

**DAMAGES FOR DISAPPOINTMENT & DISTRESS:
DAMAGES FOR BREACH OF CONTRACT
OR PERSONAL INJURY DAMAGES –
THE IMPACT OF THE CLA**

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This thesis is presented for the Honours degree of Bachelor of Laws of

Murdoch University

(November 2013)

DECLARATION OF ORIGINALITY

I, Sharon Milton, hereby declare that this thesis is my own work and effort and that it has not been submitted anywhere for any award. Where other sources of information have been used, they have been acknowledged.

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Dated: 3 November 2013

ACKNOWLEDGEMENTS

I would like to acknowledge my supervisor Sonia Walker in the preparation of this paper and thank her for her guidance and support.

I would also like to thank Steve Shaw and all the staff of Murdoch University School of Law who have helped me along the way.

Finally, thank you to my family and friends for their support and encouragement.

Sharon Milton

Dated: 3 November 2013

ABSTRACT

Damages for distress and disappointment is an award of damages under the common law to compensate a party on breach of a contractual obligation to provide pleasure, enjoyment or relaxation. In *Insight Vacations*, the New South Wales Court of Appeal determined that the type of damage was synonymous with a claim for damages for a personal injury. Therefore, the *Civil Liability Act 2002* (NSW) ('*CLA*') applied to limit the claimant's award of damages. This thesis provides a critical analysis of the theoretical principles of compensatory damages, with particular focus on the contractual claim for damages for disappointment and distress for a spoiled holiday. The central focus is on the analysis of two significant cases, *Insight Vacations* and *Flight Centre v Louw*, where the New South Wales judiciary determined that the claim for damages for disappointment and distress ought to incur the limitations of the *CLA*. This thesis argues that while both cases claimed damages for disappointment and distress, there is a distinction to be drawn between the two cases. It is submitted that the interpretation and application of the *CLA* to limit a claimant's contractual right to recover damages for a breach of an expectation in a contract was not the intention or purpose of the Act. The *CLA* was introduced to govern the awards of damages for personal injuries caused by negligence, not to deny a remedy to a party for a breach of a contractual obligation.

TABLE OF CONTENTS

I INTRODUCTION	1
II CHAPTER 1 - PRINCIPLES OF COMPENSATORY DAMAGES: CONTRACT & TORT AND DAMAGES FOR DISAPPOINTMENT & DISTRESS	5
A <i>Part 1: Compensatory Damages</i>	6
1 <i>The Wrong Committed and Loss Suffered</i>	7
2 <i>Contractual Obligation or Duty of Care</i>	8
3 <i>General Principles of Compensation: Contract and Tort</i>	9
4 <i>Measure of Damages</i>	10
(a) <i>Tests for Remoteness</i>	11
5 <i>Non-Pecuniary Loss</i>	14
B <i>Part 2: The Contractual Claim of Damages for Disappointment and Distress</i>	16
1 <i>Baltic Shipping Co v Dillon</i>	17
(a) <i>Damages for Disappointment and Distress</i>	19
(b) <i>The Measure of Damages</i>	20
(c) <i>The Court: ‘Object’ or ‘Physical Inconvenience’</i>	22
(d) <i>Assessment of Damages</i>	24
C <i>Conclusion</i>	27
III CHAPTER 2 - THE CIVIL LIABILITY ACT & CASE LAW	29
A <i>Part 1: The Civil Liability Act</i>	30
1 <i>Background: The Insurance Crisis</i>	31
2 <i>The IPP Report</i>	33
3 <i>Statutory Interpretation of the CLA</i>	35
(a) <i>The Purpose and Structure</i>	35
(b) <i>Part 1 – Preliminary</i>	36
(i) <i>Damages and Operation of the Act</i>	36
(ii) <i>Personal Injury and Negligence</i>	38
(c) <i>Part 1A – Negligence</i>	38
(d) <i>Part 2 – Personal Injury Damages</i>	39
(i) <i>Severity of the Claim</i>	40

(ii) <i>Pain and Suffering: Consequential Suffering or a Personal Injury?</i>	41
(e) <i>Is Fault Negligence?</i>	43
B <i>Part 2: New South Wales Case Law</i>	45
1 <i>Insight Vacations v Young</i>	46
(a) <i>The Facts</i>	46
(b) <i>Damages for Disappointment</i>	47
(c) <i>Critical Analysis</i>	48
(i) <i>Kinds of Damages - Application of Negligence Case Law</i>	48
(ii) <i>Principle from Baltic Shipping</i>	52
(iii) <i>Basten JA's Concluding Statements</i>	54
2 <i>Flight Centre v Louw</i>	56
(a) <i>The Facts</i>	56
(b) <i>Ground 1 – Damages for Non-Economic Loss</i>	57
(c) <i>Ground 2 – Pure Mental Harm Resulting from Negligence</i>	60
(d) <i>A Failure to take reasonable care and skill: Negligence or a Breach of Contract?</i>	62
C <i>Conclusion</i>	64
IV CHAPTER 3 - THEORETICAL PRINCIPLES OF NON-PECUNIARY LOSS	65
A <i>Part 1: Compensation for Non-Pecuniary Loss in Contract</i>	65
1 <i>Positive or Consequential Non-Pecuniary Loss</i>	66
(a) <i>Positive Non-Pecuniary Loss</i>	67
(i) <i>Expressed Promise</i>	67
(ii) <i>Implied Promise</i>	68
(iii) <i>Objective Added Value</i>	69
(iv) <i>Subjective Added Value</i>	70
(b) <i>Consequential Non-Pecuniary Loss</i>	72
(i) <i>Personal or Physical Injury</i>	73
(c) <i>Overlap of the Non-Pecuniary Losses</i>	76
2 <i>Conclusion</i>	77
B <i>Part 2: Awards of Damages in Holiday Cases</i>	78
1 <i>Milner v Carnival – The English Position</i>	79
(a) <i>The Facts</i>	79

(b) <i>The Measure of Damages</i>	80
(c) <i>The Assessment of Damages</i>	81
(d) <i>Conclusion</i>	85
2 <i>Australian Consumer Law</i>	86
V CONCLUSION	87
VI BIBLIOGRAPHY	91

I INTRODUCTION

The general rule of the common law is that on a breach of contract, damages will not be recoverable for non-pecuniary losses for ‘injured feelings’ in the form of anxiety, disappointment or distress.¹ As an exception to that rule, the High Court of Australia, following a line of English case authority, confirmed that a claimant will be entitled to damages for distress and disappointment flowing from the breach, when ‘the object of the contract was to provide enjoyment, relaxation and freedom from molestation.’² The measure of damages flowing from the breach is the measure of the expectation bargained for in the contract. However, the quantum of damages, and in some cases right to recover any damages for disappointment and distress, is now restricted on implementation of the *Civil Liability Act (2002) NSW* (‘*CLA*’).³

The *CLA* was introduced into the Australian legal framework as a set of parliamentary reforms to limit awards of damages for personal injury claims. Awards of personal injury damages and claims for non-economic loss are restricted unless the severity of the non-economic loss is at least 15% of a most extreme case.⁴ In *Insight Vacations Pty Ltd v Young*⁵ the New South Wales Court of Appeal (‘*NSWCA*’) determined that a contractual claim of damages for disappointment and distress were elements of pain and suffering that fell within the definition of non-economic loss.⁶ Therefore, an award of damages must incur the limitations imposed

¹ See *Hamlin v Great Northern Railway Co* (1856) 1 H & N 408; 156 ER 1261; *Hobbs v London & South Western Railway Co* (1875) LR 10 QB 111; *Addis v Gramophone Co Ltd* [1909] AC 488, cited with approval in *Fink v Fink* (1946) 74 CLR 127, 142-143 (Dixon and McTiernon JJ).

² *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 (*per curiam*) (‘*Baltic Shipping*’).

³ Cases that have held that the *CLA* applied to a contractual claim for damages for disappointment and distress have been determined in New South Wales (‘*NSW*’). Unless otherwise stated, *CLA* stands for the NSW legislation only.

⁴ *CLA* s 16(1).

⁵ (2010) 78 NSWLR 641 (‘*Insight Vacations*’).

⁶ *Ibid* 649-650 [125]-[130] (Basten JA), 644 [78] (Spigelman CJ) Sackville AJA’s dissenting judgment determined the loss to be ‘loss of amenities of life’ at 655 [175].

by the *CLA*.⁷ The statement of law from *Insight Vacations* was then applied in *Flight Centre Ltd v Louw*.⁸ The case concerned a claim for damages for disappointment and distress on breach of a contractual obligation to provide pleasure, enjoyment or relaxation. The breach caused a spoiled holiday, however, the claim for damages was completely denied. The court determined that ‘inconvenience, distress and disappointment experienced by the [claimants] constituted non-economic loss ... being pain and suffering ... [which] constituted impairment of the mental condition ... and so amounted to personal injury.’⁹ Following *Insight Vacations* an award of damages had to be assessed in accordance with the *CLA*. The two cases, however, are distinguishable. In the former, the claimant suffered a personal injury; in the latter, the claimant suffered no personal injury. This thesis argues while the *CLA* ought to apply in *Insight Vacations*, the *CLA* ought not to have applied to limit the claim for damages in *Louw*. Damages awarded to compensate loss incurred by a personal injury are not the same kind of damages awarded on breach of contract.

This thesis is a critically analysis of how a contractual claim for damages for disappointment and distress, awarded for breach of an expectation, came to incur the limitations imposed by legislation governing awards of damages for personal injuries. The focus of the thesis is on the impact of the *CLA* on two contract cases determined in New South Wales (‘NSW’). This thesis refers primarily to the *Civil Liability Act (2002) NSW* (‘*CLA*’). Equivalent legislation has been enacted across Australian states and territories.¹⁰ Under the *CLA*, damages for ‘non-pecuniary loss’

⁷ *Ibid* 649-650 [125]-[130] (Basten JA), 644 [78]-[79] (Spigelman CJ), 655 [176]-[177] (Sackville AJA).

⁸ (2011) 78 NSWLR 656 (‘*Louw*’).

⁹ *Ibid* 663 [31] (Barr AJ).

¹⁰ *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Personal Injuries Proceedings Act 2002* (Qld); *Civil Liability Act 2003* (Qld); *Civil Liability Act 1936* (SA); *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Wrongs and Other Acts (Public*

are referred to as damages for ‘non-economic loss.’¹¹ However the terms are interchangeable. The term ‘non-pecuniary’ loss will be used discussing theoretical principles and English case law. The term ‘non-economic’ loss will be used when discussing the *CLA* and the application to case law determined in NSW.

The thesis argument is presented through three chapters using a doctrinal research methodology assessing the legal concepts and principles through case law and statute. Chapter 1 outlines the theoretical principles of compensatory damages and introduces the principles behind compensation for non-pecuniary loss, with particular focus on the principles of compensation for the unique head of damages for disappointment and distress. Chapter 2 evaluates the policy and purpose underlying the reforms to civil liability, and outlines the relevant sections of the *CLA* that have been determined to limit a contractual claim for damages for non-economic loss. The central focus of this chapter is a critical analysis of two holiday cases *Insight Vacations Pty Ltd v Young*¹² and *Flight Centre Ltd v Louw*.¹³ In both cases the claimants pursued damages for disappointment and distress on breach of contract. The New South Wales judiciary determined, as the claim of damages was for non-economic loss, the *CLA* ought to apply to limit an award of damages. The cases, however, are distinguishable by the presence or absence of ‘negligence’ that ‘caused a personal injury’. It is these two essential factors that invoke the application of the *CLA* to limit an award of damages for non-economic loss. Whilst there has been commentary on the impact of *Insight Vacations* and *Louw*¹⁴ to date there remains a

Liability Insurance Reform) Act 2002 (Vic); *Civil Liability Act 2002* (WA). Analysis of comparative legislation is beyond the scope of this thesis; but see, below n 16.

¹¹ See *CLA* s 3 (definition of ‘non-economic loss’).

¹² (2010) 78 NSWLR 641.

¹³ (2011) 78 NSWLR 656.

¹⁴ See Trudie-Ann Atherton, ‘Damages a Disappointment for Travellers’ (2011) 107 *Precedent* 18; Selva Veeriah, ‘Is There a Distinction Between ‘Distress’ and ‘Disappointment’ in Personal Injury Damages?’ (2010) (19 July) *Mondaq Business Briefing* 1; Olivia Dinkha, ‘When Your dream Holiday

lack of critical analysis assessing whether the application of the *Civil Liability Act* to this unique head of damages is justifiable on the basis of the fundamental principles of contract law.

Chapter 3 provides a further analysis of the theoretical principles where damages are awarded to compensate for non-pecuniary loss on breach of contract. This chapter differentiates types of non-pecuniary loss as positive or consequential losses.¹⁵ These distinctive types of non-pecuniary losses, for which a claimant may recover damages on a breach of contract, distinguish the basis on whether or not the *CLA* ought to apply to limit an award of damages. This chapter includes an analysis of a recent judgment by the English Court of Appeal that outlines the English approach to the basis on which damages are awarded and assessed for disappointment and distress on breach of contract for a spoiled holiday.

The thesis concludes by arguing that the *CLA* should not apply to an award of damages for disappointment and distress. Subsequently, there appears to be confusion over the correct application and to what extent the *CLA* may apply to limit a claimant's right to a remedy.¹⁶ The *CLA* was introduced to govern the awards of damages for personal injuries caused by negligence, not to deny a remedy to a party for a breach of a contractual obligation.

Goes Bad Can You Recover Damages for Disappointment? – *Insight Vacations Pty Ltd v Young* [2010] NSWCA 137 (2010) (7 July) *Mondaq Business Briefing* 1.

¹⁵ Ewan McKendrick and Katherine Worthington, 'Damages for Non-Pecuniary Loss' in Nili Cohen and Ewan McKendrick (eds) *Comparative Remedies for Breach of Contract* (Hart Publishing, 2005) 287.

¹⁶ See *Rankilor v Circuit Travel Pty Ltd* [2011] WADC 230: the plaintiff claimed damages for breach of contract by the holiday tour company. The claim was dismissed by Magistrate Bromfield in the Magistrates Court of Western Australia. The case was appealed on the ground of a denial of natural justice. Although the appeal failed, it is interesting to note that the Magistrate referred the parties to *Insight Vacations* where the *Civil Liability Act 2002* (WA) differs from the NSW legislation. Discussion of how the Acts differ between Australian jurisdictions is beyond the scope of this thesis. However, as under s 32 of the *Magistrate Court (Civil Proceedings) Act 2004* (WA); 'there is no right of appeal against a decision because the Magistrate was wrong in fact or law:' at [5]; it is important to clarify this point of law.

II CHAPTER 1

PRINCIPLES OF COMPENSATORY DAMAGES: CONTRACT & TORT AND DAMAGES FOR DISAPPOINTMENT & DISTRESS

The first part of this chapter outlines the doctrinal principles of damages awarded to compensate a plaintiff for the two different actionable wrongs: a breach of contract and a tortious act or omission that caused a personal injury. The two actionable wrongs, under the common law, are governed by different measures that will determine the extent of the defendant's liability, and the extent of damage for which a plaintiff will be compensated for their loss. This part distinguishes between the correct measures depending on the actual breach, or the wrong, that was committed. The differing principles behind the aim of compensatory damages, between the two civil wrongs, and the types of loss that a wronged party receives compensatory damages, forms the underlying rationale to the thesis argument. The second part of this chapter provides an analysis of the unique contractual head of damages for disappointment and distress as determined in *Baltic Shipping Co v Dillon*.¹⁷ Although the claim is for 'disappointment and distress', the measure of damages and assessment of loss is governed by the contract rules for compensation. The differences between the two types of wrongs committed distinguish how the loss is measured: for a breach of contract, and a loss incurred by a personal injury caused by negligence, which establishes the starting point for the argument that the *CLA* should not apply to restrict a plaintiff's contractual claim for damages for disappointment and distress.

¹⁷ (1993) 176 CLR 344.

A Part 1: Compensatory Damages

The primary remedy for a plaintiff who has suffered a civil wrong is an award of damages. ‘The object of an award of damages is to give the claimant compensation for the damage, loss or injury he has suffered.’¹⁸ The general rule, which forms the starting point for the measure of damages, comes from the statement of Lord Blackburn in *Livingstone v Rawyards Coal Co*:

That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.¹⁹

This rule applies equally to tort and contract.²⁰ To put the party in the position as ‘if he had not sustained the wrong’²¹ it is necessary to look at what wrong was committed, and what kind of damage or loss the plaintiff is entitled to receive compensatory damages.²² The extent of the defendant’s liability depends on the scope of the defendant’s duty. The scope of a duty in tort differs to the duties or obligations owed in contract. Therefore, the type of duty owed determines the type of wrong committed. The different wrongs will then determine the correct test to measure the liability of the defendant.²³

¹⁸ Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 18th ed, 2009) 13 [1-021]; see also Harold Luntz, *Assessment of Damages for Personal Injury and Death: General Principles* (LexisNexis, 2006) 1, citing *Alexander v Perpetual Trustees WA Ltd* (2004) 216 CLR 109 at [38] (Gleeson CJ, Gummow and Hayne JJ) citing *Royal Brompton Hospital National Health Service Trust v Hammond* [2002] 2 All ER 801 at 806, 813-14. Quotations through this thesis have been cited without alteration to gender specific language. When the term he/his/man appears in a quotation, it should be read as gender neutral language: eg, ‘he’ read as ‘she’; and ‘man’ read as ‘person’.

¹⁹ (1880) 5 App Cas 25, 39.

²⁰ McGregor, above n 18, 14 [1-022].

²¹ *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39.

²² The starting point of Lord Blackburn’s statement has been redefined: ‘Before one can consider the principle on which one should calculate damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation;’ *Banque Bruxelles Lambert v Eagle Star Insurance Co* [1997] AC 191, 211A (Lord Hoffmann) (commonly referred to as *SAAMCO*) quoted in McGregor, above n 18, 14 [1-022].

²³ See William Bishop, ‘The Contract-Tort Boundary and the Economics of Insurance’ (1983) 12 *Journal of Legal Studies* 241.

1 *The Wrong Committed and Loss Suffered*

Civil wrongs, for which a successful plaintiff can recover compensatory damages, might be: a breach of contract; or a tortious act or omission, ‘negligence,’ that has caused an injury.²⁴ In contract, the wrong that is committed is the failure to perform the agreed obligations which are the express or implied terms under the contractual agreement. Obligations ‘are based on the reasonable expectations induced by a promise.’²⁵ On the disappointment of those obligations, the contract is in breach and the wrong is committed.²⁶ The law of tort, specifically negligence, is different in that it sits outside or ‘fills the gap’²⁷ around the law of contract. The wrong in negligence ‘is the failure to exercise the care of an ordinarily prudent and careful man.’²⁸ When the plaintiff can prove that, the defendant owed a duty of care to the plaintiff, the defendant breached that duty by a negligent act or omission, and that negligence caused harm, the plaintiff has an action against the wrong only to the extent that the injury and consequential suffering was caused by the negligence. The negligent wrong must have caused the damage that is the personal injury. The personal injury becomes the gist of the action.²⁹ This is distinguishable from the actionable wrong for a breach of a contractual obligation. The plaintiff has a right to pursue a claim for

²⁴ McGregor, above 18, 12 [1-019].

²⁵ Brian Coote, ‘The Essence of Contract: Part 1’ (1988) 1 *Journal of Contract Law* 91, 103-4, citing R L Meek, D D Raphael and P G Stein (eds), *Lectures on Jurisprudence* (Oxford: Clarendon Press, 1978) at 92.

²⁶ Ibid; the law will compensate a party to the extent that the promisee has relied upon the reasonable expectations that were promised, and the reliance on the expectation has caused detriment. For a comprehensive analysis of contractual theories see Coote, above n 25.

²⁷ Pam Stewart and Anita Stuhmcke, *Australian Principles of Tort Law* (Federation Press, 2nd ed, 2009) 4, citing *Hill v Van Erp* (1997) 188 CLR 159 at 231 (Gummow J).

²⁸ Richard A Posner, ‘A Theory of Negligence’ (1972) 1 *Journal of Legal Studies* 29, 29; See *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781; 156 ER 1047 at 1049 (Alderson B); *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-8 (Mason J); ‘hypothetical person on a hypothetical Bondi tram’ in *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 at 36 (Deane J).

²⁹ Harold Luntz, *Assessment of Damages for Personal Injury and Death: General Principles*, (LexisNexis, 2006) 134.

damages, based on the breach of the contract alone, regardless of the loss suffered.³⁰

The damages in contract flow from the breach of the obligation, not the extent of the injury caused.

2 Contractual Obligation or Duty of Care

The defendant in a contract will owe primary obligations under the express and implied terms in a contract. A defendant may also owe secondary duties, that is, a duty to act with reasonable care and skill. These have been described as ‘varieties of contractual liability.’³¹ ‘The three varieties of [a] contract claim are nonperformance of the promise, breach of warranty, and breach of a contractual duty of care.’³² A contractual duty of care is therefore analogous to the duties owed under the tort of negligence.³³ The defendant is liable to the extent that it was ‘reasonable’ for the plaintiff to rely on the defendant to act with reasonable care and skill. The liability is not strict. A defendant will have a defence and will not be liable if they could show they had exercised reasonable skill and care.

This is distinguishable from primary obligations owed under a contractual promise.

If the promise, or terms of the contract, are not performed this gives rise to an action in damages.³⁴ The liability of the defendant is strict. The plaintiff

need not prove negligence or other fault on the part of the [defendant] in order to collect damages ... The promisor cannot plead as [an] excuse the carefulness or reasonableness of his (or her) actions ... despite much care on his own part.³⁵

³⁰ Although only nominal damages will be awarded if the extent of loss cannot be established, these are generally not regarded as compensatory damages; see McGregor, above n 18, 413-9.

³¹ Bishop, above n 23, 243.

³² Ibid.

³³ Ibid 244.

³⁴ Ibid.

³⁵ Ibid.

If a plaintiff suffers a personal injury, even under a contractual obligation, the extent the defendant will be liable for the injury, and the rules of assessing an award of damages, are the same rules and measures as a tortious duty of care. The tort law reform legislation ‘has introduced a statutory test for breach of duty of care: a statutory definition of negligence.’³⁶ The statutory test applies when the wrong is the breach of duty of care that caused the personal injury. The duty owed, however, is not the same as a primary obligation under a contract where a party has bargained for a promise, and a defendant has failed to deliver.

In contract, parties have agreed to obligations under the terms of the contract. Each party owes a strict liability to the extent of the terms they have agreed upon. When parties have bargained for something in a contract and have paid for that promise, the party expects performance of that promise.³⁷ On breach of a contractual obligation the wronged party is awarded compensation based on the expectation of performance of the promise. How a plaintiff is then compensated for their loss, by an award of damages for a breach of contract or a personal injury caused by negligence, is governed by differing principles.

3 General Principles of Compensation: Contract and Tort

The fundamental principle of compensation in contract law comes from the statement by Parke B in *Robinson v Harman*: ‘where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the

³⁶ Stewart and Stuhmcke, above n 27, 156; see *CLA* pt 1A div 2 ‘Duty of Care’.

³⁷ See D Friedman, ‘The Performance Interest in Contract Damages’ (1995) 111 *Law Quarterly Review* 628.

same situation, with respect to damages, as if the contract had been performed.’³⁸ This is distinguishable from the principle of compensation to a party who has been injured by negligence: where an award of damages, ‘as nearly as possible, put him in the same position as if he had not sustained the injuries.’³⁹ Compensation for a personal injury is based on the principle of *restitutio in integrum*, or restoring the plaintiff to the original position.⁴⁰ Compensatory damages for a personal injury look to the extent of loss or suffering caused by the injury, whereas compensation for breach of contract looks to value of the contract that the party bargained to receive. The measure of compensatory damages across the two causes of actions, are therefore limited by different rules.

4 *Measure of Damages*

An award of damages does not aim to cover the full spectrum of losses incurred by a plaintiff on a breach of contract or losses incurred by an injury. The measure of damages for a breach of contract is primarily the measure of the expectation. The expectation loss in contract is the measure of the loss of the benefit that was created by the promises, or terms, on entering the contract. Or, those ‘benefits’ that were reasonably within contemplation of the parties at the time of entering the contract.⁴¹ The measure of damages for a personal injury differs in that it does not have any measure of expectation. The parties have no formal relationship, or agreed upon obligations. So a wider measure of loss applies for a personal injury to the losses that

³⁸ (1848) 1 Ex 850, 855; 154 ER 363, 365; confirmed by the High Court in; *Commonwealth v Amann Aviation* (1991) 174 CLR 64 at 80.

³⁹ *Todorovic v Waller* (1981) 150 CLR 402, 412 (Gibbs and Wilson JJ).

⁴⁰ Luntz, above n 29, 7.

⁴¹ See *Hadley v Baxendale* (1854) 9 Ex 341, 354; 156 ER 145, 151.

were merely reasonably foreseeable.⁴²

(a) Tests for Remoteness

In contract, the extent to which a defendant will be liable for losses on breach, comes from the test for remoteness laid down in *Hadley v Baxendale*:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such may fairly and reasonably be considered either as arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.⁴³

The rule is ‘subject to the express intentions of the parties as shown by the terms of their contract.’⁴⁴ Therefore the two-limb remoteness test in contract is based on the expected primary obligations that the parties have bargained for in the contractual agreement. Upon a breach of those obligations damages will be awarded only to the extent that the losses that the party incurred:

1. would fairly and reasonably arise naturally from the breach, or; where the loss was deemed not to arise naturally, however deemed
2. to have been in contemplation of both parties at the time the contract was entered into, as a probable result of the breach.⁴⁵

⁴² *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound (No 1))* [1967] AC 388.

⁴³ (1854) 9 Ex 341, 354; 156 ER 145, 151 (Alderson B). The rule formulated by Alderson B’s remains the governing principle of remoteness in Australian law; *Commonwealth v Amann Aviation* (1991) 174 CLR 64 at 91-2 (Mason CJ and Dawson J).

⁴⁴ Donald Harris, David Campbell and Roger Halson, *Remedies in Contract & Tort* (LexisNexis, 2nd ed, 2002) 90.

⁴⁵ *Hadley v Baxendale* (1854) 9 Ex 341, 354; 156 ER 145, 151.

A loss naturally arising from the obligations, or within contemplation that may arise from knowledge of special circumstances,⁴⁶ denotes the ‘underlying rationale the desire to set out a rule which would establish a certain and predictable method for calculating in advance the damage for which a contracting party would be liable in the event that he breached his contract.’⁴⁷ The test of remoteness in contract is narrower than the test of remoteness in tort.⁴⁸

In *Czarnikow Ltd v Koufos*, Lord Reid explained the difference between the contract and tort tests of remoteness:

The modern rule of tort is quite different and it imposes a much wider liability. The defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it. And there is good reason for the difference. In contract, if one party wishes to protect himself against a risk which the other party would appear unusual, he can direct the other party’s attention to it before the contract is made ... But in tort there is no opportunity for the injured party to protect himself in that way, and the tortfeasor cannot reasonably complain if he has to pay for some very unusual but nevertheless foreseeable damage which results from his wrongdoing.⁴⁹

⁴⁶ See *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528.

⁴⁷ Thomas D Musgrave, ‘Comparative Contractual Remedies’ (2009) 34 *University of Western Australia Law Review* 300, 360.

⁴⁸ Notwithstanding *Hadley v Baxendale*’s two-limb test, the proposition appeared to reformulate to one principle in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, where Asquith LJ determined at 539 (emphasis added):

In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time *reasonably foreseeable* as liable to the result of the breach. What was at the time foreseeable depends on the knowledge possessed by the parties, or in all events by the party who later commits the breach.

While this appears to provide a test for the second limb of *Hadley v Baxendale*, the House of Lords in *Czarnikow Ltd v Koufos* (1969) 1 AC 350, made it clear that the use of the term ‘reasonable foreseeable’ went beyond the authoritative principle of the remoteness test in contract and was not the basis of the contemplation, or knowledge test. Lord Reid stated, ‘to bring in reasonable foreseeability appears to me to be confusing measure of damages in contract with measure of damages in tort’ at 389. The test of reasonable foreseeability and the contemplation tests were two distinct tests, which all of the Law Lords in this case agreed: at 389; quoted in Musgrave, above n 47, 360-2.

⁴⁹ (1969) 1 AC 350, 385 (‘*Czarnikow*’).

The contemplation test of remoteness⁵⁰ in contract has been noted with approval by the High Court in *Burns v MAN Automotive (Aust) Pty Ltd*.⁵¹ The reasonable foreseeability test of remoteness in tort⁵² was confirmed by Mason J in *Wyong Shire Council v Shirt*.⁵³

Therefore, damages in contract aim to compensate the wronged party to the extent of the loss of the expectation that was naturally arising or within contemplation of the parties at the time of entering the contract. On occasion of a breach, a plaintiff who has relied on the expectation of the promise to his or her detriment can recover damages to the extent that the breach caused detriment. However, damages in tort, on a negligent act or omission, aim to compensate the injured party only to the extent of the injury suffered. The defendant will be liable only to the extent that any loss suffered was a reasonable foreseeable loss as a consequence of the negligence. Consequential losses may include pain and suffering as a result of the personal injury. The tests governing how a party is compensated for their loss differ between contract and tort. So too, the kind of damage, or losses, for which a wronged party may receive compensation differ between a breach of contract and negligence that caused a personal injury.

Traditionally, contracts were viewed as primarily commercial matters ‘therefore protection afforded by the law of contract is primarily directed to commercial [or

⁵⁰ Lord Reid defined the contemplation test *ibid*:

The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation.

⁵¹ (1986) 161 CLR 653, 667 (Wilson, Deane and Dawson JJ) see Musgrave, above n 47, 362.

⁵² See *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound (No 1))* [1961] AC 388.

⁵³ (1980) 146 CLR 40: ‘A risk which is not far-fetched or fanciful is real and therefore foreseeable;’ at 47-8 (Mason J).

pecuniary] losses.⁵⁴ However, the courts have held that ‘various possible heads of non-pecuniary loss are considered⁵⁵ to compensate for the wrong.

5 *Non-Pecuniary Loss*

The difference between an award of damages for a non-pecuniary loss caused by negligence or a breach of contract is that: ‘in tort they are the rule, in contract the exception.’⁵⁶ Compensation for non-pecuniary loss awarded for a personal injury is generally based on the consequential loss suffered by a plaintiff. The measure and extent of liability for damages is that which is reasonably foreseeable.⁵⁷ The types of non-pecuniary losses for which a defendant may be liable are: pain and suffering, loss of amenities (or enjoyment of life) and loss of expectation of life.⁵⁸ There is no measure of an expectation.⁵⁹

Non-pecuniary losses or damages for pain and suffering are not usually recoverable in contract. It is considered:

generally foreseeable that a breach of a contract will result in the injured party experiencing some form of disappointment at the frustration of erstwhile

⁵⁴ McGregor, above n 18, 64 [3-013]. Pecuniary losses will generally only be awarded, to the commercial value of that benefit: Harris, Campbell and Halson, above n 44, 16-7.

⁵⁵ McGregor, above n 18, 64 [3-013].

⁵⁶ Ibid 57 [3-001].

⁵⁷ *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound (No 2))* [1967] 1 AC 617; ‘a real risk’ at 643.

⁵⁸ Luntz, above n 29, 70 : Non-pecuniary losses are separated from pecuniary losses, which are generally ‘loss of earning capacity and expenditure on needs created by the injury.’

⁵⁹ Arguably, a party may *expect* not to be injured, however, the focus here looks at the loss incurred, not the benefit one hoped to obtain. For a defendant to be liable for a personal injury, the defendant must owe a duty of care, that duty must be breached, the breach must have caused the loss and the loss must not be too remote. While the tests might look similar, the standards of the duties are different: see above Part II Ch 1(A)(1)(2)(4)(a).

expectations, the recovery of such a loss has traditionally been barred by courts on the grounds of policy.⁶⁰

Despite public policy restrictions the Courts have held for a unique class of contracts: where the very object of the contract was the expectation to provide pleasure, enjoyment or relaxation; on a breach of that obligation, the plaintiff can receive compensation for the loss of the expectation.⁶¹ The only non-pecuniary loss, or pain and suffering, for which a claimant may recover damages on a breach of contract, are those that flow from the expectation. Any non-pecuniary loss that does not flow from the expectation is too remote and thus not recoverable.

Damages that are awarded for non-pecuniary losses on a breach of contract follow the rule in *Hadley v Baxendale*:⁶²

The damages flow directly from the breach of contract, the promise being to provide [a benefit]. In these situations the court is not driven to invoke notions such as ‘reasonably foreseeable’ or ‘within the reasonable contemplation of the parties’ because the breach results in a failure to provide the promised benefits.⁶³

Importantly, under this head of damage, the measure of the non-pecuniary loss that determines an award of damages is not measured solely the extent of the ‘injury suffered’ as might be analogous to a personal injury claim. The measure of damages

⁶⁰ Adrian Chandler and James Devenney, ‘Breach of Contract and the Expectation Deficit: Inconvenience and Disappointment’ (2007) 27 *Legal Studies* 126, 129-30. ‘Policy’ concerns likely ‘resulted from the apparent subjectivity of the subject matter, the difficulties of proof and a general desire to discourage victims from inflating their claims to damages (in particular the perceived danger of opening the ‘floodgates’) at 130, citing D Capper ‘Damages for Distress and Disappointment – the Limits of *Watts v Morrow*’ [2000] 116 LQR 553.

⁶¹ See *Jarvis v Swans Tours Ltd* [1973] QB 233; *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468; *Baltic Shipping* (1993) 176 CLR 344.

⁶² (1854) 9 Ex 341, 354; 156 ER 145, 151 (Alderson B); when those damages are: such as may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

⁶³ *Baltic Shipping* (1993) 176 CLR 344, 365 (Mason CJ).

is the value of the expectation that was created by the defendant party, combined with the monetary value of any consequential suffering incurred by the plaintiff on breach of that expectation. This is the unique claim of damages for disappointment and distress for a breach of contract.⁶⁴

B *Part 2: The Contractual Claim of Damages for Disappointment and Distress*

The general rule of the common law is that upon a breach of contract, damages will not be recoverable for non-pecuniary loss in the form of anxiety, disappointment or distress.⁶⁵ These type of losses classed as ‘injured feelings’ were determined not to be a type of compensable loss that flows from a breach of contract. The policy behind the general rule was that as contracts are essentially commercial transactions, allowing compensation for injured feelings might open the floodgates and lead to inflated awards of damages.⁶⁶ It was deemed that ‘anxiety is an almost inevitable concomitant of expectations based on promises, so that a contracting party must be deemed to take the risk of it.’⁶⁷ However, policy considerations and the legal rules limiting recovery were challenged by a line of English cases that created a series of exceptions to the general rule.⁶⁸

⁶⁴ See *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.

⁶⁵ *Hamlin v Great Northern Railway Co* (1856) 1 H & N 408, 411; 156 ER 1261, 1262: ‘Generally in actions upon contracts no damages can be given which cannot be stated specifically, and ... the plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but not damages for the disappointment of mind occasioned by the breach of contract;’ (Pollock CB). Followed by: *Hobbs v London & South Western Railway Co* (1875) LR 10 QB 111; *Addis v Gramophone Co Ltd* [1909] AC 488, cited with approval in *Fink v Fink* (1946) 74 CLR 127, 142-3 (Dixon and McTiernon JJ).

⁶⁶ See Chandler and Devenney, above n 60 and accompanying text. See also Harris, Campbell and Halson, above n 44 ch 30, take the view that damages for disappointment and distress might be considered ‘exemplary damages’. This thesis proceeds on the general view that damages for disappointment and distress is an award of compensatory damages.

⁶⁷ *Hayes v James & Charles Dodd (A Firm)* [1990] 2 All ER 815, 878 (Staughton LJ).

⁶⁸ See, eg, *Jarvis v Swans Tours Ltd* [1973] QB 233; *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468; *Heywood v Wellers* [1976] 1 QB 446.

The leading case that determined the exceptions whereby damages may be recovered for non-pecuniary loss was *Watts v Morrow*.⁶⁹ Bingham LJ distinguished the two exceptional categories:

Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead ... In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort.⁷⁰

However, the two exceptional categories where damages for non-pecuniary losses may be awarded on a breach of contract, appears to have become distorted by the application of the *CLA* to limit a claimant's recovery of damages for disappointment and distress. The principles underlying the measure and assessment of damages for disappointment and distress are outlined in the case *Baltic Shipping Co v Dillon*.⁷¹

1 *Baltic Shipping Co v Dillon*

The High Court case of *Baltic Shipping*⁷² confirmed the legal principle that a plaintiff is entitled to an award of damages for anxiety, disappointment and distress on a breach of contract. The claimant, Mrs Dillon had a contract with the shipping company's travel agency for a 14-day cruise. Ten days into the cruise the vessel sank and Mrs Dillon suffered a personal injury. The claimant brought an action against the shipowner for damages for breach of contract. At the first instance Mrs Dillon was

⁶⁹ [1991] 1 WLR 1421.

⁷⁰ Ibid 1445.

⁷¹ (1993) 176 CLR 344 ('*Baltic Shipping*').

⁷² Ibid.

awarded damages of \$51,396.⁷³ The award, in part, included: \$35,000 for the personal injury suffered (which included emotional trauma), \$1,417 for the restitution of the whole fare, and \$5,000 compensation for disappointment and distress.⁷⁴ Notably, in the statement of claim, compensation for disappointment and distress was sought for the ‘loss of entertainment’. That was the loss of the benefit that was promised in the contract. This was a separate head of damages to the compensation awarded for the emotional stress suffered due to the personal injury. The award of personal injury damages was not considered on appeal by the High Court.

The High Court granted special leave to consider two issues. They were, the restitution of the whole fare and the award for damages for disappointment and distress. The High Court determined that Mrs Dillon ‘was not entitled to a refund of the fare because there had not been a total failure of consideration.’⁷⁵ Further, the *per curiam* of the High Court determined that Mrs Dillon: ‘was entitled to an award of damages for disappointment and distress flowing from breach of contract, since the object of the contract was to provide enjoyment, relaxation and freedom from molestation.’⁷⁶

⁷³ The sum of damages awarded at the first instance was less the \$4,786 received from the defendant; *Dillon v Baltic Shipping Co (Mikhail Lermontov)* (1989) 21 NSWLR 614 (Carruthers J), affd *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1 (Gleeson CJ, Kirby P, Mahoney JA dissenting).

⁷⁴ Damages were also awarded for: \$4,265 for loss of valuables, and \$10,500 interest on the damages, *ibid*.

⁷⁵ *Baltic Shipping* (1993) 176 CLR 344, 344 (*per curiam*); Mrs Dillon had the benefit of enjoying the first full 8 days of the cruise.

⁷⁶ *Ibid* considered; *Hamlin v Great Northern Railway Co* (1856) 1 H & N 408; 156 ER 1261; *Burton v Pinkerton* (1867) LR 2 Ex 340; *Hobbs v London & South Western Rly Co* (1875) LR 10 QB 111; *Addis v Gramophone Co Ltd* [1909] AC 488; *Jarvis v Swans Tours Ltd* [1973] QB 233; *Heywood v Wellers* [1976] QB 446; *Cox v Philips Industries Ltd* [1976] 1 WLR 638; *Bliss v South East Thames Regional Health Authority*, [1987] ICR 700; *Hayes v James & Charles Dodd (A Firm)* [1990] 2 All ER 815; *Watts v Morrow* [1991] 1 WLR 1421; see also, *Czarnikow Ltd v Koufos* [1969] 1 AC 350 (considered, however omitted from CLR head-note).

(a) *Damages for Disappointment and Distress*

Their Honours affirmed the general rule that damages for injured feelings could not be awarded for a breach of contract.⁷⁷ However, Mason CJ confirmed that disallowing such a head of damage was based on ‘flimsy policy foundations and conceptually is at odds with the fundamental principle governing the recovery of damages.’⁷⁸ Considering a line of English case authority where damages had been awarded for disappointment and distress on a breach of contract,⁷⁹ each of their Honours applied the limiting circumstances where damages might be awarded under *Watts v Morrow*:

Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective ...

In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort.⁸⁰

The High Court determined that the limiting exceptions, for this unique head of damage, must be measured following the rule in *Hadley v Baxendale*.⁸¹

⁷⁷ *Baltic Shipping* (1993) 176 CLR 344, 360-1 (Mason CJ), 367 (Brennan J), 380 (Deane & Dawson JJ), 394-5 (McHugh J); see *Hamlin v Great Northern Railway Co* (1856) 1 H & N 408; 156 ER 1261; *Hobbs v London & South Western Railway Co* (1875) LR 10 QB 111; *Addis v Gramophone Co Ltd* [1909] AC 488.

⁷⁸ *Baltic Shipping* (1993) 176 CLR 344, 362; see also McHugh J at 396.

⁷⁹ *Ibid* see Mason CJ 362-363; *Hobbs v London & South Western Rly Co* (1875) LR 10 QB 111; *Heywood v Wellers* [1976] QB 446; *Cox v Philips Industries Ltd* [1976] 1 WLR 638; *Jarvis v Swans Tours Ltd* [1973] QB 233; *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468.

⁸⁰ [1991] 1 WLR 1441, 1445; cited in *Baltic Shipping* (1993) 176 CLR 344; 364 (Mason CJ), 371 (Brennan J), 381-382 (Deane & Dawson J), 402 (McHugh J).

⁸¹ (1854) 9 Ex 341, 354; 156 ER 145, 151 (Alderson B) quoted in *Baltic Shipping* (1993) 176 CLR 344, 363-64 (Mason CJ).

(b) The Measure of Damages

Under the *Hadley v Baxendale* rule, on breach of contract, the plaintiff would be entitled to damages for disappointment and distress when those damages are: either arising naturally from the breach of the contract or, reasonably within contemplation of both parties at the time the contract was made as a probable result of the breach.⁸²

Following the second limb of *Hadley v Baxendale*, the measure within reasonable contemplation was a narrower test than the tort concept of foreseeability.⁸³ Mason CJ explained this by citing *Czarnikow*⁸⁴ where ‘the House of Lords held that damage in the reasonable contemplation of the parties must be "a serious possibility", "a real danger", "liable to result" or "not unlikely" to occur.’⁸⁵ The measure ‘within contemplation’ was a distinct test from the tort measure of reasonably foreseeable.⁸⁶ Mason CJ held: ‘Damages for disappointment and distress are put on precisely the same footing as other heads of damage in cases of breach of contract.’⁸⁷ Therefore, if the damage arises from either the first or second limb of *Hadley v Baxendale*, the measure of the loss is not the measure of loss used in tort. The distinction between the tests that measure damages: flowing from second limb of *Hadley v Baxendale* and the measure of loss in tort, needs not be addressed when assessing damages for disappointment and distress if the damages are naturally arising from the breach.

⁸² Ibid.

⁸³ *Baltic Shipping* (1993) 176 CLR 344, 365 (Mason CJ).

⁸⁴ [1969] AC 350.

⁸⁵ *Baltic Shipping* (1993) 176 CLR 344, 365 citing *Czarnikow* (1969) 1 AC 350; see also, above nn 48-9 and accompanying text.

⁸⁶ *Czarnikow* (1969) 1 AC 350, 389; see above n 48.

⁸⁷ *Baltic Shipping* (1993) 176 CLR 344, 365.

Adopting the rule upon when damages for distress and disappointment can be awarded for a breach of contract⁸⁸, and the measure of those damages, Mason CJ determined that:

damages for disappointment and distress are not recoverable unless they proceed from physical inconvenience caused by the breach or unless the contract is one the object of which is to provide enjoyment, relaxation or freedom from molestation. In cases falling within the last-mentioned category, the damages flow directly from the breach of contract, the promise being to provide enjoyment, relaxation or freedom from molestation. In these situations the court is not driven to invoke notions such as ‘reasonably foreseeable’ or ‘within the reasonable contemplation of the parties’ because the breach results in a failure to provide the promised benefits.⁸⁹

Mrs Dillon had contracted for a pleasure cruise. The promised benefit, or the object of the contract, was to provide for enjoyment and relaxation. Mason CJ therefore determined: ‘that the respondent was entitled to an award of damages for disappointment and distress and physical inconvenience flowing from that breach of contract.’⁹⁰ Mason CJ’s judgment may appear to imply that non-pecuniary damages were awarded collectively for ‘disappointment and distress and physical inconvenience.’⁹¹ In fact his Honour separated the ‘exceptions’ and the type of ‘damage’ where damages will be awarded.⁹² His Honour found ‘an award for disappointment and distress consequential upon physical inconvenience was justified on that account alone.’⁹³

⁸⁸ Ibid, citing the principle from *Watts v Morrow* [1991] 1 WLR 1441, 1445.

⁸⁹ *Baltic Shipping* (1993) 176 CLR 344, 365.

⁹⁰ Ibid 366.

⁹¹ Ibid.

⁹² Ibid, citing the principle from *Watts v Morrow* [1991] 1 WLR 1441, 1445.

⁹³ *Baltic Shipping* (1993) 176 CLR 344, 366.

(c) *The Court: 'Object' or 'Physical Inconvenience'*

Although the Chief Justice discussed 'physical inconvenience',⁹⁴ the majority of the court awarded Mrs Dillon damages for disappointment and distress on the basis of the breach of the obligations that formed the object of the contract to provide pleasure, enjoyment or relaxation.

Brennan J focused on the institution of a contract.⁹⁵

If a contract contains a promise, express or implied, that the promisor will not cause the promisee, or will protect the promisee from disappointment of mind, it cannot be said that the disappointment of mind resulting from the breach of the promise is too remote.⁹⁶

Deane and Dawson JJ in their joint judgment determined: '[Mrs Dillon] was distressed and disappointed by reason of the fact that what had been planned and purchased as a happy holiday experience had ended up in catastrophe.'⁹⁷ Their

⁹⁴ Ibid see also Toohey J at 383; see also below n 100 and accompanying text.

⁹⁵ Ibid 369:

The institution of contract, by which parties are empowered to create a charter of their rights and obligations inter se, can operate effectively only if parties, at the time when they create their charter, can form some sort of estimate of liability in the event of default in performance. But no approximate estimate of liability could be formed if the subjective mental reaction of an innocent party to a breach and resultant damage were added on to further damage without proof of pecuniary loss by the innocent party. If the mental reaction to breach and resultant damage were itself a head of damage, the liability of a party in breach would be at large and liable to fluctuation according to the personal situation of the innocent party. If a promisor were exposed to such an indefinite liability in the event of a breach, the making of commercial contracts would be inhibited (*Addis v Gramophone Co Ltd* [1909] AC 488 at 495), the assignment of a contractual right would carry new risks for the party subjected to the reciprocal obligation, and trade and commerce would be seriously impeded; (*Hayes v James & Charles Dodd (A Firm)* [1990] 2 All ER 815 at 823). This policy has no relevance to the measure of damages in tort. The rights infringed by a wrongdoer are not acquired by a bargain but are imposed by law in order to keep an innocent party secure from the consequences of proscribed acts or omissions. Unlike a party entering into a contract who negotiates to protect himself from a risk of injury, the wrongdoer's victim has no opportunity to negotiate protection (*Czarnikow Ltd v Koufos* (1969) 1 AC 350 at 386). The policy of the law would fail if the wrongdoer were to be exempt from liability for 'resentment, disappointment and the loss of esteem' suffered by the innocent party in consequence of the wrong done.

⁹⁶ *Baltic Shipping* (1993) 176 CLR 344, 370.

⁹⁷ Ibid 373.

Honours held that the damages flowed from the first exceptional category of *Watts v Morrow*.⁹⁸

The object of the contract between Baltic and Mrs Dillon in the present case was to provide Mrs. Dillon with the relaxing enjoyment and entertainment of a fourteen-day pleasure cruise. It was an implied term of the contract that Baltic would take all reasonable steps to provide such a cruise. The direct consequence of Baltic's admitted breach of contractual duty was that Baltic failed to provide the latter part of that promised pleasant holiday. Instead, it provided an extraordinarily unpleasant experience. Subject to the ordinary need to avoid double compensation, Mrs. Dillon was entitled to recover damages for the disappointment and distress which she suffered as the result of Baltic's breach of contract.⁹⁹

Toohy J agreed with Mason CJ.¹⁰⁰ Gaudron J, determined that the entitlement for damages for disappointment and distress was because the disappointment was 'a natural consequence of the shortening of the holiday.'¹⁰¹

Further, McHugh J held:

Under the common law, damages are not recoverable for distress or disappointment arising from a breach of contract unless the distress or disappointment arises from breach of an express or implied term that the promisor will provide the promisee with pleasure, enjoyment or personal protection or unless the distress or disappointment is consequent upon the suffering of physical injury or physical inconvenience. In the present case, it was an implied term of the contract that the

⁹⁸ [1991] 1 WLR 1421, 1445:

Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective.

⁹⁹ *Baltic Shipping* (1993) 176 CLR 344, 382.

¹⁰⁰ *Ibid* 383; His Honour repeated Masons CJ's statement that 'the respondent was entitled to an award of damages for disappointment and distress and physical inconvenience flowing from the appellant's breach of contract.' Without distinguishing damages awarded for 'disappointment and distress' from 'physical inconvenience' it appears the different circumstances of when damages may be awarded and the measure of the loss has become somewhat blurred.

¹⁰¹ *Ibid* 387.

fourteen-day cruise in the South Pacific would be an enjoyable experience. The sinking of the *'Mikhail Lermontov'* resulted in a breach of that term. Consequently, the trial judge was correct in awarding damages to Mrs Dillon for the disappointment which she suffered when the cruise failed to provide the enjoyment which Baltic had promised.¹⁰²

Damages were awarded to Mrs Dillon for disappointment and distress on the basis of the breach of the obligations that formed the object of the contract to provide pleasure, enjoyment or relaxation. The damages flowed directly from the breach of those promises in the contract.¹⁰³ The basis upon how damages were assessed distinguishes the unique award of damages for disappointment and distress.

(d) Assessment of Damages

On the issue of quantum of damages, Mason CJ relied on Kirby P's statement in the previous appeal where he felt the sum of \$5,000 awarded to Mrs Dillon should not be disturbed.¹⁰⁴ While the quantum awarded to Mrs Dillon was on the 'higher end of the scale of permissible awards'¹⁰⁵ and the court's consciousness to 'avoid overlapping

¹⁰² Ibid 394.

¹⁰³ Damages flowed from the first limb of *Hadley v Baxendale*. This must be distinguished from damages awarded for physical inconvenience or personal injury caused by a breach. Depending on, if the breach was a breach of an obligation agreed upon in the contract, or a breach of a duty of care. The court would be required to assess if the damage was within reasonable contemplation of the parties (second limb of *Hadley v Baxendale*). If the damage was not within reasonable contemplation, the loss is outside the measure of *Hadley v Baxendale* and the court would invoke the tort test of reasonable foreseeability. These three distinctive tests distinguish the basis upon which Mrs Dillon was awarded damages on breach of the contract. That was, the object of the contract was a promise to provide pleasure, enjoyment or relaxation. The shipping company failed in what they were contractually obliged to do. Therefore, the measure of the loss was the measure of the expected benefit. Damages for disappointment and distress awarded to Mrs Dillon were assessed on the basis of the expected performance to receive a benefit under the contract.

¹⁰⁴ *Baltic Shipping* (1993) 176 CLR 344, 366; 'only because It might have been influenced (as assessments of the benefit and loss of enjoyment and pleasure typically are) by the impression which his Honour derived from seeing the respondent give evidence of her disagreement:' see (1991) 22 NSWLR 1 at 31.

¹⁰⁵ *Baltic Shipping* (1993) 176 CLR 344, 372 (Brennan J) citing the Court of Appeal (1991) 22 NSWLR 1 at 31 (Kirby P).

or double compensation,¹⁰⁶ their Honours all agreed with the orders of the Chief Justice and did not disturb the sum awarded by the trial judge.

The basis on which damages for disappointment and distress were assessed, was highlighted by Deane and Dawson JJ:

In a context where Mrs Dillon has received a refund of part of the fare to cover the lost final days and has been compensated, under another head of damages, for those ‘emotional scars’ and that ‘psychological trauma’ the award of an additional \$5,000 damages represents more than adequate compensation for any ‘disappointment and distress at the loss of the entertainment’ and other benefits of those final days.¹⁰⁷

Their Honours distinguished the ‘emotional scars’ and ‘psychological trauma’ that had received compensation under a separate head of damage.¹⁰⁸ The award of \$5,000 was not merely for ‘emotional suffering,’ it was for the loss of entertainment and benefits of the remaining final days she ought to have received under the contract.

The quantum of damages for disappointment and distress do not appear to distinguish between the consequential ‘emotional pain and suffering’ for the loss of a benefit and the diminution in value of that benefit. Gaudron J notes that the quantum of damages:

Quite apart from damages for disappointment and distress, Mrs Dillon is entitled to the difference in value between a fourteen-day cruise and what she received ... the amount of \$5,000 is, in my view, adequate compensation for disappointment and distress as well as any additional amount that may be referable to the difference in

¹⁰⁶ *Baltic Shipping* (1993) 176 CLR 344, 383 (Deane and Dawson JJ).

¹⁰⁷ *Ibid.*

¹⁰⁸ The award of \$35,000 Mrs Dillon received for personal injury damages.

value between a fourteen-day holiday cruise and what was received under the contract.¹⁰⁹

This confirms the principle that governs how damages are measured and assessed on a breach of a contract to provide pleasure, enjoyment or relaxation. Although an award of damages for disappointment and distress has generally been regarded as a ‘non-pecuniary loss,’ following the reasoning of the High Court: when the loss flows from the breach of the expectation in the contract the assessment of damages must take into account; the measure of the diminution in value, that is a pecuniary loss; combined with the measure of the non-pecuniary loss, the ‘disappointment and distress’ incurred due to the breach of the expectation.

The legal principle from *Baltic Shipping* is that on a breach of contract, when the object of the contract was to provide enjoyment, relaxation and freedom from molestation, a claimant will be entitled to an award of damages for disappointment and distress caused by the breach.¹¹⁰ The damages flow directly from the breach. Damages that do not flow from the breach of the object of the contract may still be recoverable if they were in contemplation of the parties, such as ‘physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort’.¹¹¹ This, however, should not necessarily be viewed independently from a promised benefit of the contract. This line is more difficult to distinguish and is explored in detail in Chapter 3. A claim for damages, and the measures to assess damages for disappointment and distress on a breach of contract either arising naturally from the breach, or within contemplation, is distinguishable from the measures used to assess damages for a personal injury.

¹⁰⁹ *Baltic Shipping* (1993) 176 CLR 344, 387.

¹¹⁰ (1993) 176 CLR 344.

¹¹¹ See *Watts v Morrow* [1991] 1 WLR 1421, 1445.

Damages will compensate loss incurred by a personal injury if that loss was reasonably foreseeable. This test applies even if a plaintiff incurs a personal injury under a contractual relationship.

A contractual claim for damages for 'disappointment and distress' may superficially appear to be the same type of claim for personal injury damages that should incur the limitations of the *CLA*. However, in cases where the pain, suffering, discomfort, anxiety or other injuries suffered by a claimant has directly flowed from a breach of an express or implied benefit the party has contracted for, an award of damages falls within the scope of that which damages for a lost expectation will be awarded. This is distinguishable from a contract that provides no implied or express promise that the party receives a benefit. Without such promise, on breach of contract if the claimant suffers general anxiety, disappointment or distress, this will be outside the scope of remoteness for breach of contract and a claimant will generally be denied a remedy under contractual rules that allow damages for distress and disappointment.¹¹²

C Conclusion

An award of damages on a breach of contract aims to restore the wronged party to a position he or she would be in as if the contract had been performed. When the object of the contract is to provide pleasure, enjoyment or relaxation, the obligation of the contract is performance of that object. On a breach of that obligation, damages will be awarded, as far as money can do, to compensate for the disappointment and

¹¹² See *Hatton v Sutherland* [2002] 2 All ER 1; the employers were not liable for psychiatric illness suffered by three employees caused by stress at work. It was not reasonably foreseeable to an employer that an employee would suffer such an injury under the contractual agreement; cited in McKendrick and Worthington, above n 15, 296.

distress incurred by the non-performance of the object of the contract. When the expectation is to receive a benefit, damages will be assessed on the value of the benefit lost with an amount to compensate for the disappointment or distress flowing from failure to receive the benefit. An award of damages for a personal injury differs in that the aim is to compensate the plaintiff as if the injury had not occurred. The plaintiff must establish the defendant owed a duty of care and that any losses were reasonably foreseeable. This may include an award of damages for 'non-pecuniary loss' such as pain and suffering that will be assessed on the extent of that pain and suffering alone. This is the type of non-pecuniary loss that falls within the scope of damages governed by the *CLA*. It appears contrary to the principles of compensatory damages awarded on a breach of contract that the statutory reforms governing awards of damages for personal injuries should apply to limit the unique claim of contractual damages for disappointment and distress.

III CHAPTER 2

THE CIVIL LIABILITY ACT & CASE LAW

The *Civil Liability Act*¹¹³ was introduced into the Australian legal framework as a set of parliamentary reforms to limit awards of damages for personal injury claims. This chapter provides a critical analysis of how the *CLA* has been interpreted and determined to limit a contractual claim for damages for distress and disappointment on breach of a contractual expectation. The chapter is divided into two parts. First, the policy and background to the legislative reforms and implementation of the *CLA* is discussed. This part includes an outline and interpretation of the relevant sections of the *CLA* that have been applied to limit claims for ‘pain and suffering’. The second part of this chapter provides a detailed examination of two cases from NSW that determined the *CLA* applied to limit a contractual claim for damages for distress and disappointment. The primary focus of this discussion is on how the judiciary in these cases interpreted the concept of non-pecuniary loss (the term non-economic loss is used in this chapter as expressed in the *CLA*). This thesis argues that the ‘injury’ suffered on a breach of a contractual expectation is not the same kind of ‘personal injury’ where the *CLA* applies to limit an award of damages.

¹¹³ 2002 (NSW) (‘*CLA*’).

A Part 1: The Civil Liability Act

The large body of commentary on the *CLA* indicates that the purpose of the Act was to reform the laws of negligence.¹¹⁴ A combination of factors in the early 2000s, primarily what was deemed a pending ‘insurance industry crisis,’¹¹⁵ and a ‘legal system out of control’¹¹⁶ led to unprecedented legislative reforms to the civil liability laws.

The collapse of major liability insurer HIH, increasing compensation payments for bodily injury during the 1990s, increasingly litigious community attitudes, and changes to the way courts were prepared to extend liability for negligence combined to impact heavily on the cost of insurance in Australia.¹¹⁷

A rapid increase of insurance premium rates sparked fears that insurance premiums were becoming inaccessible and liability insurance was becoming unaffordable or completely unavailable.¹¹⁸ This led to a Federal review of the laws of negligence and the enactment of the *CLA*. The NSW legislation was part of the Australian wide reform package to the recovery of damages for personal injuries or death caused by negligence.

¹¹⁴ See Commonwealth Treasury, *Reform of Liability Insurance Law in Australia* at February 2004 <<http://archive.treasury.gov.au/documents/799/PDF/complete.pdf>>; Lynden Griggs, ‘Consumers and the Ipp Report into Negligence Reform’ (2002) 10 *Competition & Consumer Law Journal* 208; S Stuart Clark and Ross McInnes, ‘Unprecedented Reform: The New Tort Law’ (2004) 15 *Insurance Law Journal* 99; Barbara McDonald, ‘The Impact of the Civil Liability Legislation on Fundamental Policies and Principles of the Common Law of Negligence’ (2006) 14 *Torts Law Journal* 268; E W Wright, E W, ‘National Trends in Personal Injury Litigation: Before and After ‘Ipp’’ (2006) 14 *Torts Law Journal* 233; D A Ipp, ‘The Metamorphosis of Slip and Fall’ (2001) 29 *Australian Bar Review* 150.

¹¹⁵ *Contra* E W Wright, E W, ‘National Trends in Personal Injury Litigation: Before and After ‘Ipp’’ (2006) 14 *Torts Law Journal* 233, 233.

¹¹⁶ S Stuart Clark and Ross McInnes, ‘2002: Australia’s Year Zero of Tort Reform: But Federal Government’s Response is Crucial’ (2003) 70 *Defense Counsel Journal* 341, 341; S Stuart Clark and Ross McInnes, ‘Unprecedented Reform: The New Tort Law’ (2004) 15 *Insurance Law Journal* 99, 99.

¹¹⁷ Commonwealth Treasury, *Reform of Liability Insurance Law in Australia* at February 2004, 1 <<http://archive.treasury.gov.au/documents/799/PDF/complete.pdf>> (‘*Commonwealth Report on the Reform of Liability Insurance Law*’).

¹¹⁸ *Ibid* 2.

1 Background: The Insurance Crisis

A series of professional liability reforms in the 1990s were enacted to reduce the initial concerns regarding medical professionals.¹¹⁹ Increasing costs of insurance ‘were having a significant effect on the provision of health care services.’¹²⁰ Further state-based legislation was enacted to reform the awards of damages in health care claims and to regulate medical indemnity insurance.¹²¹

Even after the initial reforms, multi-million dollar awards of damages in negligence claims continued.¹²² Large awards of damages even ‘where the community perceived the plaintiff had largely contributed to his or her own injury’¹²³ further fuelled a burgeoning litigious society.¹²⁴ Wide public concerns were that ‘the court verdicts were unreasonable and were being financed by increasingly burdensome insurance premiums.’¹²⁵ With the costs of insurance spread to the wider community, this confirmed the need for further legislative intervention and reforms to the laws of negligence.

¹¹⁹ Dominic Villa, *Annotated Civil Liability Act 2002 (NSW)* (Lawbook, 2nd ed, 2013) 5; see *Professional Standards Act 1994* (NSW).

¹²⁰ Villa, above n 119, 5. The effect of rising costs incurred by medical professions, particularly in rural areas, led to the refusal of GPs to provide community based medical services: at 6; citing Kerryn Phelps, President of the Australian Medical Association, speech to the NASOG-RANZCOG Conference held in Sydney on 12 May 2001.

¹²¹ See *Health Care Liability Act 2001* (NSW); cited in Villa, above n 119, 6; This Act: had the effect of reducing the quantum of damages that could be awarded to plaintiffs who suffered an injury as a result of the negligence of a health care professional or institution. The second was to make medical indemnity insurance compulsory, and to regulate the provision of that insurance.

¹²² In *Simpson v Diamond* [2001] NSWSC 925, damages of \$14,202,042 were awarded to a young woman born with severe disabilities as a result of the mother’s obstetrician negligence, reduced on appeal to \$10,998,692: *Diamond v Simpson (No 1)* [2003] NSWCA 67, cited in Villa, above n 119, 6.

¹²³ *Commonwealth Report on the Reform of Liability Insurance Law*, above n 117, 2.

¹²⁴ Labelled as a ‘culture of blame.’ S Stuart Clark and Ross McInnes, ‘2002: Australia’s Year Zero of Tort Reform: But Federal Government’s Response is Crucial’ (2003) 70 *Defense Counsel Journal* 341, 341; S Stuart Clark and Ross McInnes, ‘Unprecedented Reform: The New Tort Law’ (2004) 15 *Insurance Law Journal* 99, 99.

¹²⁵ *Commonwealth Report on the Reform of Liability Insurance Law*, above n 117, 2.

In addition, the collapse of the HIH Insurance Group in 2001, one of Australia's largest insurance firms,¹²⁶ led to dishonoured insurance contracts and claims went unpaid.¹²⁷ With speculation of an entire insurance industry collapse,¹²⁸ governmental concerns were that: 'Insurance cover [was] of little value regardless of the price paid if the insurance company lacks sufficient resources to pay claims.'¹²⁹

Professional indemnity and public liability insurance had become out of reach. Community sporting and recreational events were cancelled due to insurance premiums exceeding the cost of any profit.¹³⁰ More alarmingly, some operations continued uninsured.¹³¹ When 'insurance is unaffordable or simply unavailable, the insurance market is no longer performing its vital function of transferring risk across the economy.'¹³² Parliament undertook drastic measures to public liability and tort reform to 'discourage unmeritorious claims ... and to "restore sense and balance in the law of negligence".'¹³³ This led to 'unprecedented law reform'¹³⁴ to the laws of negligence that 'were specifically designed to promote predictability to improve the

¹²⁶ HIH losses estimated \$5.3 billion, see Mark Westfield, *HIH: The Inside Story of Australia's Biggest Corporate Collapse* (John Wiley & Sons, 2003). For 'years public liability insurance had been underwritten at premium levels that were unsustainably driven downwards by the undercutting of HIH:' Villa, above n 119, 6.

¹²⁷ Parliament of Australia, *HIH Insurance Group Collapse* (29 November 2001) <http://www.apf.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/hihinsurance>.

¹²⁸ See Trowbridge Deloitte, *Public Liability Insurance, Analysis for Meeting of Ministers* (27 March 2002) <http://www.deloitte.com.au/downloads/publicliability_apr02.pdf>;

'Trowbridge Consulting Ltd, the company engaged to report to the Commonwealth Government on public liability insurance matters, estimated insurance companies were losing \$750 000 a day on this type of business:' cited in Civil Liability Bill, 2002 (WA) Introduction: First Reading and Second Reading (extract), M McGowan, 1.

¹²⁹ *Commonwealth Report on the Reform of Liability Insurance Law*, above n 117, 1.

¹³⁰ Villa, above n 119, 6 [4] n 20:

The *Daily Telegraph* on 8 March 2002 reported over 50 events or activities that had been cancelled or were under threat of cancellation. See also 'Insurance costs crippling us, say sport groups' *Sydney Morning Herald*, 19 December 2001 at 4; 'Insurance premiums to soar by \$1 billion' *Sydney Morning Herald*, 11 December 2001 at 1. Examples of cancelled events include the Australia Day celebrations in Victoria Park, Dubbo (due to five-fold increase in public liability costs), the bridge to bridge race on the Hawkesbury River, and the King Street Fair in Newcastle (following quotes of between \$8,500 and \$20,000).

¹³¹ *Commonwealth Report on the Reform of Liability Insurance Law*, above n 117, 4.

¹³² *Ibid* 2.

¹³³ Villa, above n 119, 7 quoting New South Wales, Parliamentary Debates (*Hansard*), Legislative Council, 8 May 2002, at 1764.

¹³⁴ *Commonwealth Report on the Reform of Liability Insurance Law*, above n 117, 1.

cost and availability of liability classes of insurance and alleviate a crisis that had engulfed the Australian community.¹³⁵

2 *The IPP Report*

As part of a national response to the public liability insurance crisis and the spiralling effects this had on negligence claims, the Federal Government appointed a panel to review the laws on negligence. This became known as the ‘Ipp Committee’.¹³⁶ The context within which the Ipp Committee was to undertake a ‘Principles-based Review of the Law of Negligence’ was that:¹³⁷

The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.¹³⁸

The task of the Ipp Committee was to address 5 key issues:¹³⁹ to ‘inquire’, ‘develop’ and ‘evaluate’ options and proposals around the common law principles of negligence and ways to limit liability arising from personal injury and death and limit the quantum of damages.¹⁴⁰ In addition, the interaction this had with consumer protection laws and the relationship with limitation periods.¹⁴¹ The final report of the

¹³⁵ Ibid.

¹³⁶ The panel was made up of: Justice David Ipp, Professor Peter Cane, Associate Professor Donald Sheldon and Ian Macintosh; the (‘Ipp Committee’).

¹³⁷ Commonwealth of Australia, *Review of the Law of Negligence Final Report*, Canberra, September (2002) ix (‘Ipp Report’).

¹³⁸ Ibid.

¹³⁹ Ibid ix-xi.

¹⁴⁰ Ibid ix-x, see Terms of Reference points 1-3.

¹⁴¹ Ibid x-xi, see Terms of Reference points 4-5, note at the time of the review the consumer protection laws fell under the Federal, State and Territory Trade Practices Acts.

Ipp Committee was submitted on 30 September 2002 that consisted of 61 Recommendations on the reforms to the law of negligence.¹⁴²

Relevant to this discussion was the overarching Recommendation 2 of the Ipp Report:

The Proposed Act should be expressed to apply (in the absence of express provision to the contrary) to any claim for damages for personal injury or death resulting from negligence regardless of whether the claim is brought in tort, contract, under a statute or any other cause of action.¹⁴³

The reasoning behind the reference to contract, tort and other causes of action was to circumvent the plaintiff bringing an alternative action for damages where it had been limited by the proposed legislative reforms to negligence.¹⁴⁴

Across Australia, state and territory parliaments responded by amending or enacting reforms to the law of negligence.¹⁴⁵ One impact of these reforms is that the NSW courts have found that the *CLA* applies to limit or remove entirely a plaintiff's ability to recover damages for a contractual claim for disappointment and distress. How then, legislation designed to govern negligence came to reduce or remove this particular award of damages is analysed through interpretation of the Act. As the argument in this thesis derives from cases determined in NSW, statutory interpretation of the relevant provisions will be on the *Civil Liability Act 2002* (NSW) as at 3 June 2013.¹⁴⁶

¹⁴² Ipp Report, above n 137.

¹⁴³ Ibid 1 [2.2]-[2.3].

¹⁴⁴ Ibid 30 [1.28].

¹⁴⁵ *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Liability and Damages) Act 2003* (NT); *Personal Injuries Proceedings Act 2002* (Qld); *Civil Liability Act 2003* (Qld); *Civil Liability Act 1936* (SA); *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002* (Vic); *Civil Liability Act 2002* (WA).

¹⁴⁶ It is acknowledged that the *Civil Liability Act 2002* (NSW) ('*CLA*') was introduced by the NSW Parliament and assented to before the national response to the reforms. In addition the *Civil Liability*

3 Statutory Interpretation of the CLA

(a) The Purpose and Structure

The *Civil Liability Act 2002* (NSW) has been one of the most expansive reforms imposing limitations on the award of damages for claims of death and personal injury.¹⁴⁷ In many cases, specific provisions of the Act have gone beyond the intended purpose.¹⁴⁸ When interpreting a provision of an Act, the preferred construction is that which promotes the underlying purpose of the Act.¹⁴⁹

The purpose of the *CLA* is outlined in the Long Title: ‘An Act to make provision in relation to *the recovery of damages for death or personal injury caused by the fault of a person ...*’¹⁵⁰ In *Insight Vacations Pty Ltd v Young*¹⁵¹ followed by *Flight Centre v Louw*,¹⁵² the NSW courts equated a contractual claim for damages for disappointment and distress with the concept of pain and suffering. The claim was held to be a claim for personal injury damages. Therefore any award of damages had to be assessed in accordance with the *CLA*. This thesis argues that the operation of the *CLA* invariably requires that negligence caused the personal injury. The following discussion examines how ‘damages’, ‘personal injury’ and ‘fault’ of a

Amendment (Personal Responsibility) Act 2002 (NSW) was implemented as the second stage of the public liability reforms; see Villa, above n 119, 10. However, amendments to the governing legislation reflect the language and recommendations by the Committee in the published Ipp Report, above n 137. The recommendations put forth represent the *CLA* as in its current incarnation. It is noted that the discussion is slightly out of order.

¹⁴⁷ See Barbara McDonald, ‘The Impact of the Civil liability Legislation on Fundamental Policies and Principles of the Common Law of Negligence’ (2006) 14 *Torts Law Journal* 268, 268.

¹⁴⁸ See D A Ipp, ‘The Metamorphosis of Slip and Fall’ (2001) 29 *Australian Bar Review* 150, 150.

¹⁴⁹ *Interpretation Act 1987* (NSW) s 33.

¹⁵⁰ (Emphasis added) This part is relevant to a claim for damages for disappointment and distress. See Long Title of the *CLA* in full; ‘An Act to make provision in relation to the recovery of damages for death or personal injury caused by the fault of a person to amend the *Legal Profession Act 1987* in relation to costs in civil claims; and for other purposes.’

¹⁵¹ (2010) 78 NSWLR 641 (‘*Insight Vacations*’).

¹⁵² (2011) 78 NSWLR 656 (‘*Louw*’).

person have been defined and interpreted under the *CLA*. Furthermore, how this interpretation has operated to restrict or remove the court's ability to award damages for disappointment and distress for breach of contract.

Following the Long Title, the *CLA* is divided into twelve parts. Relevant to this analysis: Part 1 - Preliminary, defines 'damages' and 'non-economic loss' and prescribes the operation of the Act.¹⁵³ Part 1A - Negligence, defines 'personal injury' and 'negligence' and the operation of this Part.¹⁵⁴ Part 2 - Personal Injury Damages, further defines and outlines the operation of this Part.¹⁵⁵ Part 3 - Mental Harm¹⁵⁶ is discussed under the analysis of *Flight Centre v Louw*.¹⁵⁷ Importantly, the provisions under Part 1A of the Act were not considered relevant when determining if the *CLA* applied to limit a claim for damages for disappointment and distress.¹⁵⁸ The argument proceeds on the basis that the provisions under Part 1A - Negligence necessarily apply to the operation of the *CLA*.

(b) Part 1 – Preliminary

(i) Damages and Operation of the Act

Under Part 1 of the Act, 'damages' are defined to include 'any form of monetary compensation.'¹⁵⁹ 'Non-economic loss' is defined to mean 'pain and suffering'.¹⁶⁰

Damages for non-economic loss are not further defined in Part 2 of the Act. A claim

¹⁵³ *CLA* ss 3-3B, see below nn 159-64 and accompanying text.

¹⁵⁴ *Ibid* ss 5, 5A(1)(2), see below nn 165, 170-1 and accompanying text.

¹⁵⁵ *Ibid* ss 11, 11A, 16-17A, see below nn 173-7.

¹⁵⁶ *Ibid* ss 27-33, see below nn 277-8 and accompanying text.

¹⁵⁷ 78 NSWLR 656.

¹⁵⁸ Their Honours focused on provisions ss 3, 11, 11A, 16 of the *CLA* governing damages for non-economic loss; *Insight Vacations* (2010) 78 NSWLR 641. *Louw* (2011) 78 NSWLR 656, also considered ss 27, 31 of the *CLA*.

¹⁵⁹ *CLA* s 3.

¹⁶⁰ *Ibid*.

for an award of any non-economic damages invokes the operation of Part 1 of the *CLA*.

The provisions relating to the operation of the Act are outlined in s 3A.¹⁶¹ Subsection (3) extends to any provision of the Act even if the provision applies to liability in contract.¹⁶² The construction of this provides that the Act extends to any claim for non-economic damages for pain and suffering, even if the liability occurred in contract.

Certain civil liabilities are excluded from operation of the Act.¹⁶³ Notably, the *CLA* does not apply to the civil liability and recovery of damages for a personal injury, in ‘respect of an intentional act that is done by the person with the intent to cause injury or death.’¹⁶⁴ By the exclusion of an *intentional act* that is done with the *intent* to cause injury, the provision focuses on the conduct of the defendant. If the conduct of the defendant was not intentional, but in fact negligence: ‘a failure to exercise reasonable care and skill’¹⁶⁵ that caused injury, the Act will then operate in respect of determining the civil liability and awards of damages in those proceedings.¹⁶⁶ This appears to connote that the act or omission of the wrongdoer must then be ‘negligence’ which was the cause of the personal injury for the Act to operate.¹⁶⁷ A wide interpretation might be understood to mean that unless negligence *was* the cause of the action, the Act should not apply. This appears to fall in line with the

¹⁶¹ *CLA*.

¹⁶² Ibid sub-s (2) Part 2 of the Act cannot be excluded by contract.

¹⁶³ Ibid s 3B.

¹⁶⁴ Ibid sub-s (1)(a); see *New South Wales v Bujdoso* (2007) 69 NSWLR 302.

¹⁶⁵ ‘Negligence’ is defined under Part 1A s 5 of the *CLA*.

¹⁶⁶ Villa, above n 119, 51 stated: ‘It is now clear that a claim for damages against a person sued for negligently failing to take steps to prevent an intentional act done by another with an intent to cause injury or death does not fall within the scope of s 3B(1)(a)’ (therefore not excluded from operation of the *CLA*); citing *New South Wales v Bujdoso* (2007) 69 NSWLR 302.

¹⁶⁷ See *ibid*.

purpose of the Act and the context that the *CLA* was created.¹⁶⁸ Negligence and the scope of a defendant's liability are outlined under Part 1A of the *CLA*.¹⁶⁹ Arguably, for the *CLA* to apply to any claim for personal injury damages, this invokes the operation of Part 1A – Negligence.

(ii) Personal Injury and Negligence

The term 'Personal Injury' appears in both Parts 1A, titled 'Negligence' and Part 2, titled 'Personal Injury Damages' of the *CLA*.

(c) Part 1A - Negligence

Part 1A of the Act: 'applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.'¹⁷⁰ Defined under this Part: 'harm' includes, 'personal injury' which includes an 'impairment of a person's physical or mental condition'; and 'negligence' means 'failure to exercise reasonable care and skill'.¹⁷¹

Clearly, Part 1A only applies when a personal injury resulted from negligence. Unless negligence is the basis of the claim, Part 1A of the Act does not apply to a claim for damages on breach of contract. Importantly, for the purpose of this Part, 'negligence' is not limited simply to the tort of negligence.¹⁷² The concept is wider. Therefore, a contractual breach, if caused by a failure to exercise reasonable skill and

¹⁶⁸ See Ipp Report, above n 137.

¹⁶⁹ *CLA* ss 5-5T.

¹⁷⁰ *Ibid* s 5A(1).

¹⁷¹ *Ibid* s 5.

¹⁷² Villa, above n 119, 72.

care, might give rise to negligence under this Part. However, if the plaintiff's claim is not based on a failure to take care, Part 1A of the Act should not apply.

(d) Part 2 – Personal Injury Damages

Part 2 of the *CLA* defines 'injury' to mean a 'personal injury' which includes an 'impairment of a person's physical or mental condition.'¹⁷³ 'Personal injury damages' 'means damages that relate to the death or injury of a person'.¹⁷⁴ Part 2 of the Act applies to any award of personal injury damages¹⁷⁵ regardless of whether the claim for damages is brought in tort, contract, statute or otherwise.¹⁷⁶ Damages, or interest on damages, cannot be awarded contrary to this Part.¹⁷⁷

Part 2 of the Act then provides a 'systematic method'¹⁷⁸ to determine how the quantum of damages is assessed for non-economic loss.¹⁷⁹ Under s 16(1): 'no damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case.'¹⁸⁰ Section 16(3) further provides a table outlining how the maximum amount of damages is to be determined depending on the severity of that non-economic loss.¹⁸¹ For example, if a claimant's pain and suffering reaches the threshold of 15% of a most extreme case, the

¹⁷³ *CLA* s 11 'personal injury:' sub-s (b) has the same definition as under Part 1A.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid* s 11A(1); unless excluded by s 3B.

¹⁷⁶ *Ibid* s 11A(2). Combining the definitions relating to claims under contract: an award of personal injury damages, that is any form of monetary compensation, for pain and suffering, including an impairment of a person's mental condition, must be awarded in line with Part 2 of the Act.

¹⁷⁷ *Ibid* s 11A (3).

¹⁷⁸ Villa, above n 119, 313.

¹⁷⁹ See *CLA* s 16.

¹⁸⁰ *Ibid* see below nn 184-7 and accompanying text.

¹⁸¹ *Ibid.*

maximum amount of damages to be awarded would be 1% of an award of damages in the most extreme cases as fixed by the statute.¹⁸²

(i) Severity of the Claim

The severity of the plaintiff's claim is determined as a percentage as 'a most extreme case'.¹⁸³ The phrase has been adopted from other statutory schemes to limit the recovery of damages for non-economic loss.¹⁸⁴ These schemes all relate to where a plaintiff has been injured as a result of an accident.¹⁸⁵ Determining the severity of a claimant's suffering is at the discretion of the trial judge.¹⁸⁶ It is the task of the judge to determine the proportion of severity, before considering the quantum of damages that ought to be awarded.¹⁸⁷ This is a subjective assessment of the extent of suffering that the plaintiff has incurred due to the personal injury,¹⁸⁸ in line with the purpose of the Act to limit the award of damages for personal injuries caused by the fault of a person.

Section 16 of the *CLA* provides that the assessment of damages must be based on the severity of the injury. This is directly in line with the aim of compensatory damages

¹⁸² See *CLA* s 17: Indexation of maximum amount relating to non-economic loss.

¹⁸³ *Ibid* s 16(1).

¹⁸⁴ See, *Workers Compensation Act 1987* (NSW) s 67(3); *Motor Accidents Act 1988* (NSW), ss 79, 79A.

¹⁸⁵ *Ibid*.

¹⁸⁶ *Southgate v Waterford* (1990) 21 NSWLR 427, 440: in determining the proportion of severity of the non-economic loss under s 79(2) of the *Motor Accidents Act 1988* (NSW) quoted in Villa, above n 119, 317.

¹⁸⁷ Villa, above n 119, 318 quoting Shepherd AJA in *Kurrie v Azouri* (1998) 28 MVR 406 at 413-414, considering s 79A of the *Motor Vehicle Accidents Act 1988* (NSW), these restrictions are similar to s 16 of the *CLA*.

¹⁸⁸ It is the 'percentage' of proportionate suffering that will determine damages under the Act. See J Parmegiani et al, *Psychiatric Impairment Rating Scale*, Sydney NSW Australia (2001) for a scale to classify types and severity of psychiatric impairment. *Cf* Distress and disappointment on breach of contract, for loss of value, is assessed on an objective standard. 'The High Court has affirmed that the rights and liabilities of the parties to a contract are to be determined objectively.' Commissioner Gething in *Fitzpatrick v Garvey* [2012] WADC 42 (23 March 2012), 53 [262] citing *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451.

awarded for negligence that has caused personal injury. As so far as money can do, damages are awarded to ‘put the plaintiff in the position as if he had not sustained the injuries.’¹⁸⁹ This, however, is not the measure of damages for a breach of contract.¹⁹⁰ Despite the Act applying to liability under contract, a claim for damages for disappointment and distress on a breach of a contractual obligation is not the same kind of claim for pain and suffering that incurs the restrictions imposed by the *CLA*.

(ii) Pain and Suffering: Consequential Suffering or a Personal Injury?

As outlined above, ‘pain and suffering’ is a basis upon which damages for non-economic loss can be awarded under the Act.¹⁹¹ However, pain and suffering is not defined in the Act. The Act appears to denote that pain and suffering *is* a ‘personal injury’ in s 11.¹⁹² Personal injury is defined to include an ‘impairment of a person’s physical or mental condition.’¹⁹³ The literal meaning of personal injury may follow that, an impairment of a mental condition, or ‘pain and suffering’ *is* a personal injury under Part 2 rather than merely the consequence of an injury. The Act applies to an award of damages for a personal injury, including an impairment of a mental condition, regardless of whether the claim is brought in contract.¹⁹⁴

Following this interpretation it appears that disappointment and distress is a personal injury. This interpretation has led to limit a claimant’s contractual claim for damages for disappointment and distress.¹⁹⁵ However, when interpreting legislation, regard

¹⁸⁹ *Todorovic v Waller* (1981) 150 CLR 402, 412 (Gibbs and Wilson JJ).

¹⁹⁰ Damages in contract do not look at the extent of injury suffered. Damages in contract look at the measure of the lost expectation of performance; see above n 103.

¹⁹¹ *CLA* s 3.

¹⁹² *CLA*.

¹⁹³ *Ibid* s 11: definition of ‘injury’ sub-s (b).

¹⁹⁴ *Ibid* s 11A (1)(2) ‘tort ... under statute or otherwise’ (omitted).

¹⁹⁵ See *v Louw* (2011) 78 NSWLR 656.

must be given to the purpose of the Act.¹⁹⁶ That is, ‘*the recovery of damages for death or personal injury caused by the fault of a person.*’¹⁹⁷ If the ‘damages’ are for non-economic loss, which includes damages for ‘pain and suffering’ it appears the operation of the Act still requires a personal injury. The ordinary meaning of a ‘personal injury’ is an: ‘injury inflicted on a person, esp to the body; (*Law*) such injury as opposed to damage to a person's property or reputation.’¹⁹⁸ The ordinary meaning of the term personal injury is therefore not the consequential pain and suffering, but the actual injury inflicted on the person.

Dominic Villa’s annotated version of the *CLA* describes pain and suffering as: ‘actual suffering and mental distress which the injured person perceives as a result of the injury suffered.’¹⁹⁹ Therefore, the disappointment and distress ‘suffered’ by a plaintiff on breach of an obligation of the contract cannot sensibly be regarded as a personal injury for the purpose of limiting an award of damages by application of the *CLA*. No ‘injury’ has been inflicted on the plaintiff. Further, the claim is not one for actual suffering that the person perceives as a result of the injury. The wrong of the defendant was a breach of contract. The interpretation that disappointment and distress on a breach of contract is a personal injury, has the unreasonable effect that a claimant’s contractual right to a remedy is denied.

When interpreting statute, the use of extrinsic material may provide assistance when the ordinary meaning of the text ‘leads to a result that is manifestly absurd or

¹⁹⁶ *Interpretation Act 1987* (NSW) s 33.

¹⁹⁷ *CLA* Long Title, see above n 150 (emphasis added).

¹⁹⁸ Oxford University Press, *Oxford English Dictionary* (2013) <<http://www.oed.com>>.

¹⁹⁹ Further, the extent and severity of pain and suffering under the *CLA* is ‘purely [a] subjective’ assessment: Villa, above n xx, 314. Generally a plaintiff who is incapable of perceiving pain and discomfort is not entitled to damages for pain and suffering, see *Skelton v Collins* (1966) 115 CLR 94; cf *Del Ponte v Del Ponte* (1987) 11 NSWLR 498, exclusions may apply.

unreasonable.²⁰⁰ The Ipp Report has been cited in judgments when determining the interpretation of the *CLA*.²⁰¹ Highlighting, in part, Recommendation 2 of the Ipp Report: ‘... any claim for damages for personal injury or death resulting from *negligence* regardless of whether the claim is brought in tort, contract, under a statute or any other cause of action.’²⁰² The terms ‘resulting from negligence’ have been removed from Parts of the Act, specifically Part 2 containing ss 11 and 11A.²⁰³ However on a construction of the Act that would promote the purpose²⁰⁴ ‘fault’ appears to necessarily imply that ‘negligence’, or failure to take reasonable care and skill, be an essential element or cause of liability under the *CLA*.

(e) Is Fault Negligence?

The term ‘fault’ appears in the Long Title of the Act²⁰⁵ however is omitted from provisions in Part 1 and Part 2 of the Act. ‘Fault’, under the *CLA* is understood to mean act or omission.²⁰⁶ It is then questionable, if ‘act or omission’ means a failure to exercise reasonable care and skill.²⁰⁷ If the literal and ordinary meaning of ‘act or omission’ can be interpreted as such, this appears to invoke ‘negligence’ as the required cause of the personal injury.²⁰⁸ If Part 1A comes into operation then an assessment of damages under the *CLA* ought to only apply when the ‘injury’ has

²⁰⁰ *Interpretation Act 1987* (NSW) s 34(1)(b).

²⁰¹ See *New South Wales v Ibbett* (2005) 65 NSWLR 168, 173-4 [116]-[117] (Ipp JA); see below nn 211-2.

²⁰² Ipp Report, above n 137, 1 [2.2]-[2.3] (emphasis added); see above n 143.

²⁰³ See *CLA* s 11(1) This Part applies to and in respect of an award of personal injury damages ... and, sub-s (2) This Part applies regardless of whether the claim for the damages is brought in tort, in contract, under statute or otherwise.

²⁰⁴ Following the Long Title of the *CLA*, see above n 150; *Interpretation Act 1987* (NSW) s 33.

²⁰⁵ *CLA*.

²⁰⁶ *Certain Lloyd's Underwriters subscribing to Contract No IH00AAQS v Cross* (2012) 293 ALR 412, 414 [8]; see also *Southern Properties (WA) Pty Ltd v Executive Director of the Dept of Conservation and Land Management* (2012) 42 WAR 287 at below n 344.

²⁰⁷ See *BGC Residential Pty Ltd v Fairwater Pty Ltd* [2012] WASC 268 [62]; Pullin JA rejected the argument that ‘fault’ was any breach of ‘legal obligation’: ‘The meaning fault in the *CLA* cannot be so broad as to encompass any and all breaches of contract;’ at [61]-[62].

²⁰⁸ Negligence appears under Part 1A of the *CLA*.

been caused a failure of a party to exercise reasonable skill and care, or negligence. This is in line with the Ipp Report's overarching recommendation.²⁰⁹

Although negligence is not a term used in Part 2 s 11A,²¹⁰ the provision governing awards of damages for personal injuries, case authority in NSW suggests that negligence is a necessary requirement for operation of the Act. In *New South Wales v Ibbett*, Ipp JA explained this by reference to the Ipp Report:

The final report explained in (pars 2.3) that it used the term 'negligence' in this context to mean 'failure to exercise reasonable care and skill.' The *Civil Liability Act* incorporates provisions that adopt Recommendation 2 and the concept of 'negligence' in the sense proposed; see s 5 and s 5A (Pt 1A), s 11A (Pt 2) and ss27 and 28 (Pt 3).²¹¹

The general intent and import of Pt 1A of the *Civil Liability Act* (which is headed 'Negligence'), Pt 2 (which is headed 'Personal injury damages') and Pt 3 (which is headed 'Mental harm') ... is that ... these Parts apply to any claim for damages for personal injury or death resulting from negligence (meaning 'failure to exercise reasonable care and skill') regardless of whether the claim is brought in tort, contract, under statute or any other cause of action.²¹²

The case authority therefore indicates that unless the action brought by the plaintiff is framed under a failure to exercise reasonable care and skill, the *CLA* does not apply.

Ipp JA continues:

In my opinion, for a defendant to be able to rely on the application of the Act to a claim based on a cause of action that does not allege a breach of a duty to exercise

²⁰⁹ Ipp Report, above n 137, 1 [2.2]-[2.3]; Recommendation 2:

The Proposed Act should be expressed to apply (in the absence of express provision to the contrary) to any claim for damages for personal injury or death resulting from negligence regardless of whether the claim is brought in tort, contract, under a statute or any other cause of action.

²¹⁰ *CLA* see above n 203 and accompanying text.

²¹¹ (2005) 65 NSWLR 168, 173-4 [116] (*Ibbett*).

²¹² *Ibid* 174 [117].

reasonable care and skill, the defendant would have to plead (or, depending on the circumstances, otherwise appropriately and timeously contend) that the Act applies on the ground that the damages result from ‘negligence’.²¹³

Following the opinion of Ipp JA in *Ibbett*, unless the plaintiff’s action for personal injury damages results from negligence, the *CLA* should not reasonably apply to restrict a claim of damages.²¹⁴ A breach of a contractual obligation is not ordinarily pleaded as a failure to exercise reasonable care and skill. If the plaintiff has not framed their claim as a failure to exercise reasonable skill and care, the duty in negligence should not be imposed into the strict liability to perform the contractual obligations. This is addressed further in the analysis of the case law, where the assessment of an award of damages for distress and disappointment has been limited or restricted by application of the *CLA*.

B *Part 2: New South Wales Case Law*

Insight Vacations and *Louw* are two holiday cases in which the NSW courts determined that the *CLA* applied to limit a contractual claim for damages for distress and disappointment. In both cases, the claimant brought an action against the travel company for a breach of contract for the failure to provide pleasure, enjoyment or relaxation. In *Insight Vacations* the application of the *CLA* to restrict the award of damages appears correct. Particular attention is given to the judicial analysis of *Insight Vacations* as the case was applied in *Louw* where in fact it ought to be distinguished. It is argued that the application of the *CLA* in *Louw* was incorrect.

²¹³ *Ibid* [119].

²¹⁴ *Ibbett* (2005) 65 NSWLR 168 has been cited with approval numerous times in NSW as an authoritative case on the *CLA* and claims for personal injury damages.

Further, the *CLA* should not be applied to all cases for a contractual claim for damages for disappointment and distress.

1 *Insight Vacations v Young*

(a) *The Facts*

*Insight Vacations v Young*²¹⁵ concerned an appeal brought by the travel company, Insight Vacations,²¹⁶ in the New South Wales Court of Appeal against an award of damages for disappointment. The respondent, Ms Young was a passenger on a 20-day coach tour across Europe. Whilst she was standing to retrieve an item from the overhead compartment, the driver of the coach, in an incident of road rage, slammed on his brakes, which caused Ms Young to be thrown backwards. The respondent hit her head and as a result she suffered personal injuries. The action, as Spigelman CJ asserted, was based on the travel company's 'breach of its duty to act with reasonable diligence, care and skill in carrying out the services pursuant to the European tour.'²¹⁷

At the first instance, in the District Court, Rolfe DCJ determined that the claimant had established a breach of contract and did not deal with an alternative claim in tort.²¹⁸ Pursuant to s 16 of the *CLA*, Rolfe DCJ determined that the personal injury suffered by Ms Young was 18% of a most extreme case and awarded \$11,500 in damages. In addition Rolfe DCJ made an award of damages for the 'disappointment attending the inability of the respondent to enjoy the remainder of her tour after the

²¹⁵ (2010) 78 NSWLR 641 (Spigelman CJ, Basten JA and Sackville AJA) (*'Insight Vacations'*).

²¹⁶ (*'Insight'*).

²¹⁷ *Insight Vacations* (2010) 78 NSWLR 641, 643 [2].

²¹⁸ *Young v Insight Vacations Pty Ltd* (2009) 8 DCLR (NSW) 369.

accident.²¹⁹ Ms Young was awarded \$8000 for disappointment ‘under this head of damage.’²²⁰ In addition, an award of \$2871 interest on that component.²²¹

Insight appealed the decision of Rolfe DCJ. Notably, against the separate award of damages for ‘disappointment’ granted to the respondent for the inability to enjoy the remainder of the tour.²²² The contractual head of damages was not denied, the appeal challenged that the assessment of the additional award of damages did not incur the limitations imposed by the *CLA*.²²³

(b) Damages for Disappointment

The majority of the NSW Court of Appeal, as per Basten JA with whom Spigelman CJ agreed, determined that ‘disappointment’ along with grief, anxiety and distress are all elements of pain and suffering and therefore damages must be awarded in line with those damages of non-economic loss as defined by s 3 of the *CLA*.²²⁴ In determining damages for non-economic loss, s 16(1) of the *CLA* provides that no damages for non-economic loss may be awarded unless the loss is at least 15% of the most extreme cases.²²⁵ An award for ‘disappointment’ could not be separated from

²¹⁹ Ibid: Notably, Ms Young completed the 20-day tour, however, she was not able to enjoy the tour due to the residual suffering caused by the personal injury.

²²⁰ Spigelman CJ summarised the District Court case in *Insight Vacations* (2010) 78 NSWLR 641, 643 [4]; However, disappointment is not a ‘head of damage’, it is a ‘head of damages’ on breach of contract. See Luntz, above n 29: ‘There is a distinction between “damage” and “damages”. “Damage” generally refers to loss harm or injury. “Damages” ... is the word used to describe a sum of money that a court may award to a successful plaintiff in an action in tort or for breach of contract;’ at 1.

²²¹ Ibid: pursuant to s 100 of the *Civil Procedure Act 2005* (NSW).

²²² The award of damages for ‘disappointment’ was in line with the award of damages in *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.

²²³ Personal injury damages under pt 2 of the *CLA* ss 11, 11A, 16.

²²⁴ *Insight Vacations* (2010) 78 NSWLR 641, 644 [78]-[79], 649-50 [125]-[130]; Sackville AJA in dissent determined that ‘disappointment’ fell within the description of damages for loss of amenities within the definition of ‘non-economic loss’ at 655 [175].

²²⁵ See Parmegiani et al, above n 188 and accompanying text for assessment of psychiatric testing.

distress to avoid the constraints imposed by s 16 of the *CLA*.²²⁶ As Basten JA's reasoning formed the basis of the majority, it is his Honour's opinion that requires further critical analysis.

(c) Critical Analysis

Basten JA details at length the definitions of the *CLA* that appear relevant to the case.²²⁷ His Honour then highlights that the key issue is: 'whether damages for injury to feelings, disappointment and inconvenience fall within the concept of "non-economic loss" and are thus regulated by s 16 [of the *CLA*].'²²⁸

(i) Kinds of Damages - Application of Negligence Case Law

In considering whether damages for disappointment fell within the kind of damages regulated by the *CLA*, Basten JA acknowledged that:

On the other hand, the question may be approached at a higher level of generality, by saying that the kinds of damages which may be awarded for a breach of contract fall outside the scope of tortious damages, to which the Act was directed.²²⁹

To determine if the award of damages were of the kind that fell outside the scope of tortious damages, his Honour referred to a line of tort cases previously determined in

²²⁶ *Insight Vacations* (2010) 78 NSWLR 641, 644 [78]-[79] (Spigelman CJ), 650 [129]-[130] (Basten JA), 655 [176] (Sackville AJA). Considering: *Baltic Shipping Company v Dillon* (1993) 176 CLR 344; *Jarvis v Swans Tours Ltd* [1973] QB 233; *New South Wales v Corby* (2010) 76 NSWLR 439; *New South Wales v Ibbett* (2005) 65 NSWLR 168; *Kokl v Kablar* [1989] NSWCA 127; *Pascoli v Spittle* (1989) 9 MVR 573; *Teubner v Humble* (1963) 108 CLR 491.

²²⁷ *Insight Vacations* (2010) 78 NSWLR 641, 645-7 [112]-[117]; ss 3, 11, 11A, 16, 27, 33.

²²⁸ *Ibid* 647 [118].

²²⁹ *Ibid*.

the NSW. First, Basten JA considered *New South Wales v Ibbett*,²³⁰ a case concerning the application of the *CLA* to a claim of damages for assault.

In *Ibbett* the court held that the *CLA* did not apply as the assault was an intentional act and was excluded by the Act.²³¹ Basten JA considered the discussion of ‘personal injury’ where Spigelman CJ asserted:

The concept of ‘personal injury’ is reasonably well established in Australian legal practice. It has rarely, if ever, been used to refer to harm to reputation, deprivation of liberty, or to injured feelings such as outrage, humiliation, indignity and insult or to mental suffering, such as grief, anxiety and distress, not involving a recognised psychological condition. (See eg *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 359-363.) An award for the emotional harm involved in apprehension of personal violence would not generally be regarded as an award for ‘personal injury damages’.²³²

The issue is whether such harm should be so regarded by reason of the reference, in the inclusive definition of ‘injury’ in s 11, to ‘impairment of a person’s ... mental condition’. I incline to the view that the emotional reaction, often called ‘injured feelings’, arising from the apprehension of physical violence and the accompanying sense of outrage or indignation is not an ‘impairment of a mental condition’.²³³

Basten JA picking up Spigelman CJ’s statements acknowledged that damages for emotional harm caused by assault²³⁴ is not the kind of injury that applies to ‘personal injury damages’ under the *CLA*. The important point here is that Spigelman CJ addressed the ‘injured feelings’ arising from a cause of action (one that does not

²³⁰ (2005) 65 NSWLR 168 (*Ibbett*) considered in *Insight Vacations* (2010) 78 NSWLR 641 at 647 [118]-[121].

²³¹ *Ibbett* (2005) 65 NSWLR 168: excluded by the operation of s 3B(1)(a) of the *CLA*.

²³² *Ibid* 172 [21] quoted in *Insight Vacations* (2010) 78 NSWLR 641 at 647 [119].

²³³ *Ibbett* (2005) 65 NSWLR 168, 172 [22] quoted in *Insight Vacations* (2010) 78 NSWLR 641 at 648 [119].

²³⁴ The term ‘assault’ was used in this case to mean trespass to the person.

involve negligence) was not a claim for personal injury damages for the purpose of the *CLA*.

Basten JA further referred to *Ibbett*, where Ipp JA held that ‘anxiety and distress would be an “impairment” of a person’s mental condition in accordance with the ordinary meaning of “impairment” as the word is used in s 11.’²³⁵ However, the context in which Ipp JA made this statement was that damages for anxiety and distress were of the kind excluded from operation of the Act because the cause of action was assault, not negligence.²³⁶ Ipp JA supported this by quoting Spigelman CJ:

‘this case was conducted, and conducted only on the basis that the conduct . . . was intentional.’ The Chief Justice observes that, whatever the original pleading may have implied (in regards to particulars of damage), a case of negligence was not run. For that reason, the trial judge made no finding that Mrs Ibbett’s damages (on either cause of action) resulted from negligence. These matters alone are fatal to the argument.²³⁷

The case of *Ibbett* outlines that anxiety or distress is an impairment of a mental condition to which the *CLA* applies to determine personal injury damages, *if* the cause of the damage is negligence. It then ought to be understood that the corollary of that, is that if the claim for damages is not brought in negligence, the *CLA* should not apply. This follows the purpose of the *CLA*.

In *Insight Vacations*, Basten JA further applied cases dealing with tortious actions to justify how ‘disappointment’ formed ‘pain and suffering’ for the purpose of the *CLA*.

²³⁵ *Ibbett* (2005) 65 NSWLR 168, 175 [124] quoted in *Insight Vacations* (2010) 78 NSWLR 641 at 648 [120].

²³⁶ *Ibbett* (2005) 65 NSWLR 168, 175 [120]-[125].

²³⁷ *Ibid* [128].

His Honour referenced *New South Wales v Corby*,²³⁸ another case regarding assault although relating to a different provision of the *CLA*.²³⁹ Basten JA reiterated statements from *Ibbett*²⁴⁰ and his own comment from *Corby* that: ‘The general damages available for compensation for tortious conduct include damages for pain and suffering. There is no basis for limiting pain and suffering to physical suffering.’²⁴¹ However, it is arguable that this line of cases based on tortious actions bears no relevance to the claim for damages disappointment for a breach of contract.²⁴²

²³⁸ (2010) 76 NSWLR 439 (*Corby*).

²³⁹ See *Insight Vacations* (2010) 78 NSWLR 641, 648-9 [122]-[123].

²⁴⁰ In *Corby* (2010) 76 NSWLR 439, 448 [41] quoting *Ibbett* (2005) 65 NSWLR 168 at 175 [124]: “‘injury’ whether in its ordinary meaning or as defined in s 11, was wide enough to encompass ‘anxiety and stress’” (Ipp JA) and his Honour’s own view that the ordinary meaning of the term ‘may not reflect a distinction drawn by law between emotional distress and a psychiatric condition.’ (As the nature of the distinction Basten JA referenced another tort case; *Tame v New South Wales* (2002) 211 CLR 317 at 414 [285]-[296] Hayne J) at [212]: quoted in *Insight Vacations* (2010) 78 NSWLR 641 at 648 [123]: ‘That was because emotional distress, at least when consequent upon a medically identifiable injury, could be reflected in an award on non-economic loss for pain and suffering.’

²⁴¹ *Corby* (2010) 76 NSWLR 439, 449 [47] quoted in *Insight Vacations* (2010) 78 NSWLR 641, 648 [123].

²⁴² In *Corby* (2010) 76 NSWLR 439, 444 [23] Basten JA gives the ordinary meanings given to the word ‘injury’ by the *Oxford English Dictionary* (Online) to include:

Wrongful action or treatment; violation or infringement of another’s rights; suffering or mischief wilfully and unjustly inflicted.

Hurt or loss caused to or sustained by a person or thing; harm, detriment, damage.

Although ‘injury’ may refer either to the action of (or treatment inflicted by) the aggressor, or the consequence suffered by the victim, it is apparent that in the *Civil Liability Act*, the term is used to refer to the consequence and not the cause. Significantly, however, it is clear that the ordinary use of the word extends to a broad range of consequences, including hurt, loss, harm, detriment and damage. In its ordinary meaning, the phrase ‘personal injury’ would cover all of those adverse consequences when suffered (as most of them must be) by a person.

However, the *CLA* does not extend to a broad range of hurt, loss, harm or detriment as Basten JA asserts. Tortious actions against infringement of one’s rights, be it a trespass, nuisance or defamation do not incur the limitations imposed by the *CLA*: See *New South Wales v Williamson* (2012) 293 ALR 440 at 447 [34] French CJ and Hayne J:

[T]he claim for false imprisonment was necessarily a claim for damages on account of the deprivation of liberty with any accompanying loss of dignity and harm to reputation. The deprivation of liberty (loss of dignity and harm to reputation) is not an ‘impairment of a person’s physical or mental condition’ or otherwise a form of ‘injury’ within s 11 of the *CLA*. The claim for false imprisonment, at least to the extent to which it sought damages for deprivation of liberty, is not a ‘claim for personal injury damages’.

See also, *New Zealand v Director General, Department of Housing* [2006] NSWADT 173, an award of damages for a psychological condition caused by the unlawful disclosure of information under s 55 of the *Privacy and Personal Information Protection Act 1998* (NSW), was held by the Tribunal President O’Connor DCJ, not a claim for damages ‘caught up in the net of the *Civil Liability Act*:’ at [61]. The *CLA* ‘concern clearly was personal injury litigation of the usual kind (motor accidents, public liability claims against councils, professional malpractice suits an the like):’ at [58]. Therefore, although Basten JA asserts the *CLA* does not refer to the cause, upon a proper reading of the Act, it does appear to require negligence.

(ii) *Principle from Baltic Shipping*

Basten JA considered *Baltic Shipping* that permitted the recovery of damages for distress and disappointment on a breach of contract in the absence of a personal injury.²⁴³ He referred to the statement of Mason CJ, discussing the principle that pain and suffering is compensable as a personal injury.²⁴⁴ However, the actual point Basten JA referenced from *Baltic Shipping* was obiter dictum only. This was not the ratio decidendi of the case. The legal principle from *Baltic Shipping* is that even in the absence of a personal injury, damages are recoverable for a breach of contract for the failure by the promisor to fulfill their obligations.²⁴⁵ Damages for disappointment and distress flow from breach of contract when the object of the contract was to provide enjoyment, relaxation and freedom from molestation.²⁴⁶ Basten JA referenced *Baltic Shipping* only in the context that Mason CJ acknowledged one could recover damages for pain and suffering for a personal injury. This is not the distinguishing principle from the case that determined when a claimant is entitled to an award of damages for disappointment and distress on breach of contract.

²⁴³ *Insight Vacations v Young* (2010) 78 NSWLR 641, 649 [124].

²⁴⁴ *Baltic Shipping* (1993) 176 CLR 344, 359-60:

Pain and suffering is a well-known common law head of damage recoverable in actions for damages for personal injury, whether awarded for tortious conduct or conduct which constitutes a breach of statutory duty. And, in some circumstances at least, a plaintiff can recover damages for injury to his or her feelings caused by tortious conduct; assault, false imprisonment, malicious prosecution and defamation are causes of action in which a plaintiff may recover damages on that score. This is not surprising. As Lord Cranworth V-C observed in *Kemp v Sober* [61 ER 200, at p 201], ‘the feeling of anxiety is damage’. No doubt his Lordship, by that statement, intended to convey that damages could be recovered by a plaintiff for anxiety, disappointment or distress when those feelings were the consequence of conduct for which damages are recoverable and the damages recoverable for that actionable wrong include compensation for injured feelings of that kind.

²⁴⁵ See *Ibid* 405 (McHugh J):

it should recognize that damages for distress or disappointment are recoverable in an action for breach of contract if it arises from breach of an express or implied term that the promisor will provide the promisee with pleasure or enjoyment or personal protection . . . or if it is consequent upon the suffering of physical injury or physical inconvenience.

²⁴⁶ *Baltic Shipping* (1993) 176 CLR 344.

Basten JA acknowledged the statement from the Chief Justice in *Ibbett*: ‘that injury to reputation, deprivation of liberty and outrage, humiliation and insult are not commonly referred to as forms of personal injury’;²⁴⁷ then continued: ‘Matters such as grief anxiety, distress and disappointment may fall into a different category. They can be elements of pain and suffering which are the subject of awards for non-economic loss.’²⁴⁸ His Honour then compared the disappointment suffered as a ‘loss of amenity’.²⁴⁹ Under the *CLA* the term is ‘loss of amenities of life’.²⁵⁰ This term must be distinguished from the term ‘loss of amenities’ or loss of a benefit on breach of contract. Furthermore, his Honour determined that this was not a claim of loss of amenity therefore it seems curious as to why he should draw these comparisons.

Basten JA continued:

This is not a different concept from that accepted in *Baltic Shipping*; where such damages are said to flow from a breach of contract, they are limited to the loss of the benefit to be provided under the terms of the contract. These, however, are heads of damage which fall within the general law understanding of non-economic loss and the statutory definition of that term. Accordingly, they are subject to the constraints imposed by s 16.²⁵¹

Although Basten JA recognised ‘damages are said to flow from the breach of contract’ and that ‘they are limited to the loss of the benefit to be provided under the terms of the contract’ his Honour, did not distinguish that for a contractual claim for

²⁴⁷ *Ibbett* (2005) 65 NSWLR 168, 172 [21] quoted in *Insight Vacations v Young* (2010) 78 NSWLR 641, 649 [125].

²⁴⁸ *Insight Vacations v Young* (2010) 78 NSWLR 641, 649 [125].

²⁴⁹ *Ibid*: ‘an award of damages for “loss of amenities” [is] to cover the non-economic loss resulting from “the deprivation of the ability to participate in normal activities and thus to enjoy life to the full” citing *Teubner v Humble* (1963) 108 CLR 491 at 505 (Windeyer J).

²⁵⁰ Section 3 of the *CLA* definition of ‘non-economic loss’ (c) loss of amenities of life.

²⁵¹ *Insight Vacations v Young* (2010) 78 NSWLR 641, 649 [125]. However, *damages* for disappointment and distress are not a *head of damage*, see Luntz, above n 29, 1 and accompanying text at above n 220.

damages for disappointment and distress, the assessment of damages is the measure of the benefit not obtained. The measure of the loss of a benefit is markedly different to the measure of loss for pain and suffering caused by a personal injury.

(iii) Basten JA's Concluding Statements

In Basten JA's concluding statements on the issue of a separate head of damages for disappointment awarded by the trial judge, his Honour remarked:

With respect, the distinction is not persuasive. Distress and disappointment are closely related concepts, in a practical sense, and each is concerned with the loss of enjoyment of an opportunity for recreation and relaxation. That loss falls within the scope of available compensation under the general law principles for the tort of negligence. To exercise one element so as to avoid the constraints imposed by s 16 of the *Civil Liability Act* is an artificial exercise which does not accord with the definition of 'non-economic loss'. Such an exercise will almost inevitably give rise to the risk of double counting.²⁵²

Although it would be hard to dispute that kinds of distress and disappointment suffered on a personal injury caused by negligence, are in fact closely related concepts; if the 'disappointment' suffered by a claimant is due to a breach of contract, where the obligation was to provide pleasure or peace of mind, this is in fact a completely different concept.

Based on the facts, Ms Young's claim for damages for 'disappointment' was for the enduring pain and suffering from the personal injury that was caused by the negligent conduct of the bus driver. It was because of that consequential suffering

²⁵² Ibid 649-50 [127] citing *Kokl v Kablar* [1989] NSWCA 127 at [2] (Samuels JA).

that Ms Young was ‘disappointed’ and not able to enjoy the remainder of the tour. Therefore, any claim for damages, actually derived from the personal injury caused by negligence. As noted by Basten JA:

It is sufficient for present purposes to conclude that elements of distress and disappointment *resulting from the physical injury* in the course of the holiday, would have warranted inclusion in an award of damages for non-economic loss under the general law in relation to negligence.²⁵³

In this case, any disappointment incurred by the claimant was part of the pain and suffering as a consequence of the personal injury. Therefore, any award of damages for non-economic loss appears to fall within the scope and therefore limitations imposed by the *CLA*.

The award of damages Ms Young was claiming was for the non-economic loss for pain and suffering that was a consequence of her injury. The *CLA* applied to the award of damages because the basis of the action was in fact negligence. However, their Honours failed to clearly distinguish the essential element of this case. The *CLA* applies when the claim is based on negligence, a failure to exercise reasonable care and skill that caused the personal injury. A claim for damages for a breach of an obligation to provide pleasure, enjoyment or relaxation, is a distinguishable claim. The claim is not ordinarily one of a failure to exercise reasonable care and skill, but a breach of an expectation of an obligation under a contract.

It appears that the lower courts have picked up the statements in *Insight Vacations*, without acknowledgment of the fact that the claim was based on the consequential suffering of a personal injury caused by negligence. The effect of this is that a plaintiff’s claim for damages for the loss of a promised expectation, when the object

²⁵³ *Insight Vacations v Young* (2010) 78 NSWLR 641, 650 [129] (emphasis added).

of the contract was to obtain a benefit, has been denied by the application of the *CLA*. In addition, this raises the issue if a breach of a contractual obligation ought to become a failure to exercise reasonable care and skill that is negligence?

2 *Flight Centre v Louw*

In *Flight Centre v Louw*,²⁵⁴ the plaintiff travel company Flight Centre, sought an order by way of summons, to quash the judgment and award of damages for a breach of contract resulting in inconvenience, distress and disappointment in line with *Baltic Shipping*. In the Small Claims Division of the Local Court, Mr and Mrs Louw were awarded \$4,898.66 in damages, plus interest and costs.²⁵⁵ The Assessor determined that as neither of the Louws suffered a personal injury the *CLA* did not apply to an assessment of damages.²⁵⁶

(a) *The Facts*

The Louws contracted with the travel company, trading as Infinity Holidays, who ‘held itself out to be an expert in holiday destinations.’²⁵⁷ After informing the travel company they were ‘after a unique and special tropical holiday’²⁵⁸ based on the

²⁵⁴ (2011) 78 NSWLR 656 (Barr AJ) (*‘Louw’*).

²⁵⁵ Orders were made by the Local Court Assessor Olischlager (*‘Assessor’*).

²⁵⁶ *Louw* (2011) 78 NSWLR 656, 658. Barr AJ noted that there was generally no other method of review and no right of appeal from the Small Claims jurisdiction. His Honour highlighted that the summons raised ‘questions likely to recur from time to time, if not frequently, in claims brought before the Local and other courts;’ at [8]. Although his Honour acknowledged other cases determined in lower courts and specialist tribunals, Barr AJ held that the matters raised in the case; ‘appear to me to be of general importance and to justify this court’s considered decision:’ at [8].

²⁵⁷ *Ibid* 644 [39] quoting paragraph [12] of the Assessor’s judgment.

²⁵⁸ *Ibid* quoting paragraph [11] of the Assessor’s judgment.

recommendations provided to them the Louws booked to stay at the Meridien Hotel in Bora Bora, Tahiti.²⁵⁹

However, the Louws' experience was far from a 'special holiday'. Construction work was carried out at the hotel from 9.00 am to 4.00 pm Monday to Friday that interrupted the Louws as they rested in their room. The workers distressed the claimants with their noise. In addition, the workers distressed Ms Louw 'by staring at her.'²⁶⁰ Thirty-three percent of the beach was rendered inaccessible due to the ongoing construction work. The defendants had not been given notice of the matters when the booking was made. The Louws claimed 'damages for breach of contract resulting in inconvenience, distress and disappointment.'²⁶¹

In reviewing the decision, Barr AJ relied on the two grounds put forth by the travel company:

1. that the award of damages was not limited in accordance with s 16 of the *CLA*,²⁶² and
2. the award of damages was not limited by s 31 of the *CLA*.²⁶³

(b) Ground 1 – Damages for Non-Economic Loss

In considering whether s 16 of the *CLA* applied to the assessment of the claimant's award of damages, Barr AJ acknowledged the Assessor's reference to *Baltic Shipping*: 'where the object of the contract sued on was to provide pleasure and

²⁵⁹ *Ibid*. In addition, based on the recommendation of the travel company the Louws had changed their time of travel from February to April.

²⁶⁰ *Ibid* 657 [3].

²⁶¹ *Ibid* [4].

²⁶² *CLA* s 16(1): No damages may be awarded for non-economic loss unless the severity of the non-economic loss is at least 15% of a most extreme case.

²⁶³ *CLA* s 31: There is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

enjoyment or freedom from mental distress.²⁶⁴ The Assessor also referred to *Jarvis v Swan Tours*.²⁶⁵ However, Barr AJ noted that ‘in neither of those cases had the plaintiff to show that the Act did not apply.’²⁶⁶

To determine if the *CLA* applied to the contractual claim for damages for distress and disappointment Barr AJ relied on the statements from: *Ibbett*,²⁶⁷ *Corby*²⁶⁸ and *Insight Vacations*,²⁶⁹ all cases where the claimant had suffered a personal injury. Particular attention must be given to the actual statements Barr AJ relied on from *Insight Vacations*.²⁷⁰ The only authoritative statement from the reported case of *Insight Vacations* appears at [23] of *Louw* where Barr AJ cites Spigelman CJ:

I prefer the characterisation that grief, anxiety, distress and disappointment are elements of pain and suffering, rather than ‘loss of amenities of life’, within the definition of ‘non-economic loss’ in s 3 of the *Civil Liability Act*.²⁷¹

I agree with Basten JA that the distinction between ‘distress’ and ‘disappointment’ drawn by the trial judge is unpersuasive. I agree that his Honour erred in awarding damages for disappointment.²⁷²

²⁶⁴ (1993) 176 CLR 344 cited in *Louw* (2011) 78 NSWLR 656 at 658 [10].

²⁶⁵ [1973] QB 233: a case where the claimant had recovered ‘damages for disappointment and distress caused by breach of contract to provide a stipulated holiday:’ cited in *Louw* (2011) 78 NSWLR 656 at 658 [10].

²⁶⁶ *Louw* (2011) 78 NSWLR 656, 658 [10].

²⁶⁷ (2005) 65 NSWLR 168, 174-5 [122]-[125] (Ipp JA), 182 [211]-[212] (Basten JA); see above n, 235, 240 and accompanying text, quoted in *Louw* (2011) 78 NSWLR 656 at 660-1 [18]-[19].

²⁶⁸ (2010) 76 NSWLR 439, 449 [47] (Basten JA) quoted in *Louw* (2011) 78 NSWLR 656 at 661 [20].

²⁶⁹ (2010) 78 NSWLR 641, 644 [78]-[79] (Spigelman CJ), 645 [109], 646 [113] (Basten JA) (but see below n 270) quoted in *Louw* (2011) 78 NSWLR 656 at [21]-[25].

²⁷⁰ (2010) 78 NSWLR 641 (See above n 269 for pinpoints). In *Louw* (2011) 78 NSWLR 656 at 661-2 [22]-[25] Barr AJ quotes Spigelman CJ from *Insight Vacations* at [15] (although this citation comes from the unreported judgment *Insight Vacations Pty Ltd v Young* [2010] NSWCA 137 at [15] which does not appear in the reported judgment.) This is Basten JA’s opinion at 649-50 [127] of *Insight Vacations*. Spigelman CJ at [79] of the reported judgment agrees with Basten JA: see 644 [78]-[79]. The other references Barr AJ cites from *Insight Vacations*, are in fact issues that Basten JA aims to address in the case. *Louw* at 662 [24] quotes Basten JA in *Insight Vacations* at 645 [109]: ‘The applicant did not seek to challenge the existence of such head of damage [in accordance with *Baltic Shipping*], rather, it complained that the award of the additional amount for such a factor contravened s 16 of the *CLA*,’ and at 646 [113] where Basten JA raises four issues that ought to be addressed. Therefore, although this may provide assistance to Basten JA’s thought process in determining the application of the *CLA* in *Louw*, his Honour is does not appear to rely on the judicial analysis from *Insight Vacations* that formed the ratio decidendi. The requirement of negligence that caused a personal injury has been omitted from Barr AJ’s assessment.

²⁷¹ *Insight Vacations* (2010) 78 NSWLR 641, 644 [78] quoted in *Louw* (2011) 78 NSWLR 656 at 661 [23].

As explained above, *Insight Vacations* ought to be distinguished. Although in *Insight Vacations* the court determined that distress and disappointment were elements of pain and suffering, the distinguishing factor of that case was that the claim for damages was based on suffering incurred by the claimant as a consequence of the personal injury. Although the claim was initially framed as a breach of contract, the cause of the claim was in fact the negligence of the tour company; their Honours did not distinguish this essential factor in that case. Prima facie the Court in *Insight Vacations* correctly determined that the *CLA* applied to an assessment of damages. However in *Louw* the cause of the action was not negligence, but a breach of a contractual obligation.

Barr AJ concluded on ground 1, referring to *Insight Vacations* that:

It seems to me that much assistance is to be gained from the several remarks of the members of the Court of Appeal in the cases cited. In my opinion the inconvenience, distress and disappointment experienced by the first and second defendants constituted non-economic loss for the purposes of s 3, being pain and suffering. In my opinion they constituted impairment of the mental condition of each of the first and second defendants and so amounted to personal injury. It follows that the assessor was obliged to ask himself, in accordance with s 16, whether the severity of the non-economic loss was at least 15% of a most extreme case. He did not do so. The plaintiff has established that there was an error of law and has made good its case on the first ground.²⁷³

It is argued that *Louw* must be distinguished from *Insight Vacations*. The claimants suffered no personal injury. The ‘injury’, was the breach of a contract that caused

²⁷² *Insight Vacations* (2010) 78 NSWLR 641, 644 [79] quoted in *Louw* (2011) 78 NSWLR 656 at 662 [23].

²⁷³ *Louw* (2011) 78 NSWLR 656, 663 [31].

distress and disappointment from their ruined holiday. It does not appear that the Louws had based their claim on negligence. A breach of a contractual bargain is not ordinarily an action in negligence. It is interesting to note, that Barr AJ stated: ‘The first and second defendants sued the plaintiff. Their claim was framed in contract but the precise way in which breach was pleaded is of no present importance.’²⁷⁴ Respectfully, following the argument above, this does not appear to be a correct assumption. The *CLA* applies to claims where the basis of the claim is in negligence that caused a personal injury. Regardless of what the ‘pleading may have implied’²⁷⁵ a case must be run on the basis of negligence for the *CLA* to apply.²⁷⁶ Further to this, if the claimants did not plead their case in negligence, the second ground brought by the travel company bears no relevance to the case.

(c) Ground 2 – Pure Mental Harm Resulting from Negligence

The second ground addressed by Barr AJ was that the Assessor failed to limit the award of damages in accordance with Part 3, s 31 of the *CLA*.²⁷⁷ Outlining the relevant sections under Part 3 of the Act - Mental Harm, Barr AJ determined that as the ‘injury’ was an impairment of the Louw’s mental condition, by s 27 of the *CLA* they suffered mental harm.²⁷⁸ Further, his Honour determined that the harm suffered was ‘pure mental harm’ rather than consequential mental harm as neither claimant

²⁷⁴ Ibid 657 [4]: see also Barr AJ at 662 [27]: ‘the Assessor recognised, there was a claim only in contract, and that damages for *foreseeable* disappointment and distress were therefore recoverable.’ This is not the correct. The measure of damages for losses claimed on breach of contract are those naturally arising or within contemplation as per *Hadley v Baxendale*, see above nn 43, 48. Foreseeability is the wider measure of loss used in the tort of negligence.

²⁷⁵ See Ipp JA in *Ibbett* (2005) 65 NSWLR 168, 175 [128]:

Spigelman CJ points out: ‘this case was conducted, and conducted only on the basis that the conduct . . . was intentional’ The Chief Justice observes that, whatever the original pleading may have implied (in regards to particulars of damage), a case of negligence was not run. For that reason, the trial judge made no finding that Mrs Ibbett’s damages (on either cause of action) resulted from negligence. These matters alone are fatal to the argument.

²⁷⁶ Ibid.

²⁷⁷ *CLA* s 31: There is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

²⁷⁸ *CLA* s 27: ‘mental harm’ means impairment of a person’s mental condition.

suffered a personal injury of any other kind.²⁷⁹ Therefore, by s 31²⁸⁰ there was no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.²⁸¹

Barr AJ sated: ‘In my opinion the pure mental harm suffered by the first and second defendants resulted from negligence constituted by the plaintiff’s failure to exercise reasonable care and skill.’²⁸² This was reasoned by outlining the judgment of the Assessor, notably, that the breach of implied terms in a contract amounted to a finding that Flight Centre failed to take reasonable care and skill in giving its advice.²⁸³ Barr AJ held: ‘That was negligence as defined by s 27. It follows that there was no liability for the harm suffered by the first and second defendants and that the Assessor erred in law in awarding damages. The plaintiff has made good the second ground.’²⁸⁴ However, it does not appear that the Louw’s claim was based on negligence, nor was their claim for damages based on Insight failing to take reasonable care and skill in giving advice. The Louw’s claim, following the principle from *Baltic Shipping*, was that the travel company, in a breach of contract, failed in their obligation to provide what was bargained for under the terms of contract.

Notwithstanding the court was satisfied that Flight Centre breached the implied term of the contract, rather than assessing the measure of damages against the loss of the contractual expectation bargained for, his Honour found the travel company ‘negligent’ and assessed the damage as a personal injury. Determining that their injury was not determined as the most 15% of a severe case, their claim for damages

²⁷⁹ *Louw* (2011) 78 NSWLR 656, 664 [38]: per the definition in s 27 of the *CLA*.

²⁸⁰ *CLA*.

²⁸¹ *Louw* (2011) 78 NSWLR 656, 664 [38].

²⁸² *Ibid* 664 [39].

²⁸³ *Ibid*: Barr AJ addressed statements of the Assessor’s determination at [11]-[13].

²⁸⁴ *Louw* (2011) 78 NSWLR 656, 665 [40].

was restricted by s 16 of the *CLA*. Further, as Barr AJ found that the Louws suffered pure mental harm, ‘caused by negligence,’ as neither plaintiff suffered a recognised psychiatric injury, there was no liability to pay damages.²⁸⁵ Subsequently the Louws were denied any remedy. However, reiterating the essential point, the Louw’s claim was not based on negligence, nor did they incur a personal injury. If a case of negligence was not run by the claimant, it is not for the court to imply that the damage resulted from negligence.²⁸⁶

(d) A Failure to take reasonable care and skill: Negligence or a Breach of Contract?

In *Louw*, Barr AJ asserted that the breach of contract was a ‘failure to take reasonable care and skill.’²⁸⁷ Therefore, his Honour determined that the *CLA* applied to limit the award of damages. The very essence of contract law is that on breach of a term of the contract, the wronged party has a right to a remedy. It is not for the court to impart the principles of negligence, a failure to take reasonable care and skill, into an action for a breach of contract. As outlined in Chapter 1, while there is a duty under a contract to exercise reasonable skill and care, this is analogous to the negligent standard of care. The strict obligation to perform the agreed terms of a contract is a higher standard.²⁸⁸ While it is not entirely clear how the claimants pleaded their case, or the language used, Barr AJ’s assertion that ‘the precise way in which breach was pleaded is of no present importance,’²⁸⁹ does not appear correct. If a contractual promise is not performed, this gives rise to an action in damages.²⁹⁰

²⁸⁵ See *CLA* s 31.

²⁸⁶ See Ipp JA in *Ibbett* (2005) 65 NSWLR 168, 175 [128], above n 275 and accompanying text.

²⁸⁷ *Louw* (2011) 78 NSWLR 656, 664 [39]: the definition of ‘negligence’ under Part 1A s 5 of the *CLA*.

²⁸⁸ The liability of the defendant is strict. See Bishop, above n 23, 244 and accompanying text at above n 35.

²⁸⁹ *Louw* (2011) 78 NSWLR 656, 657 [4], 662 [27]; see also above n 274 and accompanying text.

²⁹⁰ Bishop, above n 23, 244.

Notwithstanding a plaintiff's entitlement to recover damages flowing from a breach of contract,²⁹¹ the contractual doctrine of *de minimus non curat lex rule*: 'the law does not concern itself with trifles' might deny compensatory damages if a plaintiff cannot prove the breach caused loss. However, on a breach of contract a plaintiff is still entitled to nominal damages.²⁹² Therefore, even if the court felt the Louws' has not been able to prove their loss, they still ought to have received a nominal sum for the breach of contract.

What appears to be the ratio decidendi from *Louw* is that any claim for damages for inconvenience, distress and disappointment, even on a breach of a contractual obligation, ought to be classed as a claim for personal injury damages. Therefore, any compensation awarded to the claimant is damages for non-economic loss. By application of the *CLA*, any award of damages for non-economic loss must be at least 15% of a most extreme case,²⁹³ or the claimant is denied a remedy. However, assessing damages on the extent of the injury is not the measure of damages awarded on a breach of contract. The Court of Appeal in *Insight Vacations* failed to distinguish the essential factors of that case. Ms Young's claim was in fact based on the consequential suffering of a personal injury caused by negligence. The ratio decidendi from *Insight Vacations* has been interpreted and applied by Barr AJ in *Louw* to restrict a contractual claim for damages for distress and disappointment,

²⁹¹ *Baume v Commonwealth* (1906) 4 CLR 97, 116–117 (Griffiths CJ); 'It is clear that a breach of contract by one party always gives the other party a right to recover damages for the breach:' *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at [58].

²⁹² If the breach is not proved to have caused any loss, the party in breach of contract is still liable to pay nominal damages: see *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286, 301; *Chappel v Hart* (1998) 195 CLR 232. In *New South Wales v Stevens* (2012) 82 NSWLR 106, the court held that pt 2 of the *CLA* did not apply to an award of nominal damages. Nominal damages were not 'compensatory damages' they were 'vindicatory', therefore nominal damages were not an award of 'personal injury damages' at 112 [26] (McColl JA, Sackville AJA at 120-1 [70]-[79] with Ward JA agreeing) On breach of a contractual obligation, the innocent party ought to receive compensation to the value of the benefit one expected to obtain, even if that benefit might appear to be 'trifle' to another: see *Ruxley Electronics and Construction Ltd v Forsyth* [1996] 1 AC 344. See also Harris, Campbell and Halson, above n 44 ch 30, categorise damages for disappointment and distress as 'exemplary damages', however, further analysis is beyond the scope of this thesis.

²⁹³ *CLA* s 16(1).

where it should not apply. The non-economic loss claimed in a breach of contract is not, and should not be regarded as a claim for personal injury damages. The opinion of this argument is that the application of the *CLA* to restrict the award of damages for breach of contract in *Louw* was an error of law.

C Conclusion

The *CLA* was introduced to address a number of perceived crises, specifically the increase in awards of damages for personal injury claims. Notwithstanding the Act applies to claims for non-economic damages, the Act does not restrict all claims for such damages. That was not the purpose or intention of the Act. The *CLA* should only apply to limit a claim for damages when the claim is for personal injury damages caused by negligence. Notwithstanding a claim for a spoiled holiday seeks an award of damages for non-economic loss, the award for damages is for a loss of an expectation flowing from the breach, when the object of the contract was to provide enjoyment or relaxation; this is not a claim for personal injury damages. Broad parallels were drawn between two conceptually different heads of damages. The application of the *CLA* has had the effect of limiting and in some cases completely restricting awards of damages for disappointment and distress. Compensation for non-economic loss on a breach of contract ought to be assessed on the loss of the value of the expected benefit, or on consequential losses flowing from the expected benefit as explained further in Chapter 3. The *CLA* ought not apply to restrict the unique award of damages for distress and disappointment on breach of a contract.

IV CHAPTER 3

THEORETICAL PRINCIPLES OF NON-PECUNIARY LOSS

A Part I: Compensation for Non-Pecuniary Loss in Contract

This chapter is a theoretical analysis of how a plaintiff may recover damages for the different types of non-pecuniary losses on breach of contract. The chapter is divided into two parts. The first part explains the distinction between positive and consequential non-pecuniary losses that may be recoverable on a breach of contract.²⁹⁴ It is only certain consequential non-pecuniary losses, caused by a breach, without any additional loss of a promised benefit that an award of damages might fall under the scope of damages governed by the *CLA*. The second part of this chapter focuses on a recent English Court of Appeal case *Milner v Carnival Plc*.²⁹⁵ In this case Ward LJ provided guidance to the lower courts and to practitioners for the correct measure and assessment of damages for spoiled holiday claims.²⁹⁶ This chapter highlights how the application of the *CLA* to limit the claim of damages for a breach of contract is against the principles of compensatory damages for a breach of contract. When assessing a claim for damages on breach of contract, the courts ought to give more consideration to the cause of the loss and the type of non-pecuniary loss that is actually being claimed. Finally, alternative actions under the *Australian Consumer Law*²⁹⁷ are briefly highlighted where claims of damages for breach of a legitimate expectation in a contract do not incur the limitations of the *CLA*.

²⁹⁴ See McKendrick and Worthington, above n 15, 287-315.

²⁹⁵ *Milner v Carnival Plc* [2010] 3 All ER 701.

²⁹⁶ Sarah Prager, 'The Assessment of Damages in Holiday Cases: The Impact of *Milner v Carnival Plc*' [2011] *Travel Law Quarterly* 13, 16.

²⁹⁷ *Competition and Consumer Act 2010* (Cth); *Vol 3 Sch 2: Australian Consumer Law* ('*Australian Consumer Law*').

1 *Positive or Consequential Non-Pecuniary Loss*

Damages for non-pecuniary loss may be recoverable by a plaintiff when the loss suffered as a result of the breach falls under the exceptional categories of *Watts v Morrow*.²⁹⁸ However, all types of loss falling under these exceptional categories are not, as McKendrick and Worthington describe, ‘dealing with the same issue’.²⁹⁹ The authors divide types of non-pecuniary loss that may be sought on breach of contract into two principle categories: a positive loss and a consequential loss.³⁰⁰ Damages for a *positive loss* are sought by a failure of the defendant to confer a promised non-pecuniary benefit.³⁰¹ Damages for a *consequential loss* are sought to compensate for the non-pecuniary loss suffered as a result of the breach of contract.³⁰² This classification of loss is similar to that expressed by Lord Scott of Foscote in *Farley v Skinner*³⁰³ where he distinguished between:

the injured party has been ‘deprived of something of value but the ordinary means of recovering the damage are inapplicable’ and the case ‘where the injured party seeks to recover the consequential damages in respect of the ‘inconvenience or discomfort’ that has been suffered as a result of the breach.’³⁰⁴

Categorising the ‘actual loss’ a plaintiff seeks damages for into types of non-pecuniary loss, further highlights how a claim for damages for distress and disappointment ought not to be regarded as a claim for personal injury damages.

²⁹⁸ [1991] 1 WLR 1441, 1445:

Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. ... In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort.

²⁹⁹ McKendrick and Worthington, above n 15, 300.

³⁰⁰ Ibid 288-313.

³⁰¹ Ibid 288 n 6: Along the line of damages flowing from *Watts v Morrow* first exceptional category: see above n 298 and accompanying text.

³⁰² McKendrick and Worthington, above n 15, 290: Along the line of damages flowing from *Watts v Morrow* second exceptional category: see above n 298 and accompanying text.

³⁰³ [2002] 2 AC 732 (*Farley*).

³⁰⁴ McKendrick and Worthington, above n 15, 300, quoting *Farley* [2002] 2 AC 732 at [86].

(a) Positive Non-Pecuniary Loss

The type of cases where a party claims for a positive non-pecuniary loss, are those where:

the defendant, expressly or impliedly promises to confer a non-pecuniary benefit on the claimant or the effect of the breach was to deny the claimant the non-pecuniary benefit which she would have obtained from performance in accordance with the terms of the contract.³⁰⁵

(i) Expressed Promise

A positive loss can be further subdivide into cases where the defendant has *expressly promised* to confer a non-pecuniary benefit ‘to secure a state of affairs which will bring pleasure or at least ensure peace of mind on the claimant.’³⁰⁶ A non-pecuniary benefit, such as peace of mind, might be out of the scope of the general object of the contract, however as in *Heywood v Wellers*,³⁰⁷ if the defendant had expressly promised the benefit upon entering the contract, the claimant need not prove the object of the contract as the benefit was one which was known to the parties and forms an important term of the contract.³⁰⁸ Upon a breach of that important term, the law would recognise the non-pecuniary interest and award damages in respect of the

³⁰⁵ McKendrick and Worthington, above n 15, 301.

³⁰⁶ Ibid.

³⁰⁷ [1976] QB 446.

³⁰⁸ Ibid, See Bridge LJ at 463H-464A: there is ‘a clear distinction between mental distress which is an incidental consequence ... of the conduct of litigation ... and mental distress ... which is the direct and inevitable consequence of the ... failure to obtain the very relief which it was the sole purpose of the litigation to secure.’ See also by Dillon LJ in *Bliss v South East Thames Regional Health Authority* [1987] ICR 700 CA at 718, the precise formulation was: ‘a contract to provide peace of mind or freedom from distress.’ See also, *Farley v Skinner* [2002] 2 AC 732: the claimant was awarded damages for distress and inconvenience, not because the contract was one ordinarily to protect from peace of mind, but because it was a term known to both parties on entering the contract. The surveyor was expressly requested to investigate the noise level, therefore the promise on entering the contract was to confer peace of mind, a failure to do so was a breach of the expressed obligations of the contract.

non-performance of the agreed obligation that the plaintiff was entitled, however deprived.³⁰⁹ The loss is the failure to confer a promised positive non-pecuniary benefit on the party. The assessment of damages for the loss of the benefit is the measure of the advantage that the party had contracted for. Damages for the loss of an expressed contractual benefit have nothing to do with the recovery of damages for a personal injury.

(ii) Implied Promise

The second type of positive loss consists of ‘cases in which the defendant *impliedly promises* to confer a non-pecuniary benefit’³¹⁰ on the plaintiff. While the defendant may not have expressly promised to provide peace of mind, enjoyment or relaxation, or to take reasonable care to provide a non-pecuniary benefit, it is clear that the very nature and custom of the contract is ‘inextricably bound up with enjoyment the claimant hopes to thereby obtain.’³¹¹ Holiday cases fall in to this type of positive loss. In these types of cases, ‘the law will readily imply an obligation to provide such pleasure.’³¹² When the obligation to provide a benefit is implied by law a claimant can recover damages for the failure of the defendant to provide that implied promised benefit.³¹³ The claimant is recovering damages for the loss of the value of the implied promise, to provide peace of mind, enjoyment or relaxation. Again, this type on non-pecuniary loss has nothing to do with a personal injury or suffering synonymous with a personal injury.

³⁰⁹ See generally Friedman, above n 37, 650; McKendrick and Worthington, above n 15, at 302.

³¹⁰ McKendrick and Worthington, above n 15, 302 (emphasis added).

³¹¹ Ibid.

³¹² Ibid.

³¹³ See; *Jarvis v Swans Tours Ltd* [1973] QB 233; *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468; *Baltic Shipping Company v Dillon* (1993) 176 CLR 344; *Diesen v Samson* (1971) SLT (Sh Ct) 49: the claimants recovered damages from the photographer for failing to turn up and take wedding photographs.

(iii) Objective Added Value

The first two types of positive losses that fail to confer a non-pecuniary benefit focus on the promise made by the defendant. The third class of cases highlighted by McKendrick and Worthington looks to the *objective added value* that the contract specified and the claimant reasonably assumes upon entering the contract. While there is an overlap with the previous types of cases, the difference is that the benefit need not be promised, 'it suffices that the breach resulted in an objective non-pecuniary loss to the claimant.'³¹⁴ These cases focus on the position of the claimant because of the breach, rather than the promise of the defendant.³¹⁵ The difference is, in assessing damages the court looks to the objective added value the claimant reasonably expected upon entering the contract. In some cases the objective added value may exceed the market price of performance of the defendant.³¹⁶ This is the case of the wedding photographer who, in breach of contract, fails to turn up.³¹⁷ The loss incurred by the claimant exceeds the market price of performance, as the value to the party who expected photos taken of their wedding day exceeds the actual cost of the photographer. The court therefore assesses the objective added value to compensate for the failure of performance. Damages for the objective added value are not a subjective assessment of personal suffering quantified on a percentage scale, as personal injury damages are determined and assessed under the *CLA*.³¹⁸

³¹⁴ McKendrick and Worthington, above n 15, 304.

³¹⁵ Ibid.

³¹⁶ Ibid.

³¹⁷ *Diesen v Samson* (1971) SLT (Sh Ct) 49 cited in *ibid*.

³¹⁸ *CLA* s 16(1), see also Parmegiani et al, above n 188 and accompanying text.

(iv) Subjective Added Value

The fourth class of cases, where on breach of contract the plaintiff sustains a positive loss, concerns the *subjective added value* that the claimant placed on the particular contractual specifications. In *Ruxley Electronics and Construction Ltd v Forsyth*³¹⁹ the claimant contracted for a swimming pool to be built to a specific depth. The required specifications added no objective financial value to the swimming pool. However, the specific depth of the swimming pool was subjectively important to the claimant. On breach of that required specification, damages were awarded to compensate the claimant's subjective added value.

While *Ruxley* has generally been regarded as a 'loss of amenity case',³²⁰ in that the claim was for a consequential non-pecuniary loss,³²¹ this view has been challenged in that the loss should more accurately be described as a 'defeated expectation.'³²² The claim for damages was to 'recover the value of the promised performance which had not been supplied by the party in breach.'³²³ Thus Lord Scott in *Farley* stated:

... that if a party's contractual performance has failed to provide to the other contracting party something to which that other was, under the contract, entitled, and which, if provided, would have been of value to that party, then, if there is no other way of compensating the injured party, the injured party should be compensated in damages to the extent of that value.³²⁴

³¹⁹ [1996] 1 AC 344 ('*Ruxley*').

³²⁰ McKendrick and Worthington, above n 15, 305.

³²¹ Ibid n 96: This view was adopted by Lord Lloyd of Berwick in *Ruxley* [1996] 1 AC 344 at 373-4.

³²² McKendrick and Worthington, above n 15, 305 quoting *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 at 588 (Lord Millett).

³²³ McKendrick and Worthington, above n 15, 305.

³²⁴ [2002] 2 AC 732 [79] quoted in *ibid*.

The overriding principle of which damages are awarded for a non-pecuniary loss is that the law of contract recognises the value of a promise. ‘The conception of loss recognised by the law of contract now extends beyond purely financial losses and instead has as its focus the performance for which the claimant contracted.’³²⁵ If the promise in performance of the contract is to provide a non-pecuniary benefit, that is enjoyment, relaxation or freedom from molestation, a breach of that promise is a positive loss for which the claimant is entitled to recover damages. The measure of damages and assessment of loss is the value of the benefit that was expected on entering the contract.

In *Louw*, Barr AJ interpreted the loss of the claimants as the type of loss suffered by a personal injury. On this interpretation, Barr AJ determined that the non-pecuniary loss must be assessed in accordance with the severity of that loss in accordance with the *CLA*. Their claim for damages was denied. However, the Louws sustained a positive loss by the non-performance of a non-pecuniary benefit. Barr AJ acknowledged that the travel company breached an implied term of the contract in that they failed to provide a relaxing and tranquil resort. It follows that damages ought to have been assessed on the value of the promised benefit that the claimants expected however failed to obtain because of the breach. The value of the lost promised benefit should have been assessed on an objective standard, rather than a purely a subjective assessment of suffering.³²⁶ Determining that the Louw’s claim for damages ought to be assessed in accordance with the *CLA* appears to amount to ‘a result that is manifestly absurd or is unreasonable.’³²⁷ The claim for damages was for

³²⁵ McKendrick and Worthington, above n 15, 306.

³²⁶ See *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 and accompanying text at above n 188.

³²⁷ *Interpretation Act 1987* (NSW) s 34(1)(b)(ii).

a breach of the promise to provide a tranquil holiday. The Louws were not claiming personal injury damages.

Where the *CLA* might apply to a claim for damages on breach of contract is when a plaintiff suffers a type of consequential non-pecuniary loss. These type of losses fall into McKendrick and Worthington's second category of non-pecuniary loss. However, once again these types of losses can further be classified depending on the type of consequential non-pecuniary loss and the actual breach of the obligation that may sometimes also result in a positive non-pecuniary loss. If these two factors are combined in the assessment of damages, then the *CLA* ought not apply.

(b) Consequential Non-Pecuniary Loss

Damages awarded for consequential non-pecuniary losses are those types of losses where the claimant has suffered a consequential loss or injury caused by the breach of contract. These types of damage include: physical injury, psychiatric illness, inconvenience and mental distress and disappointment.³²⁸ If the type of consequential loss involves a personal injury, the plaintiff might also recover damages for pecuniary losses, for example loss of earnings, depending on the extent of the injury suffered by the party.³²⁹ Some of these classes of consequential non-pecuniary losses are the types of injury where the *CLA* would apply.

³²⁸ McKendrick and Worthington, above n 15, 309.

³²⁹ See Personal injury damages for economic loss governed under the *CLA* pt 2 div 2.

(i) *Personal or Physical Injury*

Where a party suffers a ‘personal injury’ caused by a breach of contract, there ‘would seem to be no doubt that damages recoverable for personal injury caused by a breach of contract would include the normal non-pecuniary losses.’³³⁰ A claimant can recover damages for the non-pecuniary losses provided the damage is not too remote a consequence of the breach of contract.

In *Summers v Salford Corp* a tenant was cleaning a window when the sashcord broke, the window fell, and her hands were badly injured.³³¹ The claimant successfully sued the landlord for a breach of the covenant of fitness for habitation. There was ‘nothing to suggest that the award of damages was not based on the normal assessment for personal injury.’³³² Additionally, other cases where a plaintiff has been injured by a breach of a landlords covenant to repair, a tenant has successfully sued and claimed damages to compensate for the personal injury.³³³ In these cases it was not necessary to bring concurrent actions of liability in tort and contract. The measure of damages for the personal injury suffered was based purely on the assessment of the extent of the injuries incurred by negligence. The defendant was liable for the foreseeable physical injury suffered by the claimant as a result of the breach. In these cases there is no assessment of the value of the promise of an expectation. The injury suffered was due to negligence.³³⁴ This is the type of consequential non-pecuniary loss, flowing from a personal injury: be it bodily injury, pain and suffering or mental impairment that the *CLA* applies.

³³⁰ McGregor, above n 18, 66 [3-017].

³³¹ [1953] AC 283, cited in McGregor, above n 18, 66 [3-017].

³³² McGregor, above n 18, 66 [3-017].

³³³ Ibid citing *Griffin v Pillett* [1926] 1 KB 17; *Porter v Jones* (1943) 112 LJKB 173 CA.

³³⁴ Although a duty will be owed under a contract, this is quite different from a claimant’s expectation of the defendant to perform the object of the contract.

Other cases of a consequential non-pecuniary loss where the *CLA* might apply to limit awards of damages are professional negligence cases. Even though parties are in a contractual relationship, unless the expectation or object on entering the contract was to provide a non-pecuniary benefit, any consequential losses (psychological or mental suffering) are assessed purely on the basis of the injury. Damages can be recovered provided the loss is not too remote a consequence of the breach. As in the case of *Cook v Swinfen* Lord Denning stated: ‘just as in the law of tort, so also in the law in contract, damages can be recovered for nervous shock or anxiety state if it is a reasonably foreseeable consequence.’³³⁵

The distinguishing factor of these cases, in which the *CLA* would apply, is that the ‘wrong’ is a breach of a duty of care. The basis of the injured party’s loss is actually a negligence claim. Without a contractual promise to provide a benefit or added value, the defendant party has no contractual duty to protect against non-pecuniary consequential losses, like pain and suffering beyond the normal tortious obligation of duty of care.³³⁶ This however, does not mean that all consequential non-pecuniary losses suffered by a plaintiff, on a breach of contract, ought to incur the limitations of the *CLA*. As always in the law, cases are not always confined to neat classifications. A case example is the physical discomfort or inconvenience suffered by the claimant as a consequence of the breach in *Watts v Morrow*.³³⁷

In *Watts v Morrow*, the claimants contracted the defendant to perform a full structural survey on a house. On reliance of the survey, the claimants purchased the house. Shortly after moving in they discovered the house required major repair work.

³³⁵ [1967] 1 WLR 457, 461; quoted in McKendrick and Worthington, above n 15, 310; see also *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383.

³³⁶ See above n Part II Ch 1(A)(2): *Contractual Obligation or Duty of Care*.

³³⁷ [1991] 1 WLR 1421.

The Court of Appeal determined that the claimants were not entitled to recover damages for disappointment and distress suffered as a result of the breach, without any express or implied benefit in the ordinary course of the contract. The court held that a contract for surveying a house was itself not a contract to receive a promised benefit.³³⁸ However, the court could not deny the ‘deplorable conditions’³³⁹ the claimants had to endure while the repair work was carried out. The claimants were awarded damages, as a consequence of the breach of performance, for the ‘physical discomfort or inconvenience resulting from the breach and the mental suffering directly related to that inconvenience and discomfort.’³⁴⁰ The type of inconvenience the claimants suffered might be more analogous to nuisance cases,³⁴¹ where inconveniences suffered by a claimant might ‘consist of a noise, a smell or some other activity which has a sensory impact.’³⁴² While this opinion of ‘inconvenience’ has been challenged³⁴³ the essential point is that not all consequential non-pecuniary losses caused by a breach of contract can realistically be regarded as a claim for personal injury damages.³⁴⁴

³³⁸ Ibid 1441-2 (Ralph Gibson LJ).

³³⁹ Ibid 1427.

³⁴⁰ Ibid 1445 (Bingham LJ).

³⁴¹ See Lord Steyn in *Farley v Skinner* [2002] 2 AC 732 [30] cited in McKendrick and Worthington, above n 15, 312.

³⁴² McKendrick and Worthington, above n 15, 312.

³⁴³ Ibid; quoting Lord Clyde in *Farley v Skinner* [2002] 2 AC 732 took the view that ‘inconvenience’ covered ‘the kinds of difficulty and discomfort which are more than mere matters of sentimentality’ at [36].

³⁴⁴ See *New South Wales v Williamson* (2012) 293 ALR 440; *New Zealand v Director General, Department of Housing* [2006] NSWADT 173 at above n 242 and accompanying text. See also *Southern Properties (WA) Pty Ltd v Executive Director of the Dept of Conservation and Land Management* (2012) 42 WAR 287 concerned the issue if the *Civil Liability Act 2002* (WA) (‘CLA WA’) applied to limit an award of damages for a nuisance claim. McLure P confirmed that the CLA WA only applies where the ‘claim for damages caused by the fault of the person.’ ... The requirement of a causal link between the damage and the fault suggests fault must be an element of the cause of action ... the CLA [WA] would only apply if the appellants had to prove negligence.’ at 311-2 [126]. While the Western Australian legislation does slightly differ from the NSW Act, the word ‘fault’ appears under s 5A which is omitted from the equivalent s 5A of the *Civil Liability Act 2002* (NSW) (‘fault’ only appears in the Long Title of the NSW CLA), the inclusion of the term ‘fault’ in the Long Title cannot be ignored.

(c) Overlap of the Non-Pecuniary Losses

When a plaintiff expects performance entering a contract, even if the expectation falls outside the scope of a promised benefit (positive loss), damages are still recoverable for the consequential loss, such as physical inconvenience and discomfort suffered on a breach of contract. These types of consequential losses are not always a personal injury. Types of non-pecuniary losses might be of the kind found on breach of contract in home building cases. If the loss incurred by the claimant stems from a reasonable expectation of a promised benefit, even if that promise falls outside the scope ordinarily implied into those kinds of contracts, it is reasonable for the court to measure the lost contractual benefit by reference to the type of discomfort suffered as a consequence of the breach.³⁴⁵

A non-pecuniary consequential loss cannot always be regarded as a type of suffering incurred by a personal injury. Further to this, there may be cases where notwithstanding the breach is negligence that caused a personal injury, the claimant may still suffer a positive loss. It follows, that the measure of the non-pecuniary loss is not purely based on the measure of the losses incurred by the personal injury but also the measure of the lost benefit.

This line between the overlap of consequential and positive non-pecuniary losses is slightly more difficult to distinguish. Take for example the case of *Insight Vacations*, it has been outlined that the basis of Ms Young's claim was in fact on the consequential suffering that flowed from the personal injury caused by negligence. The claim for damages then falls within the scope of the *CLA*. However, if it were

³⁴⁵ See *Hobbs v London & South Western Railway Co* (1875) LR 10 QB 111; *Watts v Morrow* [1991] 1 WLR 1421, 1445.

the case that because of the injury Ms Young was unable to complete the final part of her holiday, notwithstanding the personal injury was caused by negligence, in addition to the negligent breach, the travel company would have also been in breach of their contractual obligation to provide a 20-day tour. The claim for damages for disappointment and distress would then be for the non-performance of the full 20-day tour, combined with the disappointed expectation of not receiving the benefit. This is analogous to the award of damages in *Baltic Shipping*. The courts would always be considerate of avoiding double compensation, which appears to be a decisive factor in *Insight Vacations*. Ms Young completed the 20-day tour, she simply didn't enjoy it because of the residual suffering caused by the personal injury. Depending on the facts of each case, a consequential non-pecuniary loss might also include a positive loss. If damages are assessed on the value of a positive loss combined with a consequential loss, then the *CLA* ought not apply to limit an award of damages.

2 Conclusion

In many cases there may be a fine line in determining the exact type of non-pecuniary loss suffered by the plaintiff. Particularly when it comes to distinguishing types of consequential non-pecuniary losses incurred on a breach. Nevertheless, when the contract promised performance of a non-pecuniary benefit, and the defendant failed in their contractual obligation, the plaintiff ought to be awarded damages for the loss of the value of the expected benefit. The measure of damages in *Flight Centre v Louw*³⁴⁶ should have been the assessment of the value of the expectation that the defendants promised to the claimants on entering the contract,

³⁴⁶ (2011) 78 NSWLR 656.

however, failed to perform. Assessing the Louws' loss as a personal injury and applying the *CLA* to limit the award of damages, as argued, is not correct.

On breach of contract, resulting in a spoiled holiday, an award of damages for disappointment and distress has generally been regarded as an award of damages for non-pecuniary loss. However, when the breach causes the plaintiff to lose a positive benefit, the value of the lost benefit might be considered a pecuniary loss. In a recent judgment by the English Court of Appeal, Ward LJ outlined the kinds of losses that might be claimed for a spoiled holiday and the correct measure and assessment of those damages.³⁴⁷

B *Part 2: Awards of Damages in Holiday Cases*

Prior to the decision handed down by the English Court of Appeal, the lower courts in England and Wales 'were struggling to assess damages in holiday claims in a way which was consistent and proportionate.'³⁴⁸ The judgment by Lord Justice Ward in *Milner v Carnival*³⁴⁹ provides authoritative guidance on the English position of the correct measure and assessment of damages for ruined holiday cases.

³⁴⁷ The United Kingdom has enacted legislation governing negligence claims and awards of damages for personal injury: see *Civil Liability (Amendment) Act 1964* (UK); *Compensation Act 2006* (UK) which do not impact on the contractual head of damages for disappointment and distress. Although this legislation is not as expansive as the *CLA*, the analysis of *Milner v Carnival* highlights how an award of damages unique to holiday cases is not determined purely on the extent of suffering as an award of damages for a personal injury. See also *Package Travel, Package Holidays and Package Tours Regulations 1992* (UK) governing package holiday contracts.

³⁴⁸ Prager, above n 296, 16.

³⁴⁹ *Milner v Carnival Plc* [2010] 3 All ER 701 (Ward LJ, Richards & Goldring LJJ) ('*Milner v Carnival*').

1 *Milner v Carnival – The English Position*

The Milners booked a 106-day world cruise on the Queen Victoria 18 months prior to passage with Carnival PLC, trading as Cunard. The passage cost £59,052.20. The Milners were promised and expected ‘star treatment’.³⁵⁰ The description in the brochure gave the expectation the claimants were in for the experience of a life-time. In reality, their expectations fell far short and they did not receive what they bargained for.³⁵¹ For a breach of contract, at the first instance the County Court awarded the claimants: £2,500 each for the diminution in the value of the luxury cruise and £7,500 each for the distress and disappointment when the cruise did not match their expectations. Mrs Milner was also awarded £2,000 for her wasted expenditure on formal dining gowns.³⁵² The Court of Appeal reduced the total award of damages from £22,000 to £12,000 and took the opportunity to provide guidance on ‘the appropriate measure of damages in a “holiday” case.’³⁵³

(a) *The Facts*

The Milner’s experience consisted of sleepless nights due to constant noise and vibration in the cabin.³⁵⁴ In turn, this affected Mrs Milner’s chest problems and asthma. During the cruise, Mr Milner suffered from ulcers. Upon seeing the cruise doctor he was told the ulcers were stress related. The disturbance in their cabin was so bad they were offered an alternative cabin. However, they were only able to stay in the alternative room for a few nights before they were returned to their original

³⁵⁰ Ibid 717 [48] (Ward LJ).

³⁵¹ Ibid 720 [52].

³⁵² Ibid 704 [2].

³⁵³ Ibid 702 (*per curiam*).

³⁵⁴ Facts set out in detail in; ibid 704- 708 [3]-[23] and detail from Mr Milner’s diaries at 717-720 [48]-[51].

suite with the unbearable noise. The uncertainty of the ongoing situation caused additional stress, particularly to Mrs Milner, who became more distressed by the day and would often wake in the middle of the night in tears. The claimants were offered an alternative suite, however, it was not to the standard that they had requested or in the correct area of the ship. This was of such importance to them, that they had booked 18 months in advance to secure their preference. In addition, Mrs Milner had wasted expenditure on 21 formal gowns purchased specifically for the cruise, which were a necessity for the regular formal occasions. Twenty-eight days into the cruise the Milners disembarked the Queen Victoria missing 78 days of the holiday. At the point of disembarkation the Milners claimed that they were exhausted, suffering from sleep deprivation and were both unwell. They spent six weeks at their port of disembarkation at their own expense before joining a different Cunard ship for the return journey to Southampton. Cunard offered, and the Milners accepted a refund of £48,270. However, their claim in addition to the refund was damages for diminution in value, distress and disappointment and wasted expenditure on the dresses.³⁵⁵

(b) The Measure of Damages

Ward LJ, somewhat refining the traditional measure of damages for breach of contract and highlighting the expectation deficit principle, stated:

It is trite law that the measure of damages is such compensation as will place the claimants, so far as money can do so, in the same position as they would have been in had the contract been properly performed. The task is to compare and contrast what was promised and what was received, acknowledging that money cannot truly compensate for this deficit.³⁵⁶

³⁵⁵ Ibid 708 [23].

³⁵⁶ Ibid 710-11 [27]; further quoting Lord Morris of Borth-y-Gest in *Parry v Cleaver* [1970] AC 1: 'But a money award is all that is possible. It is the best that can be done;' at 22.

Ward LJ drew attention to Lord Hoffman's observation in *Banque Bruxelles Lambert v Eagle Star Insurance Co*: 'Before one can consider the principle on which one should calculate damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation.'³⁵⁷ Ward LJ determined that the four kinds of losses the Milners might be compensated for were:

1. pecuniary losses, for the diminution of value where the loss is the monetary difference between what was bought and supplied;³⁵⁸ and
2. consequential pecuniary loss, for out of pocket expenses;³⁵⁹ and
3. non-pecuniary losses under physical inconvenience and discomfort, as long as the personal inconveniences are 'sufficiently serious';³⁶⁰ and
4. mental distress.³⁶¹

(c) *The Assessment of Damages*

Ward LJ acknowledged the difficulties in assessing a precise sum of damages for non-pecuniary loss.³⁶² Further, noting that tracing the awards in previous holiday cases 'is not a particularly fruitful exercise because the facts of one case will be

³⁵⁷ [1997] AC 191, 211A (Lord Hoffmann) (commonly referred to as *SAAMCO*) quoted in *Milner v Carnival* [2010] 3 All ER 701 at 711 [28].

³⁵⁸ *Milner v Carnival* [2010] 3 All ER 701, 711 [29].

³⁵⁹ *Ibid* [30].

³⁶⁰ *Ibid* 711 [31]: quoting *Hobbs v London & South Western Railway Co* (1875) LR 10 QB 111 at 117 (Sir Alexander Cockburn CJ). Ward LJ further referred at [31] to cases where damages were recovered for 'appreciable inconvenience and discomfort caused by a breach of contract' where the whole holiday had been spoiled: *Stedman v Swan's Tours Ltd* (1951) 95 Sol Jo 727 (Singleton LJ); see also 'significant interference with the enjoyment of property caused by noise:' *Farley v Skinner* [2002] 2 AC 732.

³⁶¹ *Milner v Carnival* [2010] 3 All ER 701, 712 [32].

³⁶² *Ibid* 714 [36] quoting Lord Diplock in *Wright v British Railways Board* [1983] 2 AC 773 at 777: non-economic loss ... is not susceptible of *measurement* in money. Any figure at which the assessor of damages arrives at cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even-handed instead of depending on idiosyncrasies of the assessor, whether judge or jury, the figures must be 'basically a conventional figure derived from experience and from awards in comparable cases'.

infinitely different from the facts of the next.³⁶³ Ward LJ then highlighted the factors that ought to have a bearing on the amount of damages awarded unique to claims in holiday cases. Those factors include: the type of holiday that the party had bargained for; such as a special occasion like a honeymoon, or if simply an ordinary package holiday;³⁶⁴ and the nature of the breach, that is the features of the holiday that were not performed that were regarded as the primary features.³⁶⁵ Further, Ward LJ stressed there ought to be comparability and ‘some consistency’ with the awards of general damages in personal injury cases where psychiatric injury has been suffered.³⁶⁶

Notwithstanding consideration is given to the quantum of damages awarded in personal injury cases, the essential point is that any scale used to assess personal injury damages is it is not the primary consideration, or in fact the only consideration given to the assessment of damages for distress and disappointment. Ward LJ quoted Lord Denning in *Jackson v Horizon Holidays Ltd*:

In *Jarvis* ... it was held by this Court that damages for loss of a holiday may include not only the difference in value between what was promised and what was obtained but also damages for mental distress, inconvenience, upset, disappointment and frustration caused by the loss of the holiday...

³⁶³ *Milner v Carnival* [2010] 3 All ER 701, 714 [37]; However, Ward LJ still noted the quantum of damages awarded in other holiday cases: *Jarvis v Swans Tours Ltd* [1973] QB 233; *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468; *Kepple-Palmer v Exus Travel* [2003] EWHC 3529.

³⁶⁴ *Milner v Carnival* [2010] 3 All ER 701, 714 [37].

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid* 715-5 [38]-[39]. Ward LJ noted the factors to be taken to account when valuing claims for personal injury. Noting the guidance given by the Judicial Studies Board: ‘Awards are divided into cases where the problems associated with those factors are severe, moderately severe, moderate and minor;’ at [38] and other fields where damages are awarded for the affront to feelings such in sexual and racial discrimination cases: at [39]; See Judicial Studies Board, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (Oxford University Press, 9th ed, 2008).

People look forward to a holiday. They expect the promises to be fulfilled. When it fails, they are greatly disappointed and upset. It is difficult to assess in terms of money; but it is the task of the judges to do the best they can.³⁶⁷

Ward LJ further acknowledged that damages for disappointment and distress should be governed by policy considerations in that ‘awards in this area should be restrained and modest.’³⁶⁸

From the four kinds of loss that the Milners might receive compensation, Ward LJ narrowed the Milner’s loss to be assessed under two heads of damages: the diminution in value, and distress and disappointment.³⁶⁹ Stressing, that there should be ‘no duplication of damages and so it is always salutary to stand back and look at the sum of the two elements in the round before arriving at the figure to award.’³⁷⁰

For the diminution of value, the task was to:

assess the difference between what the supplier contracted to provide and what was actually provided. It is essentially an assessment of a pecuniary loss. It is essential to exclude from this consideration how the client felt about the diminution in the service supplied, for therein lies the risk of duplication of damages.³⁷¹

Ward LJ determined that ‘the value of the cruise was diminished by one-third when regard [was] had overall to that which was not provided balanced against that which was enjoyed.’³⁷² In consideration of what the Milners actually paid (taking into

³⁶⁷ [1975] 1 WLR 1468, 1472 quoted in *Milner v Carnival* [2010] 3 All ER 701, 712-3 at [33].

³⁶⁸ *Milner v Carnival* [2010] 3 All ER 701, 715-6 [41] quoting Lord Steyne in *Farley v Skinner* [2002] 2 AC 732 at [28], whom further cited Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421, 1445H.

³⁶⁹ The wasted expenditure on the formal gowns in this instance was held not to be a recoverable loss as the Milners voluntarily chose to depart the remainder of the cruise: ‘The defendant’s breach did not cause the loss.’ *Milner v Carnival Plc* [2010] 3 All ER 701, 721 [56]. Furthermore, as the remainder of the cruise was not cancelled by agreement, the Milners were not ‘entitled to damages for the loss of the pleasure of the rest of the cruise ... Their disappointment must be measured against the month they were on board’: at 720 [52].

³⁷⁰ *Ibid* 716 [42].

³⁷¹ *Ibid* [43].

³⁷² *Ibid* 716-7 [46].

account the refund they received) a total of £3,500 was awarded for the diminution in value.³⁷³

‘As for damages for physical inconvenience, discomfort and mental distress, part of the task was to compare the expectations against the reality.’³⁷⁴ Ward LJ took into account the circumstances and ordeals that the Milners suffered. His Lordship concluded that ‘the indisputable fact is that the holiday of a lifetime was ruined for them’.³⁷⁵ In assessing the quantum of damages for disappointment, distress and physical inconvenience, Ward LJ compared the judge’s initial award of damages to the awards for psychiatric damage in personal injury cases, for injury to feelings and bereavement cases.³⁷⁶ However, Ward LJ asserted:

Damages under these heads are of course not entirely comparable with damages in holiday cases ... one is not disabled, the psyche is not injured and one gets on with life. Every time one thinks back, one relieves the horror but the reliving is transitory ... distress falls into a different and less serious category.³⁷⁷

While the quantum of damages for disappointment and distress should be consistent with the level of damages awarded in personal injury cases, it is not the sole consideration. Compensation for disappointment and distress is awarded on the basis of a party’s lost expectation that was bargained for in the contract. Ward LJ concluded that ‘the right sums to award for inconvenience and distress were £4,000 for Mr Milner and £4,500 for Mrs Milner.’³⁷⁸ Combined with the pecuniary damages awarded for the loss in diminution in the value of the holiday, the Milners were

³⁷³ Ibid.

³⁷⁴ Ibid 717 [47].

³⁷⁵ Ibid 720 [52].

³⁷⁶ Ibid 721 [57].

³⁷⁷ Ibid [58].

³⁷⁸ Ibid 721-2 [60].

awarded a total of £12,000 for the failure of Cunard to meet the Milners' legitimate expectations.³⁷⁹

(d) Conclusion

In *Milner v Carnival* the English Court of Appeal outlined the basis on which damages are awarded for a breach of contract that fails to meet the claimant's expectations. Damages are awarded for: the diminution in the value of the expected benefit; that is the pecuniary loss of what was bought and supplied, combined with a sum awarded for disappointment and distress. To avoid the constraints of the *CLA* a plaintiff claiming damages for breach of a failed expectation might be wise to claim their loss as a pecuniary loss. This does not appear to be limited by the *CLA*, which refers to types of pecuniary losses as: loss of earnings,³⁸⁰ a claimant's prospects,³⁸¹ gratuitous attendant care services,³⁸² capacity to provide domestic services³⁸³ and loss of superannuation entitlements.³⁸⁴ Clearly, none of these relate to a claim for a loss of value of a contractual benefit. Further, when assessing an award of non-pecuniary damages the 'task was to compare the expectations against the reality'.³⁸⁵ A measure of expectation against reality is not analogous to the measure of suffering caused by a personal injury, which measures the extent of suffering only. These factors distinguish an award of damages for a contractual claim for damages for disappointment and distress, and a claim for damages for suffering caused by personal injury. The *CLA* should not apply to the former, only the latter.

³⁷⁹ *Ibid.*

³⁸⁰ *CLA* ss 12, 14.

³⁸¹ *CLA* s 13.

³⁸² *CLA* ss 15, 15A.

³⁸³ *CLA* s 15B.

³⁸⁴ *CLA* s 15C.

³⁸⁵ *Milner v Carnival* [2010] 3 All ER 701, 717 [47].

The guidelines put forth in *Milner v Carnival* to the correct assessment of damages for a spoiled holiday suggest one means of ensuring the *CLA* does not limit a contractual claim for damages for disappointment and distress. In addition, a claimant might consider alternative actions brought under the *Australian Consumer Law*.³⁸⁶

2 *Australian Consumer Law*

A party may have alternative actions and right to a remedy for breach of a contractual expectation for a spoiled holiday under the *Australian Consumer Law* ('*ACL*').³⁸⁷ The *ACL* protects certain consumer guarantees and implies minimum standards and obligations that apply to contracts for the supply of goods and services.³⁸⁸ The Australian Commonwealth has published a guide by the Australian Competition and Consumer Commission, specifically dealing with breaches of contractual obligations for travel and accommodation.³⁸⁹ A breach of consumer

³⁸⁶ *Competition and Consumer Act 2010* (Cth); *Vol 3 Sch 2: Australian Consumer Law* ('*ACL*'). Although a detailed discussion is beyond the scope of this thesis, the alternative actions to recover damages are worthy of mention. Addition, in *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149 the High Court considered the issue of s 5n of the *CLA*: (a term of a contract may waiver a contractual duty of care for recreational activities) being picked up as a surrogate federal law under s 74(2A) of the *Trade Practices Act 1974* (Cth) ('*TPA*') now operating as the Consumer Protection Provisions under the *ACL*. The Court determined s 5n was not the kind of law picked up by the *TPA*. On a true construction of the exemption clause in the Insight contract, it did not extend to the circumstances of the injury suffered by Ms Young. Furthermore, the Court highlighted that the class of contracts that might allow the terms of an exception clause for recreational activities only apply to the service of activities within NSW at 162 [36].

³⁸⁷ To have standing to bring an action under the *ACL* the plaintiff must fall within definitions: ch I s 2 Definitions: '*services*' includes: (ii) a contract for or in relation to the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; s 3(3)(a)(b) defined as '*consumer*', if amount paid for service did not exceed \$40,000; and are normally acquired for personal, domestic or household purposes. For example, an action against travel agent services for a luxury cruise: Australian Competition & Consumer Commission, *Travel and Accommodation: An industry guide to the Australian Consumer Law* (2013) Australian Consumer Law <http://www.accc.gov.au/system/files/Travel%20%26%20accommodation%20-%20an%20industry%20guide%20to%20the%20Australian%20Consumer%20Law_0.pdf>; ('*Travel and Accommodation: An Industry Guide to the ACL*').

³⁸⁸ Consumer Guarantees under pt 3-2 div 1 of the *ACL*.

³⁸⁹ *Travel and Accommodation: An Industry Guide to the ACL*, above n 387.

guarantees may be; a failure to provide services with due care and skill;³⁹⁰ or a failure to provide a service fit for purpose, depending on the representations expressly or impliedly made to the consumer.³⁹¹ The Guide does not deal with the breach of guarantees as a personal injury. The breach of the defendant is a failure to provide the guarantees promised in the contract.³⁹² In addition, under the *ACL*, a party can also bring actions for: misleading or deceptive conduct,³⁹³ or for false or misleading representations about services.³⁹⁴ A plaintiff successfully bringing a claim under these actions can seek monetary damages.³⁹⁵ It therefore seems curious when parliament clearly aims to protect such consumer rights, that the NSW judiciary will impede them by applying the *CLA* to limit an award of damages.

V CONCLUSION

The principles of compensatory damages for a breach of contract were outlined in Chapter 1. Where a party sustains a loss ‘he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.’³⁹⁶ Where the object of the contract is to provide pleasure, enjoyment or relaxation, the plaintiff is awarded damages to compensate the loss of the legitimate expectation. Until recently, the common law head of damages for disappointment and distress governed this area of law. However, the introduction of the *CLA* has

³⁹⁰ *ACL* s 60.

³⁹¹ *Ibid* s 61.

³⁹² See *Travel and Accommodation: An Industry Guide to the ACL*, above n 387.

³⁹³ *ACL* General Protections: pt 2-1; s 18; A person must not in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

³⁹⁴ *Ibid* Specific Protections; pt 3-1; Unfair Practices; s 29(1)(b) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, make a false or misleading representation that services are of a particular standard, quality, value or grade.

³⁹⁵ *ACL* pt 5-2 div 3 s 236.

³⁹⁶ *Robinson v Harman* (1848) 1 Exch 850, 855 (Parke B), confirmed by the High Court in; *Commonwealth v Amann Aviation* (1991) 174 CLR 64 at 80.

resulted in a contractual claim for ‘non-pecuniary’ damages for disappointment and distress to incur the limitations and restrictions imposed by the *CLA*.

Chapter 2 considered the policy behind the implementation of the *CLA*. It was highlighted that the introduction of the Act was based upon a perceived crisis in the insurance industry. The chapter argued that the essential elements invoking the application of the *CLA* were that, the party suffered a personal injury, caused by the failure to act with reasonable care and skill. The impact that the *CLA* had on a contractual claim for damages for disappointment and distress was then considered by the critical analysis of two cases, *Insight Vacations v Young*³⁹⁷ and *Flight Centre v Louw*.³⁹⁸ In both cases, the NSW court determined that the *CLA* applied to limit the award of such damages. However, the distinctive fact in *Insight Vacations* was that the claimant suffered a personal injury that was caused by negligence, or a failure to exercise reasonable care and skill. Therefore, the claim for damages was in fact based on the suffering that was a residual consequence of the personal injury. This suffering, or disappointment, meant the claimant was unable to enjoy the remainder of the holiday. For this kind of situation, where the claim is based on the consequential disappointment or distress caused by a personal injury, the *CLA* ought to apply to determine damages. The case of *Louw* is distinguished as the party’s claim was without a personal injury, but for the breach of a promised contractual expectation. Contractual expectations are determined by the express or implied terms of the contract. When a party enters a binding contract for a holiday, if the promises that create the expectation are not fulfilled, the travel company is in breach of contract. Contractual obligations or ‘duties’ do not depend on a set of ‘foreseeable’ consequences. The claim is not based on a failure to exercise reasonable care and

³⁹⁷ (2010) 78 NSWLR 641.

³⁹⁸ (2011) 78 NSWLR 656.

skill, but a breach of the terms on the contract. Therefore, the wronged party ought to receive damages for the loss of the value of the expectation. *Louw* was not a claim for personal injury damages. Although the NSWCA in *Insight Vacations* failed to distinguish this type of loss, the Court did not need to. The loss suffered in *Insight Vacations* was not due to the failure to provide an agreed obligation: the defendants breached their duty of care. There is a distinct difference in how the loss occurred, the type of damages that were sought and a distinct difference in how damages to compensate the loss ought to be assessed.

Finally, in Chapter 3, the different types of contractual non-pecuniary losses were further explored through a theoretical analysis. When the claimant suffers a positive non-pecuniary loss, they ought to receive damages for the loss of the value of the expected benefit. Damages are assessed on the objective, or subjective value of the promise. It has been argued that this cannot be regarded as a claim for personal injury damages. If the claimant suffers a consequential non-pecuniary loss it is only when the wrong, being a failure to exercise reasonable care and skill, causes a personal injury that the consequential non-pecuniary losses are the type of losses that ought to incur the limitations of the *CLA*: this was the case of *Insight Vacations*. However, if a plaintiff suffers a consequential non-pecuniary loss, such as a personal injury, and the defendant was also in breach of a contractual expectation, the measure of the suffering is not merely on the extent of the suffering caused by the personal injury, but also on the value of the benefit not obtained. In assessing damages, as outlined in *Milner v Carnival*, the courts must consider the value of the lost expected benefit, a pecuniary loss, combined with the extent of any consequential non-pecuniary suffering incurred by the plaintiff. Any statutory scale used for the assessment of personal injury damages may provide guidance to a sum

of damages for disappointment and distress however such comparison ought not to be the sole consideration.

In assessing a claim for damages for disappointment and distress the courts ought to be mindful of the actual ‘wrong’ that caused the loss and the kind of loss that the claimant seeks compensation, to then determine the correct measure and assessment of damages. Additionally, plaintiffs must ensure they plead their case on the breach of the contractual expectation, rather than a breach of a duty of care. Plaintiffs should also be aware that on a breach of contract they might also have a right to a remedy under the *Australian Consumer Law*. The *CLA* limits awards of damages for personal injuries. The Act should not apply to limit damages for a breach of contract, unless the plaintiff suffers an actual personal injury and the claim for damages is for the pain and suffering incurred due to that injury only. This thesis concludes that *Insight Vacations* is not an authoritative case on the application of the *CLA* to limit an award of contractual damages for disappointment and distress and should not have been applied in *Louw*. To apply legislation that impedes on a contractual entitlement to a head of damages goes against the doctrinal principles of compensatory damages in contract law.

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