest is not related to the mere acquisition of the covenanted subject matter. This new understanding displaces the existing equilibrium of the different theories that are trying to describe the scope of the losses. The correlative relationship between the contractual breach, the promisee's inability to achieve his non-pecuniary aims and the causation of losses supports the conclusion that the scope and the extent of the losses is determined only by the contractual aims.

The promisee's interest is not quantifiable with regard to the counter-performance that he is obligated to confer to the promisor. Such a dependency has been thought to exist, at least to some extent, both in the legal literature[109] and in the case law.[110] The main argument that is usually put forward in defence of such a position is based on the theory of the three-interest model.[111] It is claimed that the last of these three interests is the promisee's restitutionary entitlement to receive back the counter-performance that he is obliged to provide to the other party. It could be thought that the view that such an interest existed in English law is now rejected. Apart from the reasoning that is already advanced in the literature,[112] there are other arguments in support of the conclusions that the promisee does not have an interest in receiving his counter-performance or its monetary equivalence back. There might be some economic parity between the value of the covenanted subject matter and the promisee's correlative counter-performance. Yet the promisee wants to receive the subject matter only in so far as he is able to achieve the aims that he pursues with the agreement. These aims cannot be attained if the promisee keeps his counter-performance. Therefore, he does not have a restitutionary interest even if there is a monetary equivalence between the value of the performance and the price that he pays to receive this performance.

The other interest that the promisee might be thought to have is the pecuniary equivalence of the stipulated subject matter. Yet this will not lead to achievement of his contractual aims. Where the promisee has a non-pecuniary interest, the performance of the agreement is not intended to enhance his financial position. Hence, his interest cannot be satisfied by a payment of a certain amount of money. In such cases his aspirations in entering into the contract do not lie in his patrimonial enrichment, not least because in many cases this would not be able to provide a substitutive performance. He would wish to achieve his contractual aims. If he has a non-pecuniary interest, the performance will not lead to his enrichment indispensably, or any eventual enrichment would not reflect his non-pecuniary interest in receiving the performance. This outcome has been noticed in the

---

[106] An identical conclusion but with alternative argumentation in *Treitel on The Law of Contract* (n 8) para 20-008 and *Ford v White* [1964] 1 W.L.R. 885.

[107] The opposite view where the breach is perceived as the immediate source of the losses, in D Winterton, *Money Awards in Contract Law* (Oxford: Hart Publishing, 2015) at 107 ff.

[108] For a general literature review and the usage of different terminology for description of the contractual interest see D McLauchlan 'Reliance damages for breach of contract' (2007) N.Z.L.R. 417, reprinted in J Berryman and R Bigwood (eds) *The Law of Remedies: New Directions in the Common Law* (Irwin Law, 2010) 33.

[109] *Treitel on The Law of Contract* (n 8) para 20-032.

[110] *P&O Steam Navigation Co v Youell* [1997] 2 Lloyd's Rep. 136, at 141.

[111] LL Fuller and WR Perdue (n 59) at 63.

[112] D Campbell 'Better than Fuller: A Two Interests Model of Remedies for Breach of Contract' 2015 78 (2) MLR at 298.

legal literature[113] where it is described that in certain types of cases no increase of the promisee's patrimonial wealth could be observed from a balance sheet perspective.

The promisee's non-pecuniary performance interest cannot, therefore, be measured by a reference to the increase in his patrimonial wealth. In cases where he has a non-pecuniary interest, other values which cannot be subject to monetary quantification are pursued. This could be illustrated with a further example. If the promisee is due to receive a lesson in contract law, his financial standing will not be enhanced immediately as a result of such a performance. Despite this lack of a patrimonial enrichment, he has an indisputable interest in receiving the promised contractual benefit. This interest is neither equal to the pecuniary value of the performance, nor to any eventual enrichment that he might gain from it. The promisee's interest will depend on the aims that he wants to achieve as a result of the acquisition of this knowledge.

Some authors[114] think that the promisee's contractual interest is in not being left worse off by virtue of his reliance on the agreement. This idea has been popular initially abroad but was adopted later in England too.[115] Two separate elements of this interest could be distinguished. The first one is the contractual counter-performance that the promisee provides to the other party as a form of a wasted expenditure. It is also called acquisition reliance.[116] Yet the promisee has no interest in receiving back his counter-performance or its monetary equivalence. The second element of the reliance interest is thought to include the promisee's entitlement to receive a reimbursement of all other expenses incurred in the belief that the agreement would be performed as undertaken. However, this cannot lead to achievement of his non-pecuniary contractual aims. The only non-pecuniary interest that the promisee has is to receive the subject matter of the agreement which in turn leads to achievement of his non-pecuniary contractual aims. This is to say, the only element of the agreement that can determine the nature and the extent of the non-pecuniary losses is the contractual aim that the promisee pursues with the stipulated performance.

C. General Recoverability of Damages for Non-Pecuniary Losses

A number of reasons against the general recoverability of damages for non-pecuniary losses have been raised both in the academic literature[117] and in the case law.[118] All of these reasons are related to the fact that the legal scholarship has been unable to offer an apposite principle which can identify those contracts where non-pecuniary losses can be caused. The present article resolves this problem. Non-pecuniary harms can be inflicted in all agreements where the promisee aims to achieve something else apart from, or along with, an increase in his patrimonial wealth. In cases where the breach of such agreements causes losses, they will be of non-pecuniary nature. These propositions allow for a reconsideration of the existing objections against the general recoverability of damages for non-pecuniary losses.

It has been argued[119] that contracts serve commercial interests, and their non-performance should be met with resilience and mental fortitude, which excludes any liability for damages for non-pecuniary losses. Nevertheless, the understanding that contracts are concluded for realisation of financial profits only has been questioned and probably rejected.[120] It is now widely accepted that the parties to an agreement can pursue various interests of artistic, emotional, aesthetic, and any other non-pecuniary nature. These interests need to be protected. The general remedy, which is available as of right,[121] is the liability for damages. Damages for non-pecuniary losses should be recoverable in all cases where the promisee has a non-pecuniary performance interest. These are the cases where he pursues non-pecuniary contractual aims.

---

[113] See C Webb 'Performance Damages' (n 40) at 214.
[114] LL Fuller and WR Perdue (n 59) at 63.
[115] D Campbell (n 107) at 301.
[116] D Friedmann (n 60) at 644.
[117] For a summary of these reasons see A Tettenborn 'Non-Pecuniary Loss: The Right Answer, but Bad Reasoning?' (2003) 2 Journal of Obligations and Remedies 94, at 97 ff.
[118] *Watts*, [1991] 1 W.L.R. 1421, at 1445.
[119] *Johnson v Gore Wood & Co* [2002] 2 A.C. 1 at 49 and *McGregor on Damages* (n 4) para 5-015.
[120] See for example E McKendrick 'Breach of contract and the meaning of loss' (n 20) at 40 ff.
[121] *Treitel on the law of contract* (n 8) para 20-002.

Other authors dispute the compensatory nature of the damages for non-pecuniary harms. There are two different variations of this opinion. The first one claims that awards for damages for distress, disappointment and loss of enjoyment are punitive.[122] This position is shared in some cases too.[123] The second variation of this opinion states that damages for non-pecuniary losses are available if the promisee cannot be compensated otherwise and that the combination of awards of damages for pecuniary and non-pecuniary losses would lead to double recovery.[124] Both opinions are incorrect. The first one denies the harmful effect of the non-pecuniary losses, and more broadly, the existence of a non-pecuniary performance interest. The second opinion is based on the incorrect assumption that the promisee cannot pursue both pecuniary and non-pecuniary aims in a single contract. In *Farley* the promisee ordered a survey whose aims were identification of the market price of the property and assessment of the levels of aircraft noise. The promisee had two distinctive interests here – to pay a fair price for the house and to live there in tranquillity and composure. These interests are different and their affecting needs to be addressed separately.

It is also thought[125] that in commercial contracts damages for non-pecuniary losses are too remote as they are not in the contemplation of the parties. This statement must be qualified additionally. If it includes contracts where both parties pursue pecuniary aims only, then it will be correct. In all other cases, including where the parties are companies or other associations, the breach will cause non-pecuniary losses. It is further thought[126] that in all other non-commercial contexts the question with foreseeability is reversed. The infliction of non-pecuniary losses is always within the contemplation of the parties as disappointment, distress and vexation are inevitable outcomes of any breach of contract. These losses are not considered to be compensable as otherwise damages for non-pecuniary losses would have to be awarded in any case of breach. This conclusion is true, but it can be reached if the rules established in the present article are applied. Mere disappointment or vexation from breach of contract cannot be subject to compensation because they are not resulting from the promisee's inability to achieve certain non-pecuniary contractual aims. In other words, the question of foreseeability of damages does not need to be used for identification of the recoverable losses. Its function must be to provide a principle that limits liability[127] as it is in all other cases where damages for pecuniary losses are recoverable.[128]

Other opinions argue that damages for non-pecuniary losses can be excessive,[129] difficult to prove[130] and even more difficult to assess.[131] Yet these hurdles are not insurmountable. The quantification of damages is easier if the extent and the scope of the non-pecuniary harms is known. This is achievable when the principles described in this article are applied. They provide a reliable basis from which the existence of non-pecuniary losses and the extent to which they affect the promisee's performance interest can be proved.

Lastly, it is alleged that the general recoverability of damages for non-pecuniary losses will lead to a flood[132] of bogus[133] claims. It is true that if wider compensation is allowed, the number of claims might rise. Yet the capacity of the legal system should be based on the needs of the society. Justice ought to be provided where and when it is needed. The merits of a claim are not related to the number of times when claims with identical subject matters are brought before the courts. If the principles proposed in the present article are adopted, the fear of too many unmeritorious claims will not be justified. These principles provide clear rules on whose basis it is possible to distinguish cases where genuine non-pecuniary losses can be caused. This would lead to a greater certainty in the law of damages. The parties will know in what type of contractual relationship they could suffer non-pecuniary harms, and in which cases these harms could be remedied.

---

[122] D Harris et al *Remedies in Contract and Tort* (Cambridge: Cambridge University Press, 2nd edition, 2002), at 595 ff.
[123] British Guiana Credit Corporation v Clement Hugh Da Silva [1965] 1 W.L.R. 248 at 259.
[124] *Farley*, [2002] 2 AC 732 at [109] per Lord Scott of Foscote.
[125] *Johnson v Unisys Ltd* [2003] 1 A.C. 518, at 547.
[126] H Carty 'Contract theory and employment reality' (1986) 49 MLR 240, at 245.
[127] See E McKendrick and K. Worthington (n 94) at 315.
[128] *Chitty on contracts* (n 44) para 26-117 ff.
[129] *Hayes & Anor v Dodd* [1990] 2 All E.R. 815, at 823.
[130] A Kramer (n 23) para 19-60.
[131] Francis Dawson 'General Damages in Contract for Non-Pecuniary Loss' (1983) 10 NZULR 232, at 234.
[132] J Stawton and B McDonald 'Measuring contractual damages for defective building works' (1996) 70 (6) Australian Law Journal 444, at 449.
[133] AS Burrows (n 19) at 133.

In all contracts where, as an outcome of the conferment of the stipulated subject matter, the promisee pursues achievement of something else apart from, or along with, an enrichment in his patrimonial wealth, he has a non-pecuniary performance interest. This interest is not related to the covenanted subject matter that the other party is obligated to provide, the market value of this subject matter, or the value of the promisee's counter-performance. This interest is commensurate solely to the aims that the promisee pursues with the performance. Their achievement is the only way in which the promisee can have his non-pecuniary performance interest satisfied. If such contracts are breached, he will suffer non-pecuniary losses. All damages for those losses should be recoverable, subject to the principles of limitation,[134] used in all other cases. This identical regime applied to all damages deriving from breach of contract will provide greater certainty, simplicity and predictability in English law and would lead to complete protection of the promisee's performance interest. This, in turn, would make the law fairer.

5. Conclusion

This article began with three questions that the existing scholarship fails to address. The first was about the identification of the elements of the contractual relationship which determine the presence of non-pecuniary losses. The second was about the identification of the causes that lead to causation of physical inconvenience and discomfort. The last question was if there were other genuine non-pecuniary losses that the current system of recovery of damages is unable to identify and if there were, how could they be discovered. The present article provides a common answer to all these questions. It is submitted that in all cases where the promisee has a non-pecuniary performance interest, that is when he aims to achieve something different than an enhancement of his financial standing, the breach will cause him non-pecuniary losses. It will not matter what the object of the contract was or if the breach caused physical inconvenience and discomfort.

Yet the merits of the present article are not limited to providing answers to those questions that the existing legal scholarship has been struggling to address for the last fifty years. It could be now argued that it is possible to identify in what type of contracts non-pecuniary losses can be caused. Furthermore, the nature of those losses could be described better. Previously it was claimed that these harms do not lead to the promisee's impoverishment. Now we can analyse the injurious effects of these losses more precisely. This, in turn, provides a better understanding about the nature of the relationship between the losses and the promised performance. It could be submitted that the non-pecuniary harms are identifiable on the basis of the promisee's inability to achieve his contractual aims. This would lead to the conclusion that the relationship between the losses and the promised performance is indirect. The type and the extent of the non-pecuniary losses would not depend on the stipulated subject matter of the agreement, its market value or the value of the counter-performance that the promisee is obligated to provide to the other party.

On more general level, the propositions promoted in the present work provide greater consistency in the law of contract damages. They refute persuasively the existing assumption of partial recoverability of non-pecuniary losses and replace it with a more principled and comprehensive approach that is more closely aligned with the general conceptual framework of contemporary contract law. If the principles identified in the present article are applied, all damages, including those for non-pecuniary losses, will be recoverable when a genuine harm is caused. This would be in all cases when the promisee is unable to achieve his contractual aims as a result of the other party's breach of contract.

This article does not provide answers to all questions that could be encountered in cases where non-pecuniary losses are caused. It only offers a conceptual basis from where more detailed studies could commence. Thus, the article paves the way for examination of the rules of foreseeability of damages for non-pecuniary harms or for how the principles of mitigation of losses should be applied. Even the question about the exact mechanism in which the promisee's inability to achieve his contractual aims leads to causation of losses needs to be explored in greater detail. Each of these topics allows for a detailed analysis which could exceed easily the word count of a journal article. The examination of these questions is no doubt important but must, therefore, be left for another time.

[134] *McGregor on Damages* (n 4) para 6-001.