



Kryla-Cudna, K. M. (2018). Breach of Contract and Damages for Non-Pecuniary Loss. *European Review of Private Law*, 26(4), 515-535.
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Breach of Contract and Damages for Non-Pecuniary Loss

Katarzyna KRYLA-CUDNA*

Abstract: The purpose of this article is to investigate whether non-pecuniary interests of the parties should be protected in contract law and what should be the scope of such protection. The paper sheds light on the theoretical framework of contract remedies and claims that moral damages are necessary for an adequate protection of the interests of the parties to a contract. It further investigates the policy arguments against the recoverability of non-pecuniary loss in contract law and argues that such arguments cannot be considered a sufficient justification for a bar to moral damages. Finally, based on a survey of case law from several European jurisdictions, the article provides insight into the kinds of non-pecuniary consequences that may arise from a breach of contract.

Keywords: contract law, damages, non-pecuniary loss, civil liability, a breach of contract.

1. Introduction

1. Recent years have seen increased interest in the concept of non-pecuniary loss and the extent to which it should be recognized in claims for damages brought following a breach of contract. The significance of this question lies in the practical concerns of parties concluding a contract to estimate the risks involved. However, the issue has a crucial meaning also on a theoretical level. This is because the scope of loss compensable in the case of a breach is, in fact, a question of what rights a party acquires by virtue of entering into a contract. Hitherto the occurrence of non-pecuniary loss in the case of a breach of contract has received diverse responses in European legal systems.¹ In some jurisdictions, particularly those belonging to the Germanic legal tradition, the recoverability of moral damages in the case of a breach of contract is denied in the majority of cases.² On the other hand, some European legal regimes, particularly those belonging to the Romanist legal tradition, essentially give non-pecuniary loss parity with patrimonial loss in terms of its compensability.³ Finally, some

* PhD; MJur (Oxon). This article benefited from comments by Prof. Stefan Grundmann, the members of the Max Weber Programme thematic research group 'Diversity and Unity: Governance, Constitutionalism and Democracy' at the European University Institute, Florence and the participants of the work-in-progress seminar at the Law Department of the European University Institute, Florence (11 February 2017). All errors remain entirely my own. The research leading to this paper has been funded by the Polish National Science Centre (Project-No. 2012/05/N/HS5/03029).

¹ For a detailed analysis of the solutions adopted in this respect in European legal systems see: V.V. Palmer (ed.), *The Recovery of Non-Pecuniary Loss in European Contract Law*, (Cambridge: Cambridge University Press, 2015), *passim*.

² V.V. PALMER, 'European Contractual Regimes: The Contemporary Approaches', in V.V. Palmer (ed.), *The Recovery of Non-Pecuniary Loss in European Contract Law* (Cambridge: Cambridge University Press, 2015), p 96, 106ff. The recovery of damages for non-pecuniary loss caused by a breach of contract has become possible in Germany after the legal reform of 2002. Nevertheless, non-pecuniary loss remains unrecoverable unless the breach of contract infringes one of the enumerated interests (health, body, freedom, and sexual self-determination) – see § 253 BGB. Furthermore, under German law the loss suffered must be within the scope of protection of the contractual duty breached. Thus, the breached duty must relate to the protection of one of the enumerated interests.

³ V.V. PALMER, in *The Recovery of Non-Pecuniary Loss*, p 95, 96ff. A particularly interesting example may be seen in Italian law which originally adopted a conservative approach, however, it steadily transformed itself into one of the most liberal regimes in Europe, both in contract and in tort. See e.g. C. AMATO, 'Il Danno Non Patrimoniale da Contratto', in G. Ponzanelli (ed.), *Il Nuovo Danno Non Patrimoniale*, (Milan: Giuffrè 2004), p 141.

jurisdictions, such as the Netherlands or the United Kingdom, adopt a moderate approach and allow for the recoverability of moral damages in a limited group of cases.⁴ This diversification reflects both a fundamental confusion concerning the interests which contract law should protect and the assumption common in conservative jurisdictions that the recoverability of moral damages would raise a range of negative consequences that would outweigh the benefits derived therefrom. A closer analysis of the issue reveals that if the interests of the parties in contractual performance are to be adequately protected damages must embrace both the pecuniary and non-pecuniary consequences of a breach. Even though such a broad scope of compensation may raise certain risks, these risks are not significant enough to justify the denial of the recoverability of moral damages.

2. The aim of this paper is twofold. First, it seeks to defend the argument that damages for non-pecuniary loss, in principle, should be available in contract law. In doing so, it starts by examining the theoretical basis for damages for a breach of contract. Subsequently, it investigates the policy arguments against the recoverability of moral damages that have been indicated in legal writings and case law. Secondly, having accepted that non-pecuniary loss should be compensable in contract law, the paper seeks to identify the categories of cases in which such loss may arise. It argues that the optimal level of protection of non-pecuniary interests in contract law must not only embrace cases in which the aim of a contract is to satisfy non-pecuniary interests of one of the parties but also instances in which the occurrence of non-pecuniary loss is incidental. The claim is based on the examination of case law from several European jurisdictions.

It is not the purpose of this paper to investigate the exact rules that should govern the recoverability of non-pecuniary loss caused by a breach of contract: a task which would require a monographical survey. Instead, the paper focuses on whether, in principle, non-pecuniary interests of the parties should be protected in contract law and what should be the scope of such protection.

2. Rights, Duties, and Wrongs

3. The essence of contract is performance; contracts are made in order to be performed⁵. A person enters into a contract because she desires to receive that which the other party is offering and because she places a higher value on the other party's performance than on the cost she will incur to obtain it⁶. Oliver Wendell Holmes famously claimed that the only consequence of a legally binding promise is that 'the law makes the promisor pay damages if the promised event does not come to pass'⁷. Understood this way, a contractual breach would not be a violation of a primary right but merely the choice to perform the alternative primary obligation (thus, it would not be 'a wrong')⁸. The difficulties raised by Holmes's theory have been well documented⁹. The existence of the primary right to performance may be confirmed in a number of ways. For instance, if a contract gave rise either to a

⁴ V.V. PALMER, in *The Recovery of Non-Pecuniary Loss*, p 96, 105.

⁵ D. FRIEDMANN, 'The Performance Interest in Contract Damages', 111. *LQR (Law Quarterly Review)* 1995, p (628) at 629.

⁶ *Ibid.*

⁷ O.W. HOLMES, 'The Path of the Law', in *Collected Legal Papers* (New York: Peter Smith, 1952), p (167) at 175; O.W. Holmes, *The Common Law* (Boston: Little, Brown, and Co., 1881), p 300–301.

⁸ *Ibid.*

⁹ See e.g. P. ATIYAH, *Essays on Contract* (Oxford: Clarendon Press, 1986), p 58–66; R. CUNNINGTON, 'Should Punitive Damages be Part of the Judicial Arsenal in Contract Cases?', 26. *Legal Studies* 2006, p (369) at 385–389; D. FRIEDMANN, 'The Efficient Breach Fallacy', 18. *Journal of Legal Studies* 1989, p 1.

right to performance or a right to damages, there would be no doctrine of impossibility of performance because it is never impossible to pay a sum of money by way of damages. Furthermore, if a contract created only a disjunctive obligation either to perform or to pay damages, there would be no remedies that compel the performance in the case of a breach of contract. Thus, the one and only right that a contract gives rise to is the right to counter-performance¹⁰. The secondary right to damages arises as a result of an infringement of the primary right to performance and does not exist prior to a breach of contract¹¹. A contract creates a right to performance of the promise, and a breach of contract, as an infringement of a right, is ‘a wrong’.

4. The interests of the parties in the promised performance are protected by law. An effective contractual promise differs from any other for ‘it is intended to, and does in fact, confer on the promisee an enforceable legal right to have the promise performed’¹². As a result of the formation of a contract, the promisor’s choice to perform the promised act transforms into an external object that juridically constitutes a part of the promisee’s belongings¹³. Before entering into the contract, the promisor has the power to choose to act in a specific way, subject to the principle that the act should not wrongfully infringe the rights of anyone else. Once the contract is concluded, the promisor’s choice to perform the promised act belongs to the promisee¹⁴. The content of the promisor’s duty corresponds to the content of the promisee’s right, thus, the duty and the right are correlative¹⁵. Hence, a breach of the duty is an infringement of the right. The award of a remedy is a means to correct the promisor’s breach of duty by restoring to the promisee the value of the infringed right¹⁶.

5. A remedy for a breach of contract maintains the correlativity of the right and the duty. Liability for a contractual breach converts the promisee’s right to be free of an unjust loss into an entitlement to compensation that is correlative to the promisor’s obligation to provide it¹⁷. The occurrence of a wrongful loss constitutes the foundation of the promisee’s claim against the promisor who caused the loss. ‘Loss’ is commonly understood as ‘being worse off’, thus, the suffering of a loss amounts to a detrimental difference to the person who suffers it.¹⁸ A legal explanation of the notion of loss is rarely provided; only a few European civil codes describe the meaning of the concept. The legal definitions are usually very broad and mirror the semantic understanding of the word. For example, the Austrian Civil Code in its § 1293 states that loss is to be understood as every detriment inflicted upon the property, rights or person of another¹⁹. The way of defining the concept of loss in domestic regulations corresponds to solutions adopted in the major sets of model rules: the Draft Common

¹⁰ R. STEVENS, ‘Damages and the Right to Performance: A Golden Victory or Not?’, in J.W. Neyers, R. Bronaugh, S.G.A. Pitel (eds), *Exploring Contract Law*, (Oxford: Hart Publishing, 2009), p (171) at 172.

¹¹ R. STEVENS, in *Exploring Contract Law*, p 172; H. UNBERATH, *Die Vertragsverletzung* (Tübingen: Mohr Siebeck, 2007), p. 285.

¹² B. COOTE, ‘The Performance Interest, Panatown, and the Problem of Loss’, 117. *LQR (Law Quarterly Review)* 2001, p 81.

¹³ E.J. WEINRIB, *The Idea of Private Law* (Oxford: OUP, 2012), p 139; P. BENSON, ‘The Unity of Contract’, in P. BENSON (ed), *The Theory of Contract Law: New Essays* (Cambridge: CUP, 2001), p (118) at 135.

¹⁴ E.J. WEINRIB, *The Idea of Private Law*, p. 139.

¹⁵ E.J. WEINRIB, *The Idea of Private Law*, p. 139.

¹⁶ E.J. WEINRIB, *The Idea of Private Law*, p. 140.

¹⁷ E.J. WEINRIB, ‘Punishment and Disgorgement as Contract Remedies’, 78. *Chicago-Kent Law Review* 2003, p (55) at 59; E.J. Weinrib, *The Idea of Private Law*, 2012, p 143.

¹⁸ See e.g. A. TETTENBORN, ‘What is a Loss?’, in J.W. Neyers, E. Chamberlain, S.G.A. Pitel (eds), *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007), p (441) at 443; R. STEVENS, *Torts and Rights* (Oxford: Oxford University Press, 2007), p 61.

¹⁹ ‘Schade heißt jeder Nachteil, welcher jemanden an Vermögen, Rechten oder seiner Person zugefügt worden ist.’

Frame of Reference (DCFR)²⁰ and the Principles of European Contract Law (PECL)²¹. The DCFR explains the meaning of loss in a very general manner as ‘any type of detrimental effect’.²² The PECL does not define the meaning of the concept but it states in its Art 9:501 that the loss for which damages are recoverable includes non-pecuniary loss and future loss that is reasonably likely to occur. The language of domestic regulations and soft law rules clearly suggests that the notion of loss embraces two kinds of detriments: ‘pecuniary’ and ‘non-pecuniary’. The word ‘pecuniary’ comes from the Latin *pecuniarius*. *Pecunia* is understood as property, riches, wealth, money²³ and the suffix ‘arius’ means ‘pertaining to’ or ‘belonging to’.²⁴ Hence, pecuniary loss means a detriment relating to money, riches, property or wealth of a given person. Non-pecuniary loss, on the other hand, can be defined in a negative way as a detriment that is not pecuniary, thus a detriment that does not concern money, riches, property or wealth of a given person. Therefore, the decisive factor taken into account when classifying a detriment suffered as non-pecuniary loss is neither the immaterial nature of the injured interest nor the difficulties in identifying the scope of such damage because also some pecuniary losses cannot be precisely quantified.²⁵ The deciding criterion for identifying non-pecuniary loss is whether the interference with the innocent party’s interests results in consequences other than a diminution of her money, riches, property or wealth.²⁶

6. The aim of contractual remedies is to undo the injustice done by the contract-breaker to the innocent party.²⁷ In this way, contractual remedies ensure that the interest of the promisee in the promised performance is protected. Unless an infringed contractual right is met with an adequate remedy, the right is ‘a hollow one, stripped of all practical force and devoid of all content’²⁸. An adequate remedy should provide the innocent party with ‘a full and perfect equivalent’²⁹ for the damage that she has suffered. If the innocent party is given more than that, she would have been ‘over-compensated’; if less, ‘under-compensated’. To compensate the innocent party means providing her with something that is good, i.e., with something that is desired or at least desirable, in order to bring her up to some baseline of well-being³⁰. In case of contract law, that baseline is typically identified by reference to the position that the innocent party would have been in if the contract had been performed. This position is best restored by the judicial enforcement of specific performance so that the party gets exactly what she bargained for. In cases in which specific performance is not awarded, monetary compensation should aim at placing the party in the closest possible position she would have been in if the contract had been performed. The compensation can be of two different kinds. First, it may be a *means replacing compensation* the aim of which is to provide the innocent party with

²⁰ By the Study Group on a European Civil Code and the European Research Group on Existing EC Private Law (Acquis Group).

²¹ By the Commission on European Contract Law.

²² C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (München: Sellier, 2009), vol. 1, p 68.

²³ CH.T. LEWIS, CH. SHORT, *A Latin Dictionary* (Oxford: Clarendon Press, 1879), available at: <http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.04.0059:entry=pecunia> (accessed 20 February 2018)

²⁴ A. SLOMAN, *A Grammar of Classical Latin: For Use in Schools and Colleges* (Cambridge: Cambridge University Press, 1906), p 410.

²⁵ V. WILCOX, *A Company’s Right to Damages for Non-Pecuniary Loss* (Cambridge: Cambridge University Press, 2016), p 21.

²⁶ V. WILCOX, *A Company’s Right to Damages for Non-Pecuniary Loss* (Cambridge: Cambridge University Press, 2016), p 21; K. LARENZ, ‘Zur Abgrenzung des Vermögensschadens vom ideellen Schaden’, *Versicherungsrecht* 1963, p 312.

²⁷ E.J. WEINRIB, *The Idea of Private Law*, p. 144.

²⁸ *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134 at [87] (Lord Hope of Craighead).

²⁹ *Monongahela Navigation Co v US* [1893] 148 US 312, 326.

³⁰ R.E. GOODIN, ‘Theories of Compensation’, 9. *OJLS (Oxford Journal of Legal Studies)* 1989, p (56) at 59.

equivalent means to pursue the *same* ends as before she suffered the loss (or as she would have pursued had she not suffered the loss). Second, it may be an *ends-displacing compensation*, the aim of which is to compensate the innocent party by helping her to pursue *different* ends in a way that leaves her subjectively as well off overall as she would have been had she not suffered the loss at all³¹. Giving a person who suffered severe emotional distress an opportunity to travel to an exotic destination might be an example of the latter kind of compensation. Thus, even though eradicating losses may frequently be impossible, as for example in cases where the innocent party has suffered a permanent bodily injury or severe emotional distress,³² an adequate compensation may still be available.

7. In order to provide the innocent party with ‘a full and perfect equivalent’ for the loss suffered, a remedial response must comprise both pecuniary and non-pecuniary consequences of a breach of contract.³³ Thus, it is not the availability of damages for non-pecuniary loss in contract law but its unavailability that needs a justification.

3. Defensibility of the General Bar to Compensation of Non-Pecuniary Loss in Contract Law

8. The general denial of the recoverability of non-pecuniary loss caused by a breach of contract in numerous European jurisdictions is usually justified by a reference to reasons of policy. The next part of the paper seeks to investigate whether the reasons of policy indicated in academic literature and case law are sufficient to justify the refusal to award damages for non-pecuniary loss in contract law.

3.1 Problems of Proof and Difficult Assessment

9. One of the major reasons advanced for the refusal of damages for non-pecuniary loss in contract law is the impossibility of its objective estimation³⁴. Furthermore, it has been claimed that because of the elusiveness and subjective character of such loss, its existence and scope are difficult to prove³⁵. Hence, awards of moral damages are arbitrary and subjective. As a result, where non-pecuniary loss is compensable, the parties entering into a contract are not able to estimate the scope

³¹ The distinction was introduced by R.E. GOODIN. See R.E. GOODIN, 9. *OJLS* 1989, p (56) at 60. Compare with the classification offered by Atiyah: P. CANE, *Atiyah's Accidents, Compensation and the Law* (Cambridge: Cambridge University Press, 2006), p 407ff.

³² R. Stevens, in *Exploring Contract Law*, p 174.

³³ J. KOHLER, *Deutsches Patentrecht systematisch bearbeitet unter vergleichender Berücksichtigung des französischen Patentrechts* (Mannheim und Straßburg: Bensheimer 1878), p 651; J. KOHLER, Die Ideale im Recht, 5. *Archiv für bürgerliches Recht* 1891, p (161) at 258. See also F.PH. VON KÜBEL, *Recht der Schuldverhältnisse*, Teil 1, Allgemeiner Teil, in W. Schubert (ed.), *Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuchs* (Berlin: de Gruyter, 1980), p 719.

³⁴ E. MACDONALD, ‘Contractual Damages for Mental Distress’, 7. *JCL (Journal of Contract Law)* 1994, p (141) at 155.

³⁵ See F. DAWSON, ‘General Damages in Contract for Non-Pecuniary Loss’, 10. *NZULR (New Zealand Universities Law Review)* 1983, p (232) at 259.

of liability in the event of breach,³⁶ which creates uncertainty and unpredictability in commercial affairs³⁷.

10. This point is not entirely unjustified. It may indeed be difficult for a court to recognize the occurrence of non-pecuniary loss in a given case with certainty and to convert such loss into its money equivalent. However, the same problems arise in cases in which non-pecuniary loss is caused by a tortious act. Nevertheless, the compensability of non-pecuniary loss has never been questioned in this context³⁸. There is no reason why a difficult assessment should justify a denial of compensation for immaterial damage in contract, and not in tort. The courts have developed specific rules for the assessment of intangible losses in tort law and have identified factors that may influence the scope of negative feelings suffered by the injured person. There is a clear tendency in European systems to proportion and tailor awards in relation to the duration and intensity of pain and the level and gravity of injuries, as well as societal expectations and standards of living³⁹. This guidance may also be applicable to the estimation of non-pecuniary losses that have arisen from a breach of contract. Using similar rules by courts to quantify damages for non-pecuniary loss would ensure the internal consistency of awards.⁴⁰ As a result, it would guarantee the desired certainty and predictability in commercial affairs as well as both vertical (adequate amounts for greater and lesser injuries) and horizontal (similar amounts for similar injuries) justice⁴¹.

Apart from the above-indicated arguments, it should also be stressed that the problems of proof and assessment are practical difficulties and not ones of principle. If, in principle, moral damage should be compensable in contract, then the practical arguments cannot prevail⁴².

3.2. Foreseeability

11. The general denial of the compensability of non-pecuniary loss in contract law has also been explained on the grounds that such loss is not within the contemplation of the parties concluding a contract.⁴³ However, one may point out that a breach of contract causes non-pecuniary loss so often that the parties must foresee the possibility of its occurrence. It would not be unusual to expect

³⁶ *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 (HCA) 369 (Brennan J).

³⁷ F. DAWSON, 10. *NZULR* 1983, p (232) at 234. See also: G. SCHIEMANN, in M. Martinek (ed.), *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB – Buch 2: Recht der Schuldverhältnisse §§ 249-254 (Schadensersatzrecht)* (Berlin: Sellier – De Gruyter,

³⁸ I. RAMSAY, 'Comment: Contracts – Damages for Mental Distress – Injury to Feelings', 55. *CBR (The Canadian Bar Review/La Revue du Barreau Canadien)* 1977, p (169) at 173; A.S. BURROWS, 'Mental distress damages in contract – a decade of change', *LMCLQ (Lloyd's Maritime and Commercial Law Quarterly)* 1984, p (119) at 133. See also D. NICOLESCO, *Du dommage moral résultant de l'inexécution d'un contrat en droit comparé (Thèse pour le doctorat)* (Paris: Librairie Nouvelle de Droit et de Jurisprudence, Arthur Rousseau, Éditeur, 1914), p 34ff.

³⁹ V.V. PALMER, General Introduction, in VV PALMER (ed) *The Recovery of Non-Pecuniary Loss in European Contract Law*, p 14.

⁴⁰ M.G. BRIDGE, 'Contractual Damages for Intangible Loss: A Comparative Analysis', 62. *CBR (The Canadian Bar Review/La Revue du Barreau Canadien)* 1984, p (323) at 368.

⁴¹ V.V. PALMER, in *The Recovery of Non-Pecuniary Loss*, p 14.

⁴² N. ENONCHONG, 'Breach of Contract and Damages for Mental Distress', 16. *OJLS (Oxford Journal of Legal Studies)* 1996, p (617) at 630. See also Lord Mustill in *Ruxley Electronics and Construction Ltd v. Forsyth* [1995] UKHL 8; [1996] AC 344: 'in several fields the judges are as well accustomed to putting figures to intangibles, and I see no reason why the imprecision of the exercise should be a barrier, if that is what fairness demands'.

⁴³ *Johnson v. Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518 [70] (Lord Millet); *Fidler v. Sun Life Assurance Co. of Canada* 2006 SCC 30, [2006] 2 SCR 3 [45].

emotional distress to arise from poorly conducted plastic surgery⁴⁴, a lack of electricity supply to the promisee's house for several months⁴⁵ or a lack of photographs documenting a wedding ceremony⁴⁶.

3.3. *Assumption of Risk*

12. Apart from the argument just discussed, it has also been claimed that it is the foreseeability of non-pecuniary loss that justifies the denial of moral damages⁴⁷. Disappointment or mental distress is an almost inevitable consequence of each breach of contract. Therefore, such losses must be in the contemplation of the parties concluding a contract and the parties must accept the risk of their occurrence.⁴⁸ This is claimed to be particularly the case when commercial contracts are concerned⁴⁹.

13. The authors who support the argument do not explain, however, why parties to contracts should assume the risk of suffering a certain consequence of breach while being entitled to compensation for other damage.⁵⁰ A person who concludes a contract expects that it will be performed. Otherwise, she would not enter into the contract in the first place⁵¹. Hence, the promisee does not take the risk of the occurrence of non-pecuniary loss in the case of a breach of contract just as he does not take the risk of the occurrence of financial loss⁵².

3.4. *The Risk of Excessive Awards*

14. A further justification advanced against the compensability of non-pecuniary loss in contract law is that a side-effect of the availability of such damages would be the punishment of the contract-breaker arising from excessive awards⁵³. Nevertheless, one should point out that this argument may be a reason for a moderation in measuring damages rather than for the exclusion of the recoverability of non-pecuniary losses as such. The fear of excessive awards may be justified in those jurisdictions where juries decide on the amount of damages⁵⁴, which however is not the case in most of the European countries. Apart from some occasional variations, judges make rational assessments and award modest, and sometimes even frugal, damages for non-pecuniary losses⁵⁵.

⁴⁴ Sullivan v. O'Connor 296 N.E. 2d 183 (1973).

⁴⁵ Judgment of the Polish Supreme Court from 7 December 2011, II CSK 160/11, OSNC 2012, no. 6, pos. 75.

⁴⁶ Diesen v. Samson 1971 SLT 49 (Sh Ct).

⁴⁷ H. CARTY, Contract Theory and Employment Reality, 49. *MLR (Modern Law Review)* 1986, p (240) at 245.

⁴⁸ H. CARTY, 49. *MLR* 1986, p (240) at 245; G.H. Treitel, *The Law of Contract* (London: Sweet & Maxwell, 2003), p 992–993.

⁴⁹ D. YATES, 36. *MLR* 1973, p (535) at 538.

⁵⁰ N. ENONCHONG, 16. *OJLS* 1996, p (617) at 630; A. PHANG, 'The Crumbling Edifice? The Award of Contractual Damages for Mental Distress', *JBL (Journal of Business Law)* 2003, p (341) at 350.

⁵¹ D. FRIEDMANN, 111. *LQR* 1995, p (628) at 629.

⁵² A.S. BURROWS, *LMCLQ* 1984, p (119) at 133; A.S. BURROWS, *Remedies for Torts and Breach of Contract* (Oxford: Oxford University Press, 2004), p 333.

⁵³ A. PHANG, *JBL* 2003, p 341 at (345)–346.

⁵⁴ J.A. SEBERT, 'Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation', 33. *UCLA LR (University of California at Los Angeles Law Review)* 1986, p (1565) at 1599.

⁵⁵ A. PHANG, *JBL* 2003, p (341) at 349–350; E. VEITCH, 'Sentimental Damages in Contract', 16. *UWOLR (University of Western Ontario Law Review)* 1977, p (227) at 240; V.V. PALMER, in *The Recovery of Non-Pecuniary Loss*, p 15.

3.5. *Higher Costs of Contracting*

15. A further justification advanced to refuse damages for non-pecuniary loss in contract law is that the compensability of such loss would increase the cost of contracting⁵⁶. This argument is not altogether without force. The recoverability of non-pecuniary loss in contract law may indeed produce additional costs related to the estimation and award of damages or the bargaining for an out-of-court settlement⁵⁷. Such costs certainly may influence the price of goods and services.

16. However, the recoverability of moral damages would also have a range of positive consequences. For instance, it would save the costs involved if the injured party is unable to recover for the damage suffered⁵⁸. Moreover, it would respond to the demands of justice in ensuring that individuals are compensated for the negative results of a breach of contract⁵⁹. At the same time, as mentioned above, the award of damages for non-pecuniary loss is usually modest in European legal systems. Thus, the cost of meeting such claims would not be high enough to be considered a sound reason to displace the indicated benefits.

3.6. *Fears of Floodgates*

17. The next argument against the recoverability of non-pecuniary loss in contract law is that it would open the floodgates to large numbers of claims⁶⁰. This point lacks substance like almost all other floodgates arguments. If, in principle, damages for non-pecuniary loss caused by a breach of contract should be allowed, then it should not be refused on the basis that, if allowed, it would actually be claimed⁶¹. Furthermore, there are factors that would substantially limit the number of litigations even if non-pecuniary loss were compensable. First, the cost of pursuing a claim would deter individuals who suffered insignificant intangible damage from going to court. Second, some legal systems adopt the *de minimis* principle that would filter out negligible claims⁶². Third, corporate entities could not claim damages for non-pecuniary loss because they cannot suffer such damage⁶³. Fourth, the parties could exclude liability for non-pecuniary damage through a specific provision in a contract, subject to the regulations on unfair terms⁶⁴. Fifth, the recoverability of moral damages would be subject to normal rules limiting liability for any loss caused by a breach of contract. Thus, the rules on causation, remoteness, and mitigation would exclude or reduce the award of moral damages in certain cases⁶⁵.

⁵⁶ Judgment of the Court of Appeal in Warsaw from 8 September 2009, VI ACa 201/09, LexPolonica no. 2073868; D.W. GREIG, J.L.R. DAVIS, *The Law of Contract* (Sydney: Law Book Company, 1987), p 1414.

⁵⁷ S. HARDER, *Measuring Damages in the Law of Obligations: The Search for Harmonised Principles* (Oxford: Hart Publishing, 2010), p 109.

⁵⁸ E. MACDONALD, 7. *JCL* 1994, p (134) at 146–47; S. HARDER, *Measuring Damages in the Law of Obligations*, p 109.

⁵⁹ *Baltic Shipping Company v Dillon* (Mc Hugh J), (1993) 176 CLR 344 at 397; S. HARDER, *Measuring Damages in the Law of Obligations*, p 109; N. ENONCHONG, 16. *OJLS* 1996, p (617) at 632.

⁶⁰ *Hayes v. Dodds* [1990] 2 All ER 826 (Staughton LJ); J. SWANTON, B. McDONALD, Measuring contractual damages for defective building work, 70. *Australian Law Journal* 1996, p (444) at 449.

⁶¹ S. HARDER, *Measuring Damages in the Law of Obligations*, p 110.

⁶² *Ibid.*

⁶³ N. ENONCHONG, 16. *OJLS* 1996, p (617) at 632.

⁶⁴ S. HARDER, *Measuring Damages in the Law of Obligations*, p 110; J.A. SEBERT, 33. *UCLA LR* 1986, p (1565) at 1656.

⁶⁵ S. ROWAN, *Remedies for Breach of Contract* (Oxford: Oxford University Press, 2012), p 126–127.

4. Classification of Cases in which a Breach of Contract May Cause Non-Pecuniary Loss

18. The presented analysis has shown that the policy objections to moral damages are superficial. At the same time, moral damages are necessary to fully compensate the innocent party, namely, to put her into as good a position as she would have been in if the contract had been performed. This leads to the conclusion that claims for moral damages brought following a breach of contract should be allowed. The next part of the paper seeks to identify particular groups of cases in which a breach of contract may cause non-pecuniary loss.

19. The examination of case law from several European jurisdictions suggests that there are two principal categories of cases in which non-pecuniary loss may arise as the result of a breach of contract. The first category consists of cases in which one of the essential aims of the contract is to fulfil the non-pecuniary interests of the promisee. The second category comprises cases in which the occurrence of non-pecuniary loss is, in a sense, incidental. In other words, the promisee has not contracted for any particular non-pecuniary benefit, nevertheless, as a consequence of the breach of contract she has suffered non-pecuniary loss⁶⁶. The categories are not watertight and may overlap. Thus, for example, physical injury may result from both non-performance of a contract aimed at fulfilling the non-pecuniary interests of the promisee (such as a contract to provide medical services) and non-performance of a contract that does not have such a purpose (such as a contract of carriage).

4.2. *Contracts Aimed at Fulfilling the Non-Pecuniary Interests of the Promisee*

20. The issue of compensability of non-pecuniary loss in contract law is particularly important in cases of contracts that aim to fulfil the non-pecuniary interests⁶⁷ of the promisee.⁶⁸ In this respect, it is necessary to distinguish between ends and means⁶⁹. In some instances, the financial element in a contract may be only a means of guaranteeing peace of mind (for example, in some insurance contracts)⁷⁰. In these types of situations, providing peace of mind constitutes the purpose for which the contract was concluded, even if it is to be achieved by economic means⁷¹. Furthermore, one should point out that contracts are very often made in order to fulfil both the non-pecuniary and

⁶⁶ Another distinction has been drawn by E. McKendrick and K. Worthington based on the current scope of the compensability of such loss in English contract law – see: E. MCKENDRICK, K. WORTHINGTON, *Damages for Non-Pecuniary Loss*, in N. Cohen, E. McKendrick (eds), *Comparative Remedies for Breach of Contract*, (Oxford: Hart Publishing, 2005), p 300ff. See also: F.D. ROSE, 'Comment: Contract – Damages – Non-Pecuniary Losses- Injured Feelings and Disappointment - Remoteness', 55. *CBR (The Canadian Bar Review/La Revue du Barreau Canadien)* 1977, p (333) at 334; AS BURROWS, *LMCLQ* 1984, p (119) at 122–123; F. DAWSON, 10. *NZULR* 1983, p (232) at 233.

⁶⁷ The concept of 'non-pecuniary interest' is explained more broadly by R. STRASSER in *Der immaterielle Schaden im österreichischen Recht* (Wien: Manz, 1964), p 10ff. See also: D. NICOLESCO, *Du dommage moral résultant de l'inexécution d'un contrat*, p 6ff.

⁶⁸ See J. KOHLER, 'Zwölf Studien zum Bürgerlichen Gesetzbuch', 12. *Archiv für bürgerliches Recht* 1987, p 1–88 (part 1) and p 317 – 336 (part 2), passim.

⁶⁹ E. MACDONALD, 7. *JCL* 1994, p (134) at 145.

⁷⁰ E. MACDONALD, 7. *JCL* 1994, p (134) at 145.

⁷¹ E. MACDONALD, 7. *JCL* 1994, p (134) at 145.

economic interests of the parties⁷². The analyzed group also embraces these kinds of cases as long as the non-pecuniary purpose has a significant meaning for the parties.

21. The category of contracts aimed at fulfilling the non-pecuniary interests of the promisee consists of two further subcategories. The first subcategory consists of cases in which the promisor, expressly or impliedly, promises to provide enjoyment or alleviation of distress to the promisee. The second subcategory comprises cases in which the subject matter of a contract has an ‘added value’ to the promisee.

4.2.1. *Contracts for Enjoyment or Alleviation of Distress*

22. In some cases, the promisor, expressly or impliedly, promises to provide enjoyment or alleviation of distress to the promisee. Explicit promises to guarantee such a non-pecuniary benefit are infrequent⁷³. Nevertheless, in some cases the promisor explicitly promises to take reasonable care in the attempt to procure enjoyment or peace of mind. For example, a solicitor would not guarantee to relieve the distress of a client but she could promise to take reasonable care to obtain such relief.⁷⁴ This may be seen in the English case of *Hamilton Jones v. David & Snape (a firm)* in which a solicitor’s negligence resulted in the claimant’s children being taken to Tunisia by her former husband where he was awarded their custody⁷⁵. The client expressly informed the solicitor at the time when the contract was concluded that she was afraid that her former husband could attempt to take the children from the country. The lawyer assured the client that he would take all necessary measures to guarantee her the right of custody of her children, thus, measures aimed at providing peace of mind to the client. According to the court the assurance was a significant element of the contract⁷⁶.

23. The category of contracts for enjoyment or alleviation of distress comprises a very wide range of cases in which the promisor impliedly promises to provide a non-pecuniary benefit to the promisee or to take reasonable care to provide such a benefit. The group embraces, for example, holiday contracts⁷⁷, contracts to provide medical services⁷⁸, to take photographs at a wedding⁷⁹, or to provide burial services⁸⁰. An implied promise to provide non-pecuniary benefit may also appear in contracts made from altruism to improve the environment or for other good causes. Examples of cases arisen within this category include the case in which a plastic surgeon performed poor surgery causing the patient to look worse while further surgery could not improve her condition⁸¹. Another example might be the case in which, in breach of contract, the claimants’ daughter was cremated before the

⁷² E. McKENDRICK, M. GRAHAM, ‘The Sky’s the Limit: Contractual Damages for Non-Pecuniary Loss’, *LMCLQ (Lloyd’s Maritime and Commercial Law Quarterly)* 2002, p (161) at 164. The problem may be seen in the English case of *Knott v. Bolton* (1995) 11 Const LJ 375 concerning a breach of contract by an architect to design a “dream home” for the promisees. The couple was denied compensation for disappointment and distress because the contract also had an economic purpose. The decision was later overruled in *Farley v. Skinner* at [24], [41], [52], [93].

⁷³ See E. MACDONALD, 7. *JCL* 1994, p (134) at 143.

⁷⁴ E. MACDONALD, 7. *JCL* 1994, p (134) at 143.

⁷⁵ *Hamilton Jones v. David & Snape* [2003] EWHC 3147 (Ch), [2004] 1 All ER 657.

⁷⁶ See *Neuberger J* at [61], [63].

⁷⁷ For example, *Jarvis v. Swans Tours Ltd* [1973] QB 233 (CA).

⁷⁸ For example, *Sullivan v. O’Connor* 296 N.E. 2d 183 (1973).

⁷⁹ For example, *Diesen v. Sampson* 1971 SLT 49 (Sh Ct).

⁸⁰ For example, *Lamm v. Shingleton* 55 SE 2d 810 (1949); *Reed v. Madon* [1989] Ch 408.

⁸¹ *Sullivan v. O’Connor* 296 N.E. 2d 183 (1973).

parents had viewed the body⁸². Within this group one may also offer the case concerning a Jewish congregation in which members unwittingly consumed non-kosher meat in violation of their religious convictions due to a breach of contract by a butcher⁸³. While in some of these cases the promisor may not expressly promise to secure the promisee's non-pecuniary interests or to take reasonable care to secure such interests, it is clear that the benefit contracted for is indivisibly connected with the pleasure or peace of mind that the promisee expects to obtain as a result of the performance of a contract⁸⁴.

24. There is no doubt that the law should respect non-pecuniary interests in contractual performance, especially, in cases where the intention to obtain enjoyment or alleviation of distress motivated the promisee to conclude a contract. Taking into account that the failure to obtain the intangible benefit contracted for is usually the only consequence of non-performance of contracts that belong to the discussed category, the unrecoverability of damages for non-pecuniary loss would render the promisor's promise unenforceable. This is particularly important because the non-pecuniary loss that arises in such situations is very often irreversible. Even if the promisor could provide a substitute performance, the promisee might not achieve the expected result. Likewise, the award of damages for financial loss could protect the interests of the promisee only to a very limited extent if obtaining an intangible benefit was the main purpose of the contract.

4.2.2. *Added Value*

25. The next subcategory consists of cases in which the performance of a contract has an 'added value' to the promisee. Thus, the group includes cases in which the financial value of the subject matter of a contract is slight compared to the actual value that the promisee attaches to it.

4.2.2.1. 'Objective' Added Value

26. The 'added value' that the performance of a contract may have for the promisee can be twofold. First, it can have an objective meaning, commonly respected in society and recognizable from the point of view of a third party. Non-pecuniary loss arising in relation to an objective added value may concern, for example, the infringement of *praetium affectionis* caused by non-performance of a contract to renovate a family memento that has a sentimental value to the promisee⁸⁵. There is no doubt that such an infringement may lead to the occurrence of non-pecuniary loss, the scope of which may exceed the financial value of the performance of a contract⁸⁶. Therefore, the award of damages for economic loss suffered may not sufficiently protect the interests of the promisee. At the same time, the non-pecuniary loss that may occur in such cases does usually, objectively, deserve to be

⁸² McNeil v. Forest Lawn Memorial Services Ltd (1976) 72 D. L. R. (3d) 556 (Canada).

⁸³ Trib. Com. Lyon 18.09.1936, Gaz. Pal. 1936.2.893.

⁸⁴ E. McKENDRICK, K. WORTHINGTON, in *Comparative Remedies for Breach of Contract*, p 302.

⁸⁵ See: D. STÖRMER, *Der Ersatz des Affektionsinteresses in geschichtlicher Entwicklung (Dissertation)* (Hamburg, 1977), passim.

⁸⁶ A. SZPUNAR, 'Utrata możliwości korzystania z rzeczy', 10. *Rejent* 1998, p 18–20; A. SZPUNAR, 'O sposobach naprawienia szkody na mieniu', 11. *Nowe Prawo* 1971, p 1603.

compensated. *Praetium affectionis* is considered a value worthy of protection in several European jurisdictions⁸⁷.

The objective added value of performance of a contract may also be seen in some cases in which the aim of the contract is to confer an intangible benefit upon the promisee. Thus, the two categories of cases may overlap. There is no doubt that delivering a wedding dress by a certain time, making photographs during a family event or providing transport for a funeral of a close person are generally worth more to the promisee than the price paid. At the same time, in these cases the existence of an intangible interest of the promisee and its infringement are relatively easy to recognize for the court.

4.2.2.2. 'Subjective' (Unusual) Added Value

27. The 'added value' of contractual performance may also be purely subjective and be recognizable only from the point of view of the promisee herself. An example of this may be seen in the English case of *Ruxley Electronics and Construction Ltd v Forsyth*⁸⁸ concerning a contract to build a swimming pool⁸⁹. The swimming pool was built to the wrong depth, which, however, in no way affected its economic value, or the claimant's use of the pool. Nevertheless, the difference in depth was clearly of importance to the claimant because of his individual tastes (the claimant was a particularly tall man). The court stated that it is necessary to take into account the subjective value of contractual performance to the promisee when awarding damages for a breach of contract. To award nothing in such cases would be to say that the promise was illusory⁹⁰. The court asserted that 'the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure'⁹¹. Therefore, damages for a breach of contract should not be limited to the compensation of economic loss⁹².

28. The main argument for the compensability of non-pecuniary loss in cases in which the performance of a contract had a subjective added value to the promisee is that the law should enable the parties to fulfil all of their interests as long as they are not against the law. The promisee, when entering into a contract, desires to obtain the specified performance. The promisor, on the other hand, promises to perform the contract according to its content. There is no doubt that the law should protect the interests of the promisee even if it has an unusual, subjective nature⁹³. Nevertheless, the

⁸⁷ In addition to the 'liberal' jurisdictions mentioned above (p 1) see e.g. § 1331 of the ABGB; F. BYDLINSKI, 'Der immaterielle Schaden in der österreichischen Rechtsentwicklung', in H.C. Ficker, D. König, K.F. Kreuzer, H.G. Leser, W.F.M. von Bieberstein, P. Schlechtriem (eds), *Festschrift für Ernst von Caemmerer zum 70. Geburtstag* (Tübingen: Mohr Siebeck 1978), p 788ff.

⁸⁸ *Ruxley Electronics and Construction Ltd v. Forsyth* [1995] UKHL 8; [1996] AC 344.

⁸⁹ *Ruxley Electronics and Construction Ltd v. Forsyth* [1995] UKHL 8; [1996] AC 344.

⁹⁰ See also B. COOTE, 'Contract Damages, Ruxley, and the Performance Interest', 53. *CLJ (The Cambridge Law Journal)* 1997, p (537) at 541; F. DAWSON, 'Reflections on Certain Aspects of the Law of Damages for Breach of Contract', 9. *JCL (Journal of Contract Law)* 1995, p (125) at 125-126; J. POOLE, 'Damages for Breach of Contract – Compensation and Personal Preferences: *Ruxley Electronics and Construction Ltd v. Forsyth*', 59. *MLR (Modern Law Review)* 1996, p (272) at 273; J. O'SULLIVAN, 'Contract Damages for the Failed Fun – Taking the Plunge', 54. *CLJ (The Cambridge Law Journal)* 1995, p (496) at 498;

⁹¹ Lord Mustill in *Ruxley Electronics and Construction Ltd v. Forsyth* [1995] UKHL 8; [1996] AC 344.

⁹² E. MCKENDRICK, K. WORTHINGTON, in *Comparative Remedies for Breach of Contract*, p 306.

⁹³ L. DOMANSKI, *Instytucje kodeksu zobowiązań, Komentarz teoretyczno-praktyczny*, vol 1 (Warszawa: M. Ginter, 1938), p 392.

special character of this group of cases suggests that it should be approached with a great caution. An unusual, subjective value that the performance has to the promisee, and consequently, the occurrence and the scope of immaterial loss in the case of a breach of contract, may raise significant problems of proof.

In the English case of *Farley v Skinner* Lord Hutton pointed out a range of circumstances that should be taken into account when identifying non-pecuniary loss caused by a breach of contract. For instance, he asserted that the following factors should be considered: (1) whether the matter in respect of which the individual claimant seeks damages is of importance to him; (2) whether the individual claimant has made clear to the other party that the matter is of importance to him; and (3) whether the action to be taken in relation to the matter is made a specific term of the contract⁹⁴. The proposed criteria might be useful to identify the occurrence of non-pecuniary loss in a given case. However, they do not solve the problem of identifying the scope of such loss. The identification of the scope of non-pecuniary loss in cases belonging to the analyzed category by anyone other than the promisee herself is exposed to a great risk of error. The negative consequences of a wrong assessment of loss may affect both the promisor (if the award exceeds the loss actually suffered) and the promisee (if the award is lower than the loss actually suffered). It seems that in these cases, a greater protection of the interests of the promisee may be ensured by a liquidated damages clause rather than by damages estimated by the court. A liquidated damages clause may be used by the promisee to protect a subjective added value in performance by accurately pricing the intrinsic value she assigns to it.

4.3. *Non-pecuniary Loss as an Incidental Result of the Non-Performance of a Contract*

29. The second category consists of cases in which the occurrence of non-pecuniary loss is incidental⁹⁵. The incidental non-pecuniary losses can be divided into further subcategories which, again, may overlap. The types of incidental non-pecuniary losses that have been recognized in the case law include: (i) consequences of an infringement of personality rights; (ii) consequences of an infringement of *praetium affectionis*; (iii) physical inconveniences; (iv) anxiety, mental distress and disappointment.

4.3.1. *Infringement of Personality Rights*

30. Non-performance of a contract may lead to losses consisting of the negative consequences of an infringement of personality rights⁹⁶. Personality rights are defined as rights that 'recognize a person as a physical and spiritual-moral being and guarantee his enjoyment of his own sense of existence'⁹⁷. The scope of personality rights is broad and comprises, among others, the rights to life, physical integrity, bodily freedom, reputation, dignity, privacy, and identity⁹⁸. An infringement of

⁹⁴ Lord Hutton in *Farley v. Skinner* [2001] UKHL 49; [2002] 2 AC 732, [54].

⁹⁵ A.S. BURROWS, *LMCLQ* 1984, p (119) at 126.

⁹⁶ In jurisdictions in which the concept of personality rights is not recognized there are equivalent categories of cases involving, for instance, bodily injury, illness or loss of reputation.

⁹⁷ J. NEETHLING, 'Personality Rights: A Comparative Overview', 38. *The Comparative and International Journal of Southern Africa* 2005, p (210) at 210.

⁹⁸ V.V. PALMER, 'Preliminary taxonomy and glossary of moral damages', in V.V. Palmer (ed.) *The Recovery of Non-Pecuniary Loss in European Contract Law*, p 408.

personality rights almost by definition tends to cause non-pecuniary loss⁹⁹. In some instances, these types of losses may give rise to both contract and tort claims. However, this does not necessarily have to be the case, taking into account that both liability regimes require the parties to satisfy different prerequisites. An example of a situation in which an infringement of personality rights resulting from a breach of contract could hardly constitute a tort is the case in which the claimant purchased woollen underwear from the defendant retailer¹⁰⁰. The underwear contained an excess of sulphur compounds which caused the claimant to suffer intense dermatitis. Similarly, a breach of contract caused bodily injury in the case where the claimant purchased a body lotion from the defendant. As a result of the use of the lotion the claimant suffered extensive damage to the skin, which temporarily prevented her from meeting with other people¹⁰¹.

31. Non-pecuniary loss caused by an infringement of personality rights is compensable in tort law in most of the European jurisdictions. However, in many of the legal systems the recoverability of such loss is denied in contract. The need for equal treatment of this kind of case in both contract and tort has been strongly supported in legal writings¹⁰². It has been argued that the source of infringement (a tortious act or a breach of contract) should be irrelevant to the lawmaker when making a decision on types of interests that should be protected by law¹⁰³. One could argue that tort liability occurs as a result of a violation of generally applicable norms, thus, a behavior that deserves a particularly negative assessment. However, this argument is not convincing. First, one should point out that the circumstances in which tort liability may arise are not limited to intentional or negligent conduct of the tortfeasor. Non-pecuniary loss may also arise in cases in which the law provides for strict liability. Thus, the possibility to claim moral damages in tort law is, in general, not dependent on a particularly undesirable behavior of the tortfeasor. Second, the purpose of civil liability is not to sanction activities that are considered reprehensible but to transfer the burden of damage suffered from the innocent party to the person who caused it¹⁰⁴. The scope of the compensable loss should therefore be established from the perspective of the injured and not the person responsible for its occurrence.

4.3.2. *Infringement of Praetium Affectionis*

32. As it was pointed out earlier, the infringement of *praetium affectionis* is very often a result of non-performance of a contract aimed at fulfilling the non-pecuniary interests of the promisee. In particular, it may be a consequence of a breach of contract to secure, improve or renovate an item that has a personal meaning to the promisee. Nevertheless, the infringement of *praetium affectionis* may also be an incidental result of a breach of contract which purpose was not to fulfil the intangible interests of the promisee. An example of this could be the well-known French case in which a contract

⁹⁹ V.V. PALMER, in *The Recovery of Non-Pecuniary Loss*, p 408.

¹⁰⁰ *Grant v Australian Knitting Mills Ltd* [1936] AC 85. See also: *Wren v. Holt* [1903] 1 KB 610; *Summer v. Salford Corporation* [1943] AC 283 and *Godley v Perry* [1960] 1 WRL 9.

¹⁰¹ Trib. Seine 11.10.1937, *Gaz. Pal.* 1937, II 792.

¹⁰² R. VON JHERING, 'Ein Rechtsgutachten, betreffend die Gäubahn', 18. *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* 1880, p 50; M. SAFJAN, 'Naprawienie krzywdy niemajątkowej w ramach odpowiedzialności ex contractu', in M. Pyziak-Szafnicka (ed) *Odpowiedzialność cywilna. Księga pamiątkowa ku czci Profesora Adama Szpunara* (Kraków: Zakamycze, 2004), p 266; J. JASTRZEBSKI, 'Kara umowna a ochrona interesów niemajątkowych w reżimie kontraktowym', 4. *Kwartalnik Prawa Prywatnego* 2006, p 953 at 970.

¹⁰³ R. VON JHERING, 18. *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* 1880, p 50.

¹⁰⁴ M. KALINSKI, *Szkoda na mieniu i jej naprawienie* (Warszawa: C.H. Beck, 2014), p 146ff.

was made between a horse owner and a horse trainer¹⁰⁵. The purpose of the contract was to prepare the horse to take part in a particular horse race. Under the contract, the horse had been trained for almost a year before the race. On the day of the race, the trainer negligently left a portable lamp in the loose box. The horse bit through the lamp cable and was electrocuted. The horse owner claimed damages for non-pecuniary loss resulting from the loss of the animal to which he was emotionally attached. It can be seen that the purpose of the contract between the horse owner and the horse trainer did not necessarily have to be to fulfil the intangible interests of the promisee. It is probable that the horse-owner entered into the contract in order to obtain financial benefits related to the participation in the race. Hence, the occurrence of non-pecuniary loss could be in this case incidental.

33. A sentimental value placed upon an object or an animal, in general, deserves to be protected regardless of whether its loss results from a breach of contract aimed at fulfilling the non-pecuniary interests of the promisee or occurs as an incidental result of a breach. The non-pecuniary loss that arises in such cases is usually recognizable from the perspective of the third person and involves the infringement of values commonly accepted in the society. There is no reason to limit the compensability of such losses to cases in which the purpose of the contract is to fulfil intangible interests of one of the parties. It may be alleged that the introduction of such limitation would just lead to a very broad interpretation of the concept of the non-pecuniary purpose of a contract by the courts, in a way that would also allow for the compensation of incidental consequences of a breach.

4.3.3. *Physical Inconveniences*

34. The third subcategory consists of cases in which the promisee suffers physical inconvenience as a result of a breach of contract. Compensation of such non-pecuniary losses is allowed, for example, in English law, where the first cases in which damages were awarded for physical inconvenience appeared as early as the 19th century. In the case of *Hobbs v. London and South Western Rly Co.* of 1875¹⁰⁶ the defendant railway company, in breach of contract, failed to transport the claimant and his family to the agreed destination and instead abandoned them after midnight in a different place, leaving them with a five-mile walk home in the rain. The claimant was awarded damages for the inconvenience suffered. In the more recent case of *Perry v. Sidney Phillips & Son*¹⁰⁷ damages for physical inconvenience were awarded in the context of a negligence claim against a surveyor who failed to observe serious defects, including a leaking roof and a septic tank with an offensive smell. In the case of *Perera v. Vandiyar*¹⁰⁸ the claimant tenant was awarded damages for inconvenience suffered as a result of a breach of the tenancy contract when the landlord, to force him out, cut off the gas and electricity supply for a period of six days.

35. The compensability of physical inconvenience arising from a breach of contract is entirely justified. This may be seen particularly in the context of the case law of jurisdictions in which such losses are not recoverable. The Polish Supreme Court, for example, refused to award damages for non-pecuniary loss in a case in which the defendant energy enterprise in breach of contract

¹⁰⁵ Cour de cassation, Civ. (1), 16.01.1962 r., D 1962.199, S 1962.281, JCP 1962 II.12447.

¹⁰⁶ *Hobbs v. London and South Western Rly Co.* (1875) LR 10 QB 111.

¹⁰⁷ *Perry v. Sidney Phillips & Son* (1982) 1 WLR 1297.

¹⁰⁸ *Perera v. Vandiyar* [1953] 1 WLR 672.

suspended electricity supply to the claimant's house for nine months, even though the breach caused enormous discomfort to the claimant and his family¹⁰⁹.

36. As the examples show, physical inconvenience is usually caused by a severe infringement of the intangible interests of the promisee. A lack of possibility to claim damages for non-pecuniary loss would deprive these interests of sufficient protection. The occurrence of such loss is, in general, easy to recognize for the court, which minimalizes the risk of its wrong identification. Furthermore, such losses very often have a broad scope and are foreseeable. Hence, there are no reasons to leave the burden of its compensation on the promisee.

4.3.4. *Anxiety, Mental Distress and Disappointment*

37. The final group consists of cases of anxiety, mental distress and disappointment. In almost every case of non-performance of a contract the promisee experiences a feeling of dissatisfaction, which may be classified as non-pecuniary loss¹¹⁰. The recoverability of such losses cannot be questioned from the axiological perspective – their occurrence is the result of a breach of contract, thus, a negatively assessed behavior of the promisor. On the other hand, such losses are difficult to prove and to evaluate in court. Therefore, it is very often claimed that they should be unrecoverable.

38. It seems, however, that the problem of the compensability of the usual anxiety, distress and disappointment is of a theoretical, rather than practical, nature. One should point out, for instance, that in some jurisdictions the principle of *de minimis non curat lex* applies, according to which the law does not concern itself with trifles¹¹¹. One may assume that the usual anxiety, distress and disappointment will almost always be *de minimis*¹¹². Furthermore, it would be very difficult for the claimant to prove the extent of such losses. Moreover, the costs of litigation will be a factor limiting the number of claims in cases in which the scope of loss is slight¹¹³. Burrows makes another point¹¹⁴. In cases in which the promisee expected to receive only financial benefit from the performance of a contract, the award of damages for economic loss can compensate for the suffered disappointment. Furthermore, even if the promisee expected to receive mental benefit from the performance, she will not be awarded moral damages, so long as an award for damages for economic loss will enable her to buy a substitute providing the same mental benefit. For these reasons, even if damages for the usual anxiety, mental distress and disappointment caused by a breach of contract are available, in practice they would be excluded in many cases¹¹⁵.

5. Conclusion

¹⁰⁹ Judgment of the Polish Supreme Court from 7 December 2011, II CSK 160/11, OSNC 2012, no. 6, pos. 75.

¹¹⁰ A.S. BURROWS, *LMCLQ* 1984, p (119) at 132; F DAWSON, 10. *NZULR* 1983, p (232) at 255–256; M.G. BRIDGE, 'Contractual Damages for Intangible Loss: A Comparative Analysis', 62. *CBR (The Canadian Bar Review/La Revue du Barreau Canadien)* 1984, p (323) at 360.

¹¹¹ N. ENONCHONG, 16. *OJLS* 1996, p (617) at 636; S. HARDER, *Measuring Damages in the Law of Obligations*, 111ff.

¹¹² N. ENONCHONG, 16. *OJLS* 1996, p (617) at 636.

¹¹³ M.G. BRIDGE, 62. *CBR* 1984, p (323) at 360.

¹¹⁴ A.S. BURROWS, *LMCLQ* 1984, p (119) at 123, 125.

¹¹⁵ M.G. BRIDGE, 62. *CBR* 1984, p (323) at 360.

39. Starting with the fundamental idea that the essence of contract is performance, this paper has shown that, in the case of a breach of contract, the remedial response must comprise both pecuniary and non-pecuniary consequences suffered by the innocent party. The paper has demonstrated that there are no immediate reasons to deprive the promisee of an adequate protection of her contractual rights by denying the recoverability of non-pecuniary losses. In order to ensure the proper protection of the interests of the promisee, it is necessary to allow claims for moral damages in all types of cases in which non-pecuniary loss may occur as a result of a breach of contract. This includes both cases in which the aim of a contract is to fulfil the non-pecuniary interests of the promisee (i.e. cases in which the aim of a contract is to provide enjoyment or alleviation of distress to the promisee and cases in which the performance of a contract has an ‘added value’ to the promisee), as well as cases in which the occurrence of non-pecuniary loss is incidental (i.e. cases in which the breach of contract caused an infringement of personality rights or *praetium affectionis*; physical inconveniences; or anxiety, mental distress and disappointment).