

CONTRACTUAL DAMAGES FOR INTANGIBLE LOSS: A COMPARATIVE ANALYSIS

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In this article, the author attempts to chart the progress of claims for intangible (or non-pecuniary) loss in the event of a breach of contract. French and Quebec civil law, and the common law of England and the Canadian provinces other than Quebec are examined with a view to discovering how and to what extent such claims are accommodated in the range of interests protected by contract law. An inquiry is made into the reasons underlying the increasing incidence of such awards and an effort is made to explore the justifications for them, as well as the principles to be considered when damages are quantified. In the process, the observations are made that the common law of contract has no ready doctrinal basis to explain intangible loss awards but that the civil law has long accepted them within the framework of a unified law of obligations.

L'auteur de cet article cherche à définir les progrès faits, en cas de rupture de contrat, dans le domaine des revendications pour pertes incorporelles (ou autres que pécuniaires). Il s'agit de découvrir, dans le droit français et dans le droit civil du Québec ainsi que dans le droit anglais et dans la common law des provinces canadiennes autres que le Québec, comment et dans quelle mesure ces revendications se sont fait une place parmi les droits que garantit le droit des contrats. On s'attache particulièrement à analyser les raisons pour lesquelles les compensations sont, dans ces cas-là, de plus en plus fréquentes et à décider si celles-ci se justifient. On y étudie aussi les principes à considérer quand il est question du montant des dommages. On en vient à conclure que, dans le domaine des contrats de la common law, il n'existe pour l'instant aucune base doctrinale qui explique l'adjudication de compensation en cas de perte incorporelle alors que le droit civil, dans le cadre de son droit unifié des obligations, accepte cette compensation depuis longtemps.

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Introduction

An interesting point emerging from the recent SSHRC Report on Research and Education in Law,¹ popularly known as the Arthurs Report, is the revelation that there exists a surprising dearth of academic writing in Canada comparing the country's common law and civil law traditions.² The Report is quite blunt, especially as far as Canadian common lawyers are concerned, in drawing attention to the shortfall between the aspirations and the achievements of individual academics in matters pertaining to this country's other legal tradition.³ Given the political, linguistic and cultural developments of the last twenty-five years, this is a state of affairs that obviously cannot continue. In a country like Canada, with two distinct legal systems derived from the English common law⁴ and French civil law,⁵ the advantages of the comparative legal method in promoting mutual tolerance, understanding and respect between these two legal cultures can fairly be described as so obvious that they do not need to be stated. Whatever conflicting opinions there may be about the premises, methodology and conclusions of the Arthurs Report, its recommendation concerning exchanges between the two Canadian legal systems⁶ must command close

¹ Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law (1983).

² *Ibid.*, p. 79, Tables 4-5 at p. 81.

³ "Civil law professors . . . are far more involved in research and teaching across the two legal systems than the common law professor. Common law professors aspire to greater contact with the other legal system, but remarkably few pursue it in research or otherwise": *ibid.*, p. 89.

The Report also strongly emphasized the need for greater comparative legal research: "There can be no doubt about the need for more comparative legal research. This lacuna is especially evident in Canada where, although the common and civil legal systems exist side by side, there is remarkably little analysis of the differences and similarities of the two systems . . . Canada provides a perfect laboratory for work in this field": *ibid.*, p. 127.

⁴ A useful guide to the introduction of English common law at the formal level is J.E. Coté, *The Reception of English Law in Common Law Jurisdictions* (1977), 15 *Alta. L. Rev.* 29.

⁵ Though in many respects similar to the French Code Civil of 1804, the Civil Code of Lower Canada (hereinafter, the Quebec Civil Code) of 1866 is not directly drawn from it. The commissioners charged with codifying the law of Lower Canada were enjoined to incorporate only the law at that time in force in the province, though they were permitted to make suggestions for legislative amendments: *Loi de codification*, S.C. 1857, c. 43, s. 6. At that time, Quebec civil law was based on the *Coutume de Paris*, compiled in 1510 and modified in 1580, as supplemented by local statute and local customary law: *ibid.*, preamble. See F. Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* (republished 1980 with an introduction by M. Tancelin) and J. Brierley, *Quebec's Civil Law Codification Viewed and Reviewed* (1968), 14 *McGill L.J.* 521.

⁶ "Formal and informal networks of scholars should be encouraged . . . For example, support is needed for . . . scholarly exchanges involving representatives of the two Canadian legal systems": *op. cit.*, footnote 1, p. 158.

to universal acceptance. The aim of this article is to go some way towards bridging the cultural gap between the common law and the civil law.

This article is not, however, confined to the two Canadian legal traditions but extends to the systems from which they were drawn, namely English common law and French civil law. The former cannot be ignored in view of the ready currency possessed by English decisions in Canadian common law courts, especially when the initial impetus leading to modern developments in contractual liability for intangible loss came from English case law. Though French decisions are by no means as readily referred to in Quebec courts, French civil law should be examined because it is the foundation of Quebec civil law⁷ and because it possesses a richness of expression and experience denied to a system of law with a relatively small critical mass.

Despite its obvious relevance in Canada, the comparative legal method must be handled with care. It is easy for a common lawyer—and for a civilian too—to select an area of law that in his own legal system is relatively mature and well-ordered and, finding no equivalent in the other legal system, to conclude that that other system is immature or in a state of disarray. A legal system can only be properly understood by means of a penetrating survey conducted from within its own contours. In consequence, it is often fallacious to conduct a narrow comparison of two legal cultures corresponding to the conceptual classifications of only one of them. It would be better to define a problem in practical terms and to be prepared to bend, or even disregard, conceptual divisions in order to arrive at a valid and fruitful comparison.

It therefore follows that the very title of this article should be treated with suspicion as far as it presupposes that the common law and the civil law have an identical characterization of contract and, in particular, an identical location of the line between contract, on the one hand, and tort and delict, on the other. It will become apparent that the civil law of obligations is conceptually unified to such a degree⁸ that delict cannot be ignored when the availability of contractual damages for intangible loss is discussed. To a much greater extent, common law liability in contract for intangible loss stands independently of tort law so that the treatment of intangible loss claims in tort can largely be disregarded.

⁷ *Supra*, footnote 5.

⁸ The integration of contract and delict in standard civil law texts on Obligations, and of contractual and delictual liability in standard texts on civil liability, is one manifestation of this. See also P.-A. Crépeau, *Des régimes contractuel et délictuel de responsabilité civile en droit civil canadien* (1962), 22 R. du B. 501 where the author states at p. 503: "En effet, on admet assez généralement aujourd'hui—et cela depuis la critique de Planiol en la matière—les postulats fondamentaux de l'unité théorique et de la dualité technique de la responsabilité civile".

I. *The Law*

A. *Definitions and Beginnings*

This article deals with the law's attempts to come to terms with the problem of compensation for intangible losses in contract cases. The expression "intangible loss" is used because it best signifies the type of injury under discussion, which has particularly eluded monetary evaluation. In negative terms, "intangible loss" excludes financial loss, property damage and personal injury, all of which are highly visible injuries, though the last of these presents its own problems of monetary evaluation. The difficulty of classifying personal injury suggests that "intangible loss", defined in positive terms, is more accurately descriptive than "non-pecuniary loss" of a range of injuries affecting feelings, emotional stability, self-esteem, psychic well-being and related phenomena. Losses of this kind are clearly caught by the expression "dommage moral" (or "préjudice moral"), a well understood term in the civil law corresponding to "intangible loss", the difficulty in coining which reveals its lack of ready connotation and location in the common law scheme of things. Not surprisingly, therefore, an exploration of the definition and roots of "dommage moral" in the civil law can be conducted in a much more systematic and orderly way than is the case with "intangible loss", its common law counterpart.

In recent years, there has emerged in the common law and Quebec civil law a discernible and accelerating trend towards the award of damages for intangible losses arising from a breach of contract. Unless one takes the uncritical view that this constitutes progress and that progress is "a good thing", or the sentimental-historical view that the possibility of such awards was always present in the common law waiting to be "discovered" by someone with the requisite keenness of legal vision, this process prompts a number of interesting questions. These can be usefully posed if one avoids the optimistic trap of believing a review of just the case law will supply the answers. It might be asked, for example, if the award of damages for intangible losses is a reaction to a deeply-felt need to assert human individuality in an increasingly complex and fragile society of organizations and interrelationships.⁹ Similarly, one could inquire if the emergence of an evident drive to recognize and compensate intangible losses acts as a counterpoint to the tendency for status and hierarchical differentials in our society to be compressed.

If these questions suggest that compensation for intangible loss plays too reactive a role, could this development be seen in more affirmative

⁹ In G. Viney, *Traité de droit civil, les obligations, la responsabilité: conditions* (1982), at §257 the author sets the scene for various legislative interventions in the area of "dommage moral" by referring to "les menaces qui font peser sur la liberté et l'autonomie de la personne humaine certaines formes modernes de diffusion de la parole, de l'écrit et de l'image, et, plus généralement le développement d'une civilisation de masse qui donne de plus en plus le sentiment d'un étouffement de l'individu".

terms as an assertion of the values of an affluent society where more than the bare physical needs of human existence are catered to?¹⁰ If, putting it bluntly, one can affirm that Canadian courts are much more likely than third world courts to award damages in contract for intangible loss, this would tend to suggest that the emergence of such a liability is an aspect of what has been popularly called the consumer revolution: travel agents and house builders, after all, deal in the stuff of human dreams¹¹ and employers provide what for many is the spiritual as well as physical core of their existences. And is this way of looking at things consonant with the supposed shift in mature societies from a production-based to a services economy? Those who see the law as moving inexorably in step with the iron principles of economics may convince themselves that they are witnessing judicial legislation to counter abuses in the market place which give certain inefficient or unscrupulous operators an unfair advantage over their more reputable competitors. Persons of a less earthy disposition may be seeing the exaltation of spiritual over material values, though they may be discomfited by the monetarisation of these values in the form of damages awards. If it turns out to be the case that there is something for everyone in the growing incidence of intangible loss awards, this does not diminish the utility of asking the above questions, though it serves as fair warning that conclusive answers are unlikely to be forthcoming.

Turning first to the common law treatment of intangible loss claims in contract, one is struck by the absence of structure and the conceptual underdevelopment of the subject. In one of the leading common law contract texts, Treitel,¹² there is no reference at all in the relevant section to

¹⁰ In G. Ripert, *La Règle morale dans les obligations civiles* (1949), the author refers at §181 to the "rôle hédonistique" played by "dommages moraux" when awarded to a victim who has suffered an intangible loss. That such an approach might not always have been in tune with the times is apparent from Sir Thomas Browne, *Religio Medici*, Third Part (Christian Morals), Section XXIII, a work written in the seventeenth century: "Live happy in the Elizium of a virtuously composed Mind, and let intellectual Contents exceed the Delights wherein mere Pleasurists place their Paradise. Bear not too slack reins upon Pleasure, nor let complexion or contagion betray thee unto the Exorbitancy of Delight. Make Pleasure thy Recreation or intermissive Relaxation, not thy Diana. Life and Profession. Voluptuousness is as insatiable as Covetousness. Tranquillity is better than Jollity, and to appease pain than to invent pleasure. Our hard entrance into the World, our miserable going out of it, our sicknesses, disturbances and sad Rencounters in it, do clamorously tell us we come not into the World to run a Race of Delight; but to perform the sober Acts and serious purposes of Man; which to omit were folly to miscarry in the advantage of humanity, to play away a uniterable Life, and to have lived in vain".

¹¹ "À notre époque où est proclamé "le droit aux loisirs" et "le droit à la culture", fut-elle organisée, quel est le Français, qui en mal d'exotisme ou d'évasion, que ce soit vers les pyramides d'Égypte ou les lagons de l'Océan Indien, ne sera pas susceptible de s'adresser aux "marchands de rêves" que sont devenues les agences de voyages?": J. Boulanger, *Les Relations juridiques entre les agences de voyages et leur clientèle après l'arrêté du 14 juin 1982*, J.C.P. 1983.1.3117 at §1.

¹² G. Treitel, *The Law of Contract* (6th ed., 1983).

“intangible loss” or “non-pecuniary loss”. The author deals with a disparate group of cases concerning employment contracts, holiday operators and solicitors under the heading of “Injured Feelings and Reputation”,¹³ which is hardly an accurate summary of the grievances of someone who has experienced a ruined holiday,¹⁴ or someone who has suffered distress and anxiety as a result of her solicitor’s negligent failure to take appropriate legal steps to prevent a former male friend from molesting her.¹⁵ Moreover, a common law contract textbook is not the place to look for what civil lawyers would regard as an important example of “dommage moral”. Pain and suffering awards against contract-breaking carriers and hospitals are conventionally framed in tort rather than in contract, though there is no reason in principle why the claim should not be dressed up in contract if one has been concluded between the parties.¹⁶ The vast majority of damages cases in common law contract are concerned with pecuniary loss claims; consequently, odd cases are bundled together in an unclassified category of sundries.

Tort law cannot be looked to for conceptual assistance, since the absence of structural unity is just as much evident here as in contract law. Furthermore, as befits a legal system where damages were traditionally within the province of a jury, the emphasis in tort law has always been on fault rather than injury.¹⁷ In addition, accustomed as common lawyers are to a law dealing with individual torts, it generally does not occur to them to consider what range of interests is protected by the law of torts¹⁸ and how that law sets about ordering its priorities.¹⁹ Consequently, the question

¹³ *Ibid.*, pp. 742-45.

¹⁴ For example, *Jarvis v. Swans Tours Ltd.*, [1973] Q.B. 233, [1973] 1 All E.R. 71 (C.A.).

¹⁵ *Heywood v. Wellers*, [1976] Q.B. 446, [1976] 1 All E.R. 300 (C.A.).

¹⁶ See M.G. Bridge, *The Overlap of Tort and Contract* (1982), 27 McGill L.J. 872. In the case of carriers, this is explicable by the long-standing practice of suing common carriers on the custom of the realm; tracing the network of contractual relationships in the case of doctor, patient and hospital is difficult, especially in an era of socialized medicine and, anyway, surgeons belonged to one of the common callings who were traditionally sued on the custom of the realm.

¹⁷ “The effort required to coax the English law of torts into the pleasingly neat categories of French law is particularly obvious when the category is “damage.” The concept is absent from the digests and indices, and it has never been a central topic of discussion. The common lawyer would never ask himself the question “What damage is redressible in an action of tort?”—the system concentrates on *injuria*, not *damnum*—so it is not surprising that it is difficult to answer”: P. Catala and J.A. Weir, *Delict and Torts: a Study in Parallel* (1963), 37 Tul. L. Rev. 573, (1964), 38 Tul. L. Rev. 221, 663, and (1965), 39 Tul. L. Rev. 701, at p. 665, of the third excerpt. The four excerpts were republished together in 1965 as Monograph no. 2 of the Institute of Comparative Law of Tulane University.

¹⁸ One of the few exceptions, and it is no accident that the author is German-trained, is K. Lipstein, *Protected Interests in the Law of Torts*, [1966] Cam. L.J. 85. Another is J.A. Weir, *A Casebook on Tort* (4th ed., 1979).

¹⁹ Weir, *ibid.*, pp. 4-5 and *passim*.

“Does the common law of tort compensate for intangible loss?” evokes no ready response. It all depends on the nature of the individual tort and whether it is based on intention, negligence or strict liability; there is no coherent design. Torts like defamation can readily be seen as protecting intangible interests,²⁰ and there are various instances of liability, falling short of a generalized tort of invasion of privacy,²¹ where intangible interests are vindicated. Recent attempts to create a tort of discrimination²² could, if consolidated, be harnessed to protect the victims of discrimination from distress and humiliation, as well as from loss of economic opportunity. The tort of assault also exists to protect intangible interests, though its possibilities are greatly limited by the requirement that the plaintiff apprehend the immediate infliction of a battery.²³ Even torts traditionally concerned with vindicating property rights can also be applied to compensate for intangible loss. In one case, the tort of nuisance was invoked to protect the plaintiff from unsolicited and harassing telephone calls.²⁴ But it remains difficult to state the general attitude of tort law to intangible loss.

On the whole, there persists in the law of torts a strong current of sentiment that emotional bruises are an inevitable consequence of human existence and that a certain degree of personal robustness should be cultivated. In the most important of the torts, negligence, one sees a general

²⁰ See the standard texts on Torts for a discussion of the tort of defamation. This tort is concerned with the protection of a person's reputation and damages are normally at large. Defamation is by no means confined to the award of damages for financial loss consequent upon damage to reputation, though it is to be noted that in one of its two forms, slander, which is concerned with defamatory utterances conveyed in a non-permanent, usually oral, form, there are special rules concerning the pursuit of an action. Slander is not normally actionable *per se* but there are statutory exceptions, including words “calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him”, where a plaintiff can sue without having to show special damage: Libel and Slander Act, R.S.O. 1980, c. 237, s. 18. This means that, for example, a trading plaintiff would not have to quantify his loss precisely. This exceptional rule for slander is the same as the universal rule for libel, which is defamation in a permanent, usually written, form.

²¹ The non-American common law position is summarized in J. Fleming, *The Law of Torts* (6th ed., 1983), chap. 25.

²² The most prominent example was the decision of the Ontario Court of Appeal in *Bhadauria v. Board of Governors of Seneca College of Applied Arts and Technology* (1979), 105 D.L.R. (3d) 707, reversed [1981] 2 S.C.R. 181, (1981), 124 D.L.R. (3d) 193, on the ground that the Ontario Human Rights Code, R.S.O. 1980, c. 318, had exhaustively defined the rights of discrimination claimants so as to obviate any recourse to a private law remedy. The decision of the Ontario Court of Appeal is certainly open to criticism for its methodology, notably its pigeon-hole approach to tort liability and its failure to come to terms with landmark authority. See M.G. Bridge, *The Nascent Tort of Discrimination* (copies on file with the author), a presentation to the Torts section of the Canadian Association of Law Teachers at its 1980 meeting held in Montreal.

²³ See *Turberville v. Savage* (1669), 1 Mod. 3, 86 E.R. 684 (K.B.) and the standard torts texts.

²⁴ *Motherwell v. Motherwell* (1976), 73 D.L.R. (3d) 62, [1976] 6 W.W.R. 550 (Alta. App. Div.).

resistance to liability for grief and emotional distress falling short of nervous shock. Even the victims of nervous shock find, once they have penetrated the circle of reasonable foreseeability, that they can recover damages only if the shock engendered tangible physical consequences.²⁵ Yet it should not be forgotten that the common law, even when not prepared to concede liability independently for certain kinds of loss, will commonly grant compensation when this loss can be tacked parasitically on to a recognized head of loss. Thus, the road accident victim of someone else's negligence will experience no difficulty in recovering for mental suffering in the shape of a pain and suffering award. Another example of the common law's tendency to move covertly is the recently repealed English statutory provision which, by allowing the estate of a deceased person to bring actions vested in him at the time of his death, ultimately conferred on the parents of a deceased child a bereavement award in the shape of the moderate, conventional figure awarded for the objective loss of the child's expectation of life.²⁶ Moreover, odd pockets of common law liability should not be overlooked. In assessing the common law position on intangible loss in negligence cases, the old *actio per quod consortium amisit*, by which the husband of an injured wife is permitted in some cases to lay claim for loss of her company, should be taken into account.²⁷

An examination of the civil law reveals that delict²⁸ is both the intellectual and the practical starting-point of a "dommage moral" inquiry. Much of the debate taken as read in contract is located in the law of delict. Analysis of delict yields a more structured response than that produced by the common law inquiry into tort law. In view of the simplicity and generality of the fault provisions in the French and Quebec codes, a general inquiry is encouraged into "dommage moral", an expression long and firmly established in the lexicon of civil lawyers. Consequently, it is necessary to review at some length the position in delict since compensation for "dommage moral" in contract cases stands in a derivative rela-

²⁵ See *McLoughlin v. O'Brian*, [1983] A.C. 410, [1982] 2 All E.R. 298, (H.L.) and the authorities therein reviewed. *Shelley v. Paddock*, [1979] Q.B. 120 (C.A.) is authority for the view that, in cases of intentional torts (in this case fraud), a party may recover damages for emotional distress falling short of physical illness.

²⁶ Law Reform (Miscellaneous Provisions) Act 1934, 24 and 25 Geo. 5, c. 41, s. 1; this has now been superseded as a result of the Administration of Justice Act 1982, 1982, c. 53, ss. 3-4, which amended fatal accidents legislation so as to confer directly upon the parents of a deceased unmarried minor, or upon his spouse where he is married, an entitlement to a "bereavement" award fixed at £3,500 but subject to change by statutory instrument.

²⁷ See *Best v. Samuel Fox & Co. Ltd.*, [1952] A.C. 716, [1952] 2 All E.R. 394 (H.L.) and the discussion in Fleming, *op. cit.*, footnote 21, pp. 618-21. The entitlement has recently been repealed by statute in England: the Administration of Justice Act 1982, *supra*, footnote 26, s. 2(a). For statutory abolitions and modifications in Canadian common law provinces, see S. Waddams, *The Law of Damages* (1983), at §303-06.

²⁸ Throughout this article, "delict" will be used to signify both intentional wrongs (delict in the strict sense) and non-intentional wrongs (quasi-delict).

tionship to compensation in delict. Given the greater development of the subject in French law than in the law of Quebec, and the tendency for the latter law to pursue a somewhat independent line in jurisprudential and doctrinal development, the question of recovery for "dommage moral" in delict will be considered separately, first in French law and then under the law of Quebec.

B. *The French Law of Delict*

Marty et Raynaud, in one of the classic French civil law texts,²⁹ present a binary distinction between "dommage matériel" and "dommage moral": the former is described as an injury to an interest which is economic and patrimonial in character; the latter, on the other hand, is concerned with non-economic and extra-patrimonial interests. Patrimony³⁰ is best understood as attaching to legal personality and as encompassing in a universal sense all the present and future assets and liabilities of the person that can be valued in monetary terms. It is not unlike a running balance sheet, interrupted by death and bankruptcy, in which the assets are set out on one side and the liabilities on the other and it provides a conceptual base for the various rules of the civil law in the areas of persons, property, successions and obligations. The introduction of this proprietary concept of patrimony at once suggests the difficulty of setting a figure on extra-patrimonial damage and raises four square the problem of drawing the line between compensating for such a loss and punishing the defendant for his misbehaviour.

French law and Quebec law both formulate a general principle of fault in their respective civil codes. According to Article 1382 of the French code: "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer."³¹ This provision, on its face, draws no distinctions among the various heads of loss and says

²⁹ G. Marty et P. Raynaud, *Droit civil*, Tome II, Vol. 1, *Les Obligations* (1962), at §381.

³⁰ There is a good discussion in J. Ghestin et G. Goubeaux, *Traité de droit civil*, *Introduction générale* (1977) at §194-208.

³¹ Reference should also be made to Articles 1146-53 of the Code which deal with a defendant's liability to pay "dommages-intérêts" in contract cases. There is no delictual provision on damages but the plaintiff's injury has to be both "direct" and "certain" if he is to recover them. The Code has no provision requiring direct causation in delict cases but the requirement in contract cases set by Article 1151 has been extended by the jurisprudence to delict: see B. Starck, *Droit civil*, *obligations* (1972) at §740. For the plaintiff to recover damages, the judge must also be certain that he would have been in a better position had the act complained of not been committed by the defendant: see H. et L. Mazeaud et A. Tunc, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle* (6th ed., 1965) (hereinafter, *Mazeaud*), volume 1 at §216, where the authors see this requirement as manifesting a general principle governing resort to justice. These requirements having been met, the trial judge has in principle an unfettered power ("pouvoir souverain des juges du fond") in quantifying damages: see Starck, *supra*, at §940 *et seq.*

nothing that might suggest that "dommage moral" is less favourably regarded than "dommage matériel". After some initial uncertainty, the recoverability of "dommages moraux" is now quite clear.³² But since the injury in question is clearly extra-patrimonial, there is an obvious objection to such awards, namely, that they do not indemnify the plaintiff, in the sense of making good his loss.³³ Consequently, there is no logical stopping point from nominal damages onwards in quantifying ("monnayer", "chiffrer") these awards. To this objection, however, the typical response is that "dommage moral" awards can supply a diversion for the injured party by permitting him to purchase pleasures providing a "source de distraction,

³² Ripert, *op. cit.*, *supra*, footnote 10, at §181; Starck, *op. cit.*, *supra*, footnote 31 at §115.

There is a tendency in French law to see explicit references to "dommage moral" in other legislative texts as evidencing an acceptance by the civil law of the legitimacy of awarding "dommages moraux", with the consequence that the unrestricted words of Article 1382 are read in all their generality. Mazeaud, *op. cit.*, *supra*, footnote 31, in what has become the definitive treatise on civil liability, lists the following texts as evidencing the proposition, accepted by French legislation in spirit, that Article 1382 creates a presumption in favour of compensation for "dommage moral": loi du 29 juillet 1881, art. 46 (on the press); loi du 12 juillet 1905, art. 6 (justices of the peace) art. 5 *bis* (damages in defamation actions); loi du 8 juin 1895 (miscarriages of justice); loi du 7 février 1933 (guaranteeing individual freedom); loi du 2 avril 1941 (fault in divorce proceedings), amending Article 302 of the Code Civil; and Article 3 of the Code de procédure pénale (civil liability in criminal proceedings "pour tous chefs de dommages, aussi bien matériels que corporels ou moraux, qui découleront des faits objets de la poursuite"). More recent legislative texts are: loi du 17 juillet 1970 (privacy), creating a new Article 9 of the Code Civil; loi du 3 juillet 1972 (right of reply on television); loi du 6 décembre 1976 (industrial accidents).

Provided they can show their injury is both "direct" and "certain", there should be no difference in principle between "dommage moral" claimants and other claimants under the general delictual liability provision. It was the contention of F.H. Lawson, *Negligence in the Civil Law* (1950), however, that French law had come close to the requirement of something approaching the common law duty of care: *ibid.*, p. 31. Nevertheless, the author conceded: "It is undoubtedly much harder to ascertain the actual limits of liability for negligence in French law, for the vagueness of the term *faute* is matched by the highly empirical and what would seem even to an English lawyer the amorphous character of the law of *responsabilité civile* as disclosed in *doctrine* and *jurisprudence*"; *ibid.* Obviously, flexible notions of fault and causation are capable of detracting in practice from the generality of a provision like Article 1382.

But it is worth noting the apparent change of mind in the revised version of the above text, F.H. Lawson and B.S. Markesinis, *Tortious Liability for Unintentional Harm in the Common Law and the Civil Law* (1982), Vol. 1, pp. 97-98, where the authors observe that the notion of duty appears to be losing ground in French law.

³³ See the discussion of this theme and its refutation in Mazeaud, *op. cit.*, footnote 31, Vol. 2, at §§311-13. One consequence of the extrapatrimonial character of this relief is that an "action oblique" may not be taken under Article 1166 of the Code Civil in the victim's name by his creditors, not even in the event of bankruptcy; R. Savatier, *Théorie des obligations* (3rd ed., 1974), at §288. The "Chambre mixte" of the Cour de Cassation has, nevertheless, held that a personal action for "dommage moral" can be transmitted by a victim to his heirs: Ch. mixte 30 avril 1976, D. 1977, 185. P. Esmein, *La Commercialisation du dommage moral*, D. 1954, chr. 113, sees no reason for drawing any distinction

d'intérêt et d'oubli".³⁴ Besides, if the indemnification principle were pressed in its purest form, it could be used to deny recovery to the owners of unique, and therefore irreplaceable, physical objects lost or damaged as a result of the defendant's fault.³⁵ Perhaps the most intellectually satisfying response to the quantification difficulty was given by the "commissaire de Gouvernement"³⁶ in the *Bondurand* case,³⁷ a decision of the Conseil d'État, when he said that the idea that money cannot quantify or provide compensation for "dommage moral" goes to technique and not to basic principle, the impossibility of rendering perfect justice hardly warranting the total denial of justice.³⁸

between heirs and creditors in this respect. See also the view of Ripert, *op. cit.*, *supra*, footnote 10, at §183.

³⁴ These pleasures would distract his attention, engage his interest and help him to forget. The phrase comes from Starck, *op. cit.*, footnote 31, at §115. This theme is a common one in French doctrine and is a response to those who would argue that liability for "dommage moral" should exist only to the extent that it is compensable "en nature", that is to say, by the performance of a course of action, such as publishing a notice of retraction after a defamation has been uttered, other than the payment of money, which actually expunges the "dommage moral". Similar statements come from G. Ripert et J. Boulanger, *Traité de droit civil (d'après le traité de Planiol)*, vol. II, Obligations (1957), which speaks at §998 of the ability of money to procure a "satisfaction de remplacement", a formula used also by J. Carbonnier, *Droit civil*, Vol. 4, *Les Obligations* (1976), at §89. Mazeaud, *op. cit.*, *supra*, footnote 31, mentions "la possibilité de se procurer des satisfactions équivalentes" at Vol. I, §313. Ripert, *op. cit.*, *supra*, footnote 10 at §181, notes the ability of money to serve as a medium of exchange between different values.

That adherence to the "distraction" principle may appropriately produce an award which is dwarfed by the gravity of the "dommage moral" is pressed by A. Tunc, *La Sécurité Routière* (1966). Referring to the claims of those whose "sentiments d'affection" have been injured as a result of the death of a close relative, he argues at §49: "Qu'on regarde les choses de la manière la plus concrète, au risque d'être accusé de cynisme: à qui a perdu un être très cher, il ne serait pas ridicule d'offrir un appareil de télévision, qui lui procure une sorte de compagnie. Mais il est choquant de lui accorder un ou plusieurs millions, et plus choquant encore de l'encourager à les réclamer." What if the plaintiff already has a television set?

³⁵ This point is made by J. Flour et J.-L. Aubert, *Droit civil, Les Obligations*, vol. II Sources: *Le fait juridique* (1981), at §641, where the authors, addressing the argument that damages cannot give true "réparation" for "dommage moral" say: "Mais, même pour les dommages matériels, il en est souvent ainsi: par exemple, lorsqu'il y a eu destruction d'un objet dont il n'existe pas semblable sur le marché."

³⁶ M. Fougère. There is a brief sketch of the role of this functionary, similar to the Advocate-General in the European Court of Justice, in L. Neville Brown and J.F. Garner, *French Administrative Law* (3rd ed., 1983).

³⁷ Conseil d'État (ass. plén.) 29 octobre 1954, D.1954.767.

³⁸ "Faut-il se résigner, parce qu'on ne peut rendre une justice parfaitement exacte, à ne pas la rendre du tout?": *ibid.* A similar sentiment is expressed by Ripert, *op. cit.*, *supra*, footnote 10, at §181: "S'il est vrai que la loi civile sanctionne le devoir moral de ne pas nuire à autrui, comment pourrait-elle, alors qu'elle défend le corps et les biens, rester indifférente en présence de l'acte nuisible qui s'attaque à l'âme?"

French doctrine overwhelmingly supports the award of "dommages moraux" in cases of delict.³⁹ Occasionally, however, one comes across lingering traces of the notion that moral suffering is noble and money is base,⁴⁰ and there is certainly no consensus as to the way in which "dommages moraux" should be quantified.⁴¹ What is striking to a common lawyer about the doctrine is the recognition by a number of authors that the punitive principle is at work,⁴² a conclusion obviously seductive to logicians unable to set a figure on an item of extra-patrimonial loss. The punitive damages idea is further fostered by the obvious tendency to shift from the gravity of the injury to the gravity of the defendant's fault when the assessment comes to be made, a factor also quite evident in recent common law decisions in the area of unlawful dismissal. It is not unusual, indeed, in references to fatal accidents cases to see arguments that the

³⁹ The views of writers like C. Aubry et C. Rau, *Droit civil français* (5th ed., 1920), Vol. 6, at §445, that "dommages moraux" should be recovered only where the defendant has committed a criminal offence, and Meynial and A. Esmein, discussed in Mazeaud, *op. cit.*, *supra*, footnote 31 at §306, that "dommage moral" should be compensable only where it gives rise to tangible physical consequences, seem nowadays to have no doctrinal support; there is certainly no support in the jurisprudence.

⁴⁰ Commenting on the *Bondurand* case, *supra*, footnote 37, De Laubadère detects this attitude in the decision of the Conseil d'État: *ibid.* Distaste at the commercialisation of "dommage moral" is evident in P. Esmein, *La commercialisation du dommage moral*, D.1954, chr. 113, and G. Morange, *À propos d'un revirement de jurisprudence . . . La réparation de la douleur morale par le Conseil d'État*, D.1962, chr. 15. See also Savatier, *op. cit.*, *supra*, footnote 33, who states at §287: "Accorder un capital important pour réparer le chagrin causé par la perte d'un vieux père ou d'une vieille mère, dont, au surplus, on hérite; rembourser en monnaie sa réputation à l'homme auquel s'est attaqué un journaliste acerbe; consoler, à l'aide d'une somme confortable, le mari bafoué par une femme infidèle; n'est-ce pas déprécier moralement la victime?"

⁴¹ See for example the separate views of Tunc in Mazeaud *op. cit.*, footnote 31, at §313. He would regard the means of the plaintiff as highly material in conducting the inquiry whether he should recover "dommages moraux" to enable him to purchase a "distraction" or "satisfaction de remplacement" such as a television set. In his view, there could be cases where the values of dignity and humanity would be best served by refusing "dommages moraux", for example, that of the negligent husband sued by the parents of his deceased wife.

Ripert et Boulanger, *op. cit.*, footnote 34, at §998, see the jurisprudence as promoting the principle that, since the injury cannot be quantified exactly in monetary terms, damages fall to be assessed by reference to the gravity of the defendant's fault. This of course amounts to the levying of a penalty and is regarded by Mazeaud, *op. cit.*, footnote 31, at Vol. I, §311 as violative of the general principles of civil liability.

It is worth considering the factors that Savatier, *op. cit.*, footnote 33, at §288, would take into account in computing damages: "toutes les circonstances de la cause, telles que les besoins de la victime, la malice de l'acte dommageable, l'esprit de la demande d'indemnité". In some cases, in the author's view, this would lead to symbolic damages of one franc.

⁴² See Savatier, *ibid.*, Ripert et Boulanger, *ibid.*; Ripert, *op. cit.*, footnote 10, at §184-85. A concession to the punitive principle is clearly evident in the no longer tenable view of Aubry et Rau, *op. cit.*, footnote 39. See also Viney, *op. cit.*, footnote 9, at §270.

aggrieved relatives of a deceased person are (rightly) pursuing an action in the nature of a private vendetta.⁴³

In view of the difficulties of common lawyers in assessing the open-ended civilian system of delictual and quasi-delictual liability, the prospects of recovering "dommages moraux" in French law can best be summed up if some distinctions are first made. To begin with, it is useful to divide "dommage moral" decisions into two categories: first, cases dealing with "la partie sociale du patrimoine moral", in other words, with external and public feelings; and secondly, cases concerned with "la partie affective du patrimoine moral", in other words, internal and private feelings.⁴⁴ The first of these deals with intangible injuries immediately experienced by plaintiffs and would comprise cases of defamation, invasions of privacy and cognate injuries.⁴⁵ The leading case awarding "dommages moraux", a decision of 1833 of the Cour de Cassation⁴⁶ allowing an association of pharmacists to recover damages from a number of unqualified pharmacists unlawfully exercising the profession, belongs to this group. In one case,⁴⁷ the omission of an inventor's name from a history of wireless telegraphy was adjudged a fault under Article 1382 of the Code Civil by the Cour de Cassation. Another example is the case of the publication of unauthorized photographs of a famous actress.⁴⁸ In a legal system that lacks the limiting boundaries of the nominate common law torts, there is clearly a difficulty in knowing where the line is to be drawn

⁴³ See for example Savatier, *op. cit.*, footnote 33, at §288, who observes, however, that the existence of insured defendants has destroyed the rationale of such an action. Nor does the argument work in the context of strict delictual liability: Esmein, *loc. cit.*, footnote 40. The same argument has arisen in the context of administrative liability when the inappropriateness of seeking vengeance against the State for the actions of its agencies has been noted.

⁴⁴ This is a distinction that is made by certain authors seeking to confine the incidence of "dommage moral" claims to the former of the two classifications. See the discussion in Mazeaud, *op. cit.*, footnote 31, Vol. I, at §308. Other writers formulate more complex classifications though there is a general tendency to isolate as one category injuries "la partie affective du patrimoine morale", the most fruitful source of "dommage moral" claims. See Ripert et Boulanger, *op. cit.*, footnote 34, at §§999-1002 where they distinguish (a) injuries to extrapatrimonial rights (e.g. the adulterous spouse), (b) injuries to honour or dignity (e.g. defamation), (c) injuries of affection and (d) injuries to the general interests of a profession.

⁴⁵ Such as injuries to a person's sense of honour or decency, and interferences with the right of access to children. There is no exhaustive list: Viney, *op. cit.*, footnote 9 at §158. One decision imposed liability in the case of a funeral director who advanced the hour of a ceremony thus denying the family of the deceased the opportunity to be present: Trib. civ. Seine 8 décembre 1936, Gaz. Trib. 11 février 1937.

⁴⁶ S.1833.1.458. The award of "dommages moraux" here is best seen as a pragmatic response to the difficulties involved in laying a multitude of small actions by the individual pharmacists: see Ripert, *op. cit.*, footnote 10 at §184.

⁴⁷ Cass. civ., 27 fév. 1951, D.1951.329.

⁴⁸ Paris, 27 fév. 1967, D.1967.451 (Brigitte Bardot).

under Article 1382,⁴⁹ though doubtless many difficult cases can be resolved by the application of causation rules requiring that the injury be "direct" and "certain".

Real problems, nevertheless, are posed by the mental element on the part of the defendant. Although the incidence of liability in Roman law was affected by the nature of the plaintiff's loss, whether for example it was proprietary or pecuniary, and though Roman law was a law of specific delicts, such as *injuria* and the various forms of liability set out in the *lex Aquilia*,⁵⁰ no similar distinctions exist in Article 1382, which enacts a standard of the utmost generality. Article 1382 represents a triumph for the rationalistic patterns of thought underlying the Code Civil of 1804 and stands in sharp contrast to the tendency of the common law, apart from the growth of negligence in the present century, to persist in discrete, writ-based thinking. So wide a liability provision as Article 1382 makes it hard to state a general principle behind entitlement to "dommages moraux". Thus the notion of a private penalty, a respectable element in the "dommage moral" debate in France, loses much of its force in negligence cases, particularly where the defendant is insured.⁵¹ The width of Article 1382 also makes it difficult to know where to draw the line in establishing liability for "dommage moral". In one celebrated and controversial decision of the Cour de Cassation in 1962,⁵² a "partie affective" case, damages were awarded to the owner and trainer of a race horse which took a bite out of a mobile lamp and electrocuted itself. The decision is widely regarded in the doctrine as having taken "dommage moral" liability too far,⁵³ even to the extent of bringing the law into disrepute. Its legacy is the impossibility thus created of knowing where liability stops.⁵⁴

Decisions dealing with "la partie affective du patrimoine moral" can be broken down into two categories. First of all, there are pain and

⁴⁹ Almost by default, the inquiry displays a tendency to move from the injury to the gravity of the fault of the defendant, thus placing the spotlight on the punitive principle. In one case, concerning a claim brought by the parents of a deceased small boy, the relative veniality of the driver's fault led to the award of "dommages moraux" in principle only: *Chalon-sur-Saône* 6 avril 1929, D.H. 1929.359.

⁵⁰ See Lawson and Markesinis, *op. cit.*, footnote 32, pp. 1-30; W.W. Buckland and A.D. McNair, *Roman Law and Common Law* (2nd ed., 1952, by F.H. Lawson), Chapters X-XI.

⁵¹ *Supra*, footnote 43.

⁵² Cass. 1ère civ., 16 janv. 1962, D.1962.199.

⁵³ J.C.P. II.12557 (P. Esmein). The author sarcastically asks if the jockey could have claimed (he probably had a closer relationship with the horse than the owner), and wonders if the owner was like the peasant in the popular song who would prefer to see his wife die rather than his two cherished white oxen.

⁵⁴ *Ibid.* The same author speculates on the possibility of suits brought by small farmers who lose their animals, by an old person whose dog dies and by a family which is deprived of a rare and precious heirloom. While prepared to support family death actions in the nature of vengeance suits, he finds the decision of the Cour de Cassation in the instant case to be quite inappropriate.

suffering claims asserted by the immediate victim of the defendant's fault, where recovery is the "*pretium doloris*" in the terminology employed by Quebec jurisprudence. Secondly, there are claims for "dommage par ricochet", brought by someone who is not the immediate victim of the defendant's fault, for example the grieving parents of a child killed by the defendant. Recovery here is the "*solatium doloris*" according to Quebec terminology.

Though no particular difficulty is posed in France by *pretium doloris* claims, *solatium doloris* has proved to be a problem in the past.⁵⁵ The major difficulty emerging in relation to *solatium doloris* concerns the size of the class entitled to seek compensation under Article 1382,⁵⁶ which at one time the Cour de Cassation attempted to confine to close relations.⁵⁷ This attempt seems not to have endured and indeed, as Mazeaud remarks,⁵⁸ could hardly have survived the remarkable racehorse decision in 1962. In administrative cases, the Conseil d'État long resisted "dommage par ricochet" claims, but even as it resisted them it gave damages for "troubles apportés aux conditions d'existence", for the myriad inconveniences of life consequent upon the death of a close family member.⁵⁹ Eventually, the Conseil d'État seems to have yielded to arguments that awards of this kind amounted to *sub rosa* "dommages moraux" and reversed its jurisprudence

⁵⁵ Ripert et Boulanger, *op. cit.*, footnote 34, at §1001, are attracted by the solution set out in Article 1056 of the Quebec code: "[C]ette notion de préjudice moral est trop imprécise pour que les Tribunaux puissent en régler les conditions d'application . . . Entre toutes les personnes susceptibles d'invoquer un préjudice moral il faut faire un choix. Sans doute ce choix est-il nécessairement arbitraire si l'on a égard à l'infinie variété des situations particulières. Mais c'est précisément parce que ce choix est arbitraire qu'il doit être l'oeuvre du législateur. Une disposition légale serait nécessaire. La loi sur les accidents de travail détermine les personnes qui peuvent agir en cas d'accident mortel. Il en est de même dans la législation anglaise; elle a été imitée sur ce point par la loi de la province de Québec qui réserve le droit d'agir aux parents en ligne direct et au conjoint".

⁵⁶ It is possible that a Freudian response to this problem prompts Mazeaud, *op. cit.*, footnote 31, at §324-2 to speculate on the possible claims of 6,000 students in the Law Faculty of the University of Paris who lose one of their professors. In one decision, the Cour d'Appel d'Amiens was faced with sixteen claims brought by four children, three daughters-in-law, one son-in-law and eight grandchildren: Amiens, 17 nov. 1931, S.1932.2.118.

⁵⁷ Req. 9 fév. 1931, D.P. 1931.I.38. See the discussion of subsequent developments in Ripert et Boulanger, *op. cit.*, footnote 34, at §1001; Mazeaud, *op. cit.*, footnote 31 at §320-28; A. Weill et F. Terré, *Droit civil, Les Obligations* (3rd ed., 1980) at §615 (see the jurisprudence and doctrine therein cited).

⁵⁸ *Op. cit.*, footnote 31 at §325.

⁵⁹ See the discussion in *Bondurand, supra*, footnote 37. Criticizing the lack of clarity in the distinction between "dommages moraux" and indemnification for "troubles d'existence", M. Fougère, the "commissaire de Gouvernement", states: "[I]l est en tout cas un domaine où . . . cette clarté s'éteint tout à fait, c'est celui où le requérant obtient réparation pour le décès d'un jeune enfant dont l'existence ne pouvait être pour ses parents une source d'avantages matériels, mais au contraire ne pouvait être qu'une charge . . .": *ibid.*, at p. 770.

in 1961 when awarding damages to a grandfather whose son and grandchild were killed in a motorcycling accident.⁶⁰

As in the case of injuries to "la partie sociale du patrimoine", a certain healthy scepticism in the application of causation rules seems the major bulwark against extravagant demands. The more remote the relationship between the immediate victim and the victim "par ricochet", the less likely it is that the latter will be able to demonstrate that his loss satisfies the requirements of being "direct" and "certain".⁶¹

In sum, the French position now appears to be one of extensive liability in both "partie sociale" and "partie affective" cases, tempered by the limiting effect of causation rules. But the position in France cannot be left without some reference to the civilian tendency to conduct the debate at the level of an abstract rhetoric that is unattractive to casuistic common lawyers. So Mazeaud⁶² states:

[I] semblerait choquant, dans une civilisation avancée comme la nôtre, qu'on puisse sans encourir aucune responsabilité civile léser les sentiments les plus élevés et les plus nobles de ses semblables, alors que la moindre atteinte à leur patrimoine donne lieu à réparation.

Taking a contrary view, Morange,⁶³ commenting critically on the Letisserand decision⁶⁴ of the Conseil d'État, produces this piece of sublime mysticism:

Le plus grave, en effet, selon nous, dans cette longue évolution qui conduit à la commercialisation progressive des sentiments, c'est qu'elle est en opposition absolue avec les valeurs fondamentales dont se réclame la civilisation occidentale. Les courants chrétien et rationaliste sont, en effet, d'accord pour accorder à l'homme, en tant que tel, une valeur transcendente. C'est porter, à notre avis, un rude coup à ce caractère transcendantal que d'évaluer en argent les sentiments qui sont inhérents à la personne humaine.

C. The Quebec Law of Delict

Article 1053 of the Quebec Civil Code, which is similar to its French counterpart, states: "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by

⁶⁰ *Letisserand*, Conseil d'État, 24 nov. 1961, D.1962.34.

⁶¹ It is the opinion of Mazeaud, *op. cit.*, footnote 31, at §§324-2, that claims of this nature can be controlled by a two-stage process requiring, first, that the existence of a "préjudice moral" be established with the requisite degree of probity, increasingly difficult as the relationship with the deceased becomes more remote, and that, secondly, this "préjudice moral" be sufficiently serious to amount to a truly profound sadness ("douleur vraiment profonde") transcending feelings of compassion or sadness prompted by the death.

⁶² *Op. cit.*, footnote 31, at §315.

⁶³ *Loc. cit.*, footnote 40.

⁶⁴ *Supra*, footnote 60.

positive act, imprudence, neglect or want of skill.”⁶⁵ It is this provision which governs defamation actions, an area where the civil law of Quebec has been influenced by the common law to a substantial degree.⁶⁶ But Article 1053 also protects interests in “la partie sociale du patrimoine moral” going far beyond those protected by the common law tort of defamation and the jurisprudence is in substantial accord with its French counterpart. Thus recovery was granted to a teacher exposed to ridicule at the hands of his pupils when his unauthorized photograph was used in an advertising campaign.⁶⁷ A doctor recovered for the harassment he endured when a television personality invited viewers to get in touch with him and cheer him up at the address flashed on the screen.⁶⁸ When police broke up a meeting of Jehovah’s Witnesses, compensation was granted⁶⁹ and a willingness expressed to give damages for “toute atteinte aux droits extrapatrimoniaux, comme le droit à la liberté, à l’honneur, au nom, à la liberté de conscience ou de parole”.⁷⁰ Other examples, cited by Tancelin,⁷¹ include the case of an unlawful internment in a psychiatric hospital,⁷² racial discrimination⁷³ and a reckless denunciation leading to the plaintiff’s arrest.⁷⁴

When it comes to *pretium doloris* claims, there appear to be no particular obstacles to recovery in Quebec law, though there is some

⁶⁵ The Quebec position regarding causation and delictual liability is very similar to the position in France, *supra*, footnote 31: See Articles 1070-1078.1. The general damages provision is Article 1075 which requires the injury to be “direct” and “immediate” in order to be compensable. (These distinctions appear to work in the same way as “direct” and “certain”.) In the case of contractual obligations, except where there is fraud, Article 1074 also requires that the injury be foreseeable at the time of contracting the obligation. See also J.-L. Baudouin, *La responsabilité civile délictuelle* (1973), at §§100-10; L. Faribault, *Traité de droit civil du Québec*, Vol. 7-bis (1957), at §§452-67.

For general statements as to the recoverability of “dommages moraux” in delict actions, see A. & R. Nadeau, *Traité pratique de la responsabilité civile délictuelle* (1971), at §§255-56 and 582.

⁶⁶ This causes difficulty where the notion of fault in Article 1053 is confounded by the introduction of common law defences such as qualified privilege: see G.V.V. Nicholls, *Offences and Quasi-Offences* (1938), at p. 38; J.-L. Baudouin, *La responsabilité des dommages causés par les moyens d’information de Masse* (1973), 8 R.J.T. 201, at p. 202.

⁶⁷ *Rebeiro v. Shawinigan Chemicals (1969) Ltd.*, [1973] C.S. 389.

⁶⁸ *Robbins v. Canadian Broadcasting Corp.*, [1958] C.S. 152.

⁶⁹ *Chaput v. Romain*, [1955] R.C.S. 834.

⁷⁰ *Ibid.*, at p. 841, per Taschereau, J.

⁷¹ M.A. Tancelin, *Jurisprudence sur les obligations* (2nd ed., 1981), Vol. II, at p. 595.

⁷² *X. v. Y.*, [1970] C.A. 795.

⁷³ *Gooding v. Edlow Investment Corp.*, [1966] C.S. 436.

⁷⁴ *Yacknin v. Ulrich*, [1972] C.S. 163. Other examples include *N. v. H.*, [1969] B.R. 348 (alienation of affections); *De Bellefeuille v. Ville de Montréal*, [1975] C.S. 637 (humiliation and arrest by police officers); and *Bélair Carpet v. Maisonneuve Broadcasting*, [1975] C.S. 645 (public refusal to give publicity).

evidence of a tendency to follow common law precedents on loss of amenities and pain and suffering so as to limit recovery to a maximum conventional figure of \$100,000.⁷⁵ This is evidence, not so much of the seductive appeal of the common law, but of the tendency of Quebec courts to limit "dommages moraux" to moderate amounts.

It is doubtful that a Quebec court would have compensated the owner and the trainer of the electrocuted racehorse. For one thing, it looks too much like a "dommage par ricochet" claim in a jurisdiction where, as we shall see, there are real difficulties in the way of "dommages moraux" awards in fatal accidents cases. Perhaps the dividing line in such cases will come between intentional and negligent misbehaviour,⁷⁶ with a conservative judiciary demanding particularly cogent proof of causation and loss in the latter case. Another factor that should not be overlooked is that Quebec courts are likely, if anything, to be less sympathetic than their French counterparts to the punitive factor in "dommage moral" claims,⁷⁷ though one wonders whether an apparent tendency of statutes to permit the award of punitive damages⁷⁸ will have a spill-over effect on judicial sentiments.

Solatium doloris claims in Quebec involve a distinct departure from French law because Article 1056 of the Code,⁷⁹ modelled on English fatal accidents legislation and having no French equivalent,⁸⁰ has been interpreted authoritatively as denying "dommage moral" recovery, consistent-

⁷⁵ See *Corriveau v. Pelletier*, [1981] C.A. 347. The statutory provision should not be ignored. While no provision is made for *pretium doloris* claims in the workers compensation scheme (Lois sur les accidents du travail, L.R.Q., c. A-3), the automobile insurance scheme (Loi sur l'assurance-automobile, L.R.Q., c. A-25) permits them subject to a fixed ceiling (section 44: maximum award of \$20,000 for "indemnités forfaitaires" in the case of "une blessure, une préjudice esthétique, une mutilation, des douleurs ou une perte de jouissance de la vie").

⁷⁶ *Supra*, footnotes 41 and 49.

⁷⁷ See the judgment of Taschereau J., in *Chaput v. Romain*, *supra*, footnote 69, at p. 841; Nadeau & Nadeau, *op. cit.*, footnote 65, at §257.

⁷⁸ Charte des droits et libertés de la personne, L.R.Q., c. C-12, s. 49; Loi sur la protection du consommateur, L.R.Q., c. P-40.1, s. 272; Loi sur la protection des arbres, L.R.Q., c. P-37, s. 1. See a recent small claims case decided under s. 41 of the Loi sur la protection du consommateur, *supra*: *Sirois v. Club Jeunesse Outaouais Inc.*, [1982] Rev. Lég. 520 (\$50 punitive damages).

⁷⁹ "In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death".

In all cases no more than one action can be brought on behalf of those who are entitled to the indemnity and the judgment determines the proportion of such indemnity which each is to receive . . .".

See Baudouin, *op. cit.*, footnote 65, at §§682-86a.

⁸⁰ *Supra*, footnote 55.

ly with the fate of similar claims under the parent English legislation.⁸¹ This position has never been successfully challenged by direct assault,⁸² but it has been collaterally attacked.⁸³ Furthermore, the recent grant of *solatium doloris* recovery to the spouse of a living victim under Article 1053⁸⁴ has produced the unpalatable and paradoxical conclusion that it may be cheaper to kill than to maim in “ricochet” cases. The collapse of the inhibition on recovering “dommages moraux” under Article 1056 is predictable. One possibility would be to confine Article 1056 to delictual actions and to classify the claims of grieving relatives against hospitals and carriers as contractual:⁸⁵ the civil law is somewhat more expansive in creating exceptions to its principle of relativity of contract than is the common law with its privity rule.⁸⁶

At present there is greater scope for *solatium doloris* recovery under Quebec statutory compensation schemes. Both the workers compensation and automobile insurance schemes⁸⁷ grant recognition, albeit limited, to *solatium doloris* as a source of compensation.⁸⁸

⁸¹ *C.P.R. v. Robinson* (1888), 14 R.C.S. 111.

⁸² But it was doubted by Lamothe C.J. in *Hunter v. Gingras* (1922), 33 B.R. 403.

⁸³ In *Hunter v. Gingras*, *ibid.*, the father of a deceased nine year-old girl recovered damages for the loss of future pecuniary benefit and one of the judges, Dorion J., referred to “la perturbation apportée dans la vie d’un père de famille”: p. 415. In *Green v. Elmhurst Dairy*, [1953] B.R. 85, the plaintiff’s aged mother survived for three days after being hit by a milk-cart. The action for pain and suffering, vested in her at the time of her death, passed to the plaintiff as her heir under Article 607 of the Quebec Civil Code. But see *Driver v. Coca Cola*, [1961] R.C.S. 201, where the victim did not survive for long enough to activate Article 607. Where a spouse suffers nervous shock in consequence of the death of her husband, the restrictions on “dommages moraux” recovery read into Article 1056 do not apply: *Santos v. Annett*, [1967] C.S. 617.

⁸⁴ *L’Hôpital Notre-Dame de l’Espérance v. Laurent*, [1974] C.A. 543, affirmed [1978] 1 S.C.R. 605.

⁸⁵ See the trial judgment in *Marier v. Air Canada*, [1971] C.S. 142. See P.-A. Crépeau, *L’indemnisation de la victime par ricochet d’un accident mortel résultant de l’inexécution d’un devoir contractuel* (1981), 26 McGill L.J. 567.

⁸⁶ In this regard, the most important exception is the “stipulation pour autrui”, provided for in Article 1121 of the French code and in Article 1029 of the Quebec code. According to the latter provision: “A party . . . may stipulate for the benefit of a third person, when such is the condition of a contract which he makes for himself, or of a gift which he makes to another; and he who makes the stipulation cannot revoke it, if the third person have signified his assent to it.” Some idea of the potentialities of the “stipulation pour autrui” for the transmission of warranties can be seen in *General Motors of Canada Ltd. v. Kravitz*, [1979] 1 R.C.S. 790, (1979), 93 D.L.R. (3d) 481. See the symposium on this decision at (1980), 25 McGill L.J. 296-403. For a general discussion of the “stipulation d’autrui”, see Starck, *op. cit.*, footnote 31, at §§1978-2011.

⁸⁷ *Supra*, footnote 75.

⁸⁸ *Loi sur les accidents du travail*, *supra*, footnote 75 permits in section 35.7 a special indemnity of \$500 to surviving spouses. *Loi sur l’assurance-automobile*, *ibid.*, grants in section 39 an “indemnité forfaitaire” of \$6,000 to parents in the absence of spouses and dependents.

In sum, the civil law of both France and Quebec favours recovery for "dommage moral" in cases of delict, subject to Quebec's Article 1056, and controls such claims by rules of causation and the collective discipline of a legal profession sharing common ethical standards. It remains to be seen what is the scope of "dommage moral" recovery in contract actions.

D. *Review of the Common Law Authorities in Contract*⁸⁹

For reasons considered above, the recovery of damages for intangible loss in contract need not be considered in tandem with the recovery of similar damages in tort law. The initial reluctance of the common law to grant recovery in contract for intangible loss cannot adequately be explained as reflecting a total preoccupation with the economic function of contract law. But it has been argued that the common law, knowing no basic distinction between civil and commercial law, allowed the commercial ethic to invade the general contractual part.⁹⁰ Consequently, the doctrine of consideration came to be defined in economic terms as pertaining to the idea of "bargain" and attempts to extend it to cases of moral or natural obligation came unstuck. The thesis is not without substance but is somewhat overstated and hardly does justice to the survival of the rule that consideration is not necessary to support a promise under seal,⁹¹ the rule that a nominal consideration is good consideration⁹² or the tendency for ideas of moral obligation to survive in an attenuated form in particular contexts, for example, the rule that an acknowledgment by the debtor can revive a statute-barred debt.⁹³

Though the nineteenth century cases dealing with liability for intangible loss in contract fail to articulate a principled position behind the refusal to award damages, they do reveal a measure of hard-headed judicial scepticism. In *Hamlin v. Great Northern Rly. Co.*,⁹⁴ the Court of Exchequer ruled that a delayed passenger was not entitled to recover damages

⁸⁹ See F. Dawson, *General Damages in Contract for Non-Pecuniary Loss* (1983), 10 N.Z.U.L. Rev. 232; Waddams, *op. cit.*, footnote 27, at §§454-68.

⁹⁰ A.G. Chloros, *The Doctrine of Consideration and the Reform of the Law of Contract* (1968), 17 I.C.L.Q. 137, at p. 139.

⁹¹ Instead of trying to construct artificial arguments that consideration reposes in the seal, it is best to see this as evidence of the failure of a developing law of contract to assimilate the old writ of covenant. The rule has been repealed in a number of American jurisdictions where a disinclination to invest legal significance in meaningless forms has triumphed over the countervailing tendency to demand a less strict adherence to the doctrine of consideration.

⁹² *Thomas v. Thomas* (1842), 2 Q.B. 851, 114 E.R. 330; *Chappell v. Nestlé Co.*, [1960] A.C. 87, [1959] 2 All E.R. 701 (H.L.). But see *Gilchrist Vending Ltd. v. Sedley Hotel Ltd.* (1967), 66 D.L.R. (2d) 24 (Sask. Q.B.).

⁹³ See the discussion in *Eastwood v. Kenyon* (1840), 11 Ad. & E. 438, 113 E.R. 482 (Q.B.). Nor does it do justice to the emergence of the principle of promissory estoppel.

⁹⁴ (1856), 1 H & N. 408, 156 E.R. 1261 (Exch.).

“for the disappointment of mind occasioned by the breach of contract”.⁹⁵ The court was prepared to concede that there could be nominal damages in all events for a breach of contract but it was not prepared to sanction an award of general damages where these could not be “stated specifically”.⁹⁶ In a passage similar in sentiment to the opinion of certain French critics of “dommage moral”, Pollock C.B. said that “[i]n actions for breach of contract the damages must be such as are capable of being appreciated or estimated”.⁹⁷

This clear proposition, that only loss that can be specifically quantified in pecuniary terms is compensable, was departed from in *Hobbs v. London and South Western Railway Co.*,⁹⁸ where the plaintiff and his family were delivered late at night to the wrong station. Unable to secure transport or overnight accommodation at such an hour, the plaintiff later recovered damages for the physical inconvenience of walking several miles on a wet night. Mellor J. made it plain, however, that this head of loss was to be distinguished from a mere “sentimental” loss where recovery would not be allowed.⁹⁹

The position taken by Mellor J. was confirmed by the House of Lords in the seminal case of *Addis v. Gramophone Co.*¹⁰⁰ where an employee, claiming that he had been unlawfully dismissed, initially recovered a sum of some hundreds of pounds for “the harsh and humiliating way in which he was dismissed” and for “the pain he experienced by reason . . . of the imputation upon him conveyed by the manner of his dismissal”.¹⁰¹ The tenor of the majority judgments makes it plain that the protection of injured feelings is not one of the goals promoted by contract damages. The dissenting judge, Lord Collins, was prepared to support liability for the manner of dismissal on the ground that this was an appropriate case for punitive damages.¹⁰² And it was precisely because Lord Atkinson saw it as a case of punitive damages, directing his attention more to the defendant’s behaviour than to the effects this behaviour produced on the plaintiff, that he denied the plaintiff recovery: “I have always understood that damages for breach of contract were in the nature of compensation, not punishment. . .”.¹⁰³ Another concern expressed by the majority was that the plaintiff was seeking to introduce a backdoor defamation action,¹⁰⁴ an

⁹⁵ *Ibid.*, at pp. 411 (H&N), 1262 (E.R.).

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ (1875), L.R. 10 Q.B. 111.

⁹⁹ *Ibid.*, at p. 122.

¹⁰⁰ [1909] A.C. 488 (H.L.).

¹⁰¹ *Ibid.*, at p. 493 (per Lord Atkinson).

¹⁰² *Ibid.*, at pp. 500-01.

¹⁰³ *Ibid.*, at p. 494.

¹⁰⁴ *Ibid.*, at pp. 496 (per Lord Atkinson), 501 (per Lord Gorell), 503 (per Lord Shaw).

undesirable development in view of the special procedural and pleading rules in defamation cases.

Addis v. Gramophone Co. has conventionally been interpreted as an uncompromising denial of damages for intangible loss in breach of contract cases. Yet, when it is closely examined, it hardly purports to go beyond unlawful dismissal and there is no clear and general statement that the law of contract protects only tangible interests. On the other hand, there is not to be found in the case any concession that the results in individual cases are determined by the remoteness rules, so that whether a defendant is liable to pay compensation for intangible losses should turn upon the knowledge conveyed, or to be imputed, to him at the date of the contract.¹⁰⁵ Once it is conceded that the brunt of controlling intangible loss claims falls on the remoteness rules, the scene is set for the extensive vindication of such claims. Indeed, since this is the direction taken by the common law in recent years, it is useful briefly to rehearse these rules.

After more than a century of judicial refinement since the rules of remoteness were laid down in 1854 by the Court of Exchequer in *Hadley v. Baxendale*,¹⁰⁶ it is now possible to say that a defendant will have to pay damages for loss that the parties reasonably contemplated as being liable (or not unlikely) to result from a breach of the contract.¹⁰⁷ This rule differs from the tortious rule, that a defendant is liable for loss that was reasonably foreseeable, in two respects. First, it is now established that the degree of probability required for a successful claim in contract is higher than that required of a tort claimant, though a contract plaintiff by no means has to show that the loss was more likely to occur than not.¹⁰⁸ Secondly, the reasonable contemplation test in contract is based on what the defendant knew or should have known at the date of the contract, not at the date of breach.¹⁰⁹ In principle, therefore, a subsequent disclosure of information to the defendant should not affect the scope of the defendant's liability. If

¹⁰⁵ See Dawson, *loc. cit.*, footnote 89 who argues that the effect of *Addis* is to prevent general damages claims for intangible injuries from even being considered under the remoteness rules, except in a limited number of cases: see pp. 242-43.

¹⁰⁶ (1854), 9 Ex. 341, 156 E.R. 145.

¹⁰⁷ This statement can be made on the basis of the refinement of the rules or rule in *Koufos v. C. Czarnikow Ltd. (The Heron II)*, [1969] 1 A.C. 350, [1967] 3 All E.R. 686 (H.L.).

¹⁰⁸ See the discussion of *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] 2 K.B. 528, [1949] 1 All E.R. 997 (C.A.), in *The Heron II*, *ibid.*, at pp. 389 (A.C.), 694 (All E.R.), per Lord Reid, 425 (A.C.), 717 (All E.R.), per Lord Upjohn.

¹⁰⁹ The reasons for this emerge most clearly in *British Columbia and Vancouver's Island Spar, Lumber, and Saw-Mill Co. v. Nettleship* (1868), L.R. 3 C.P. 499 where, at p. 508, Willes J. states: "[O]ne of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for"; and: "The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it" (at p. 509). See also *Horne v. Midland Railway Co.* (1873), L.R. 8 C.P. 131.

an explanation is sought for this apparently strange position, it can be given on the basis of secondary obligation theory,¹¹⁰ which sees the obligation to pay damages for breach of contract as stemming from an implied contractual undertaking, rather than from a liability imposed *ex juris*.¹¹¹ A disclosure by the plaintiff to the defendant after the contract has been entered into will therefore be ineffectual in enlarging the defendant's sphere of liability, unless presumably it meets the test of a binding variation of contract. This would in principle require fresh consideration to move from the plaintiff for the defendant's enlarged undertaking, and is unlikely to arise if information is merely conveyed to the defendant.

The intricacies of this formulation of the contract remoteness rules should not be dismissed as complex and irrelevant formalism lacking any practical application. As we shall see when recent unlawful dismissal cases are discussed, the need to show reasonable contemplation at the date of the contract is in danger of being overlooked. There is, however, a strand of opinion that regards the stated difference in the degree of probability of the tortious and contractual rules of remoteness of damage as being too semantically subtle to grasp.¹¹² This development may be seen as an offshoot of the tendency of tort and contract to overlap,¹¹³ a phenomenon which should be borne in mind when the recent cases on intangible loss in contract are assessed, since it encourages a comparison of contractual and tortious liability.

Though *Jarvis v. Swans Tours*¹¹⁴ was not the first case in recent years to award contractual damages for an intangible loss transcending physical

¹¹⁰ Lord Diplock is the leading judicial exponent of this theory. See his judgments in: *Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Association*, [1966] 1 W.L.R. 287, sub. nom. *Kendall (Henry) & Sons v. Lillico (William) & Sons Ltd.*, [1966] 1 All E.R. 309 (C.A.); *R.V. Ward Ltd. v. Bignall*, [1967] 1 Q.B. 534, [1967] 2 All E.R. 449 (C.A.); *Lep Air Services Ltd. v. Rolloswin Investments Ltd.*, [1973] A.C. 331, sub nom. *Moschi v. Lep Air Services Ltd.*, [1971] 3 All E.R. 45 (H.L.); and *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827, [1980] 1 All E.R. 556 (H.L.).

¹¹¹ It is hard to agree with the thesis advanced by Dawson, *loc. cit.*, footnote 89, who argues that, while the *Addis* case, *supra*, footnote 100, excludes the possibility of general damages for intangible losses in certain cases, a permissible exception to this concerns cases where the defendant specifically undertakes not to cause an intangible injury: see, at p. 245. Contract law has long downplayed any distinction between express and implied undertakings, and an explicit conveyal of information to the defendant, clearly informing him that emotional distress will result from his breach of contract, should be enough to fix him with liability for intangible loss on the basis of an undertaking to answer for it: see *Newell v. Canadian Pacific Airlines Ltd.* (1976), 74 D.L.R. (3d) 574, 14 O.R. (2d) 752 (Ont. Co. Ct.), which Dawson regards as wrongly decided: *ibid.*, at p. 256. For further discussion of *Newell*, see the text, *infra*, commencing at footnote 124.

¹¹² See *H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co.*, [1978] Q.B. 791, [1978] 1 All E.R. 525 (C.A.), per Lord Denning M.R.; and *Kienzle v. Stringer* (1981), 130 D.L.R. (3d) 272 (Ont. C.A.).

¹¹³ Bridge, *loc. cit.*, footnote 16.

¹¹⁴ *Supra*, footnote 14. See also *Jackson v. Horizon Holidays Ltd.*, [1975] 1 W.L.R. 1468, [1975] 3 All E.R. 92 (C.A.). There have been a number of Canadian holiday cases

inconvenience,¹¹⁵ it has proved to be the most authoritative and so can be taken as the starting-point for a discussion of the modern law. The plaintiff signed up for a holiday in the Swiss Alps. He was given numerous promises about the services and entertainments provided in the hotel, many of which were untrue. The plaintiff's holiday was ruined and he was held entitled to recover on the ground *inter alia* that the false statements in the holiday brochures were warranties.

The trial judge awarded the plaintiff half the cost of his holiday as damages. The English Court of Appeal thought this insufficient. Looking at the matter "broadly" — no doubt in the way that a jury would look at it — Lord Denning M.R. thought the plaintiff entitled to recover a sum approximately equal to twice the cost of the holiday. In his opinion, damages could be awarded in contract "for the disappointment, the distress, the upset and frustration" caused by the breach of contract. The plaintiff's purpose was not merely to spend time in a Swiss hotel, but to "enjoy himself with all the facilities which the defendants said he would have".¹¹⁶

Jarvis v. Swans Tours made it plain that there was no rule of law that damages were unavailable in contract for intangible loss. Everything turned on the application of the remoteness rules to particular circumstances. In the present case, the plaintiff's loss of enjoyment was well within the contemplation of the holiday operators: enjoyment was what they dealt in and enjoyment was what they promised.¹¹⁷

Though a very different case on its facts, *Heywood v. Wellers*¹¹⁸ is similar to *Jarvis* in that the performance promised by the contract was so closely related to the plaintiff's peace of mind that emotional distress was not merely a possible consequence of a breach of contract by the defendant, but the very kind of consequence that a breach of contract was likely to

including *Keks v. Esquire Pleasure Tours Ltd.*, [1974] 3 W.W.R. 406 (Man. Co. Ct.) (some element of double recovery); *Pitzel v. Saskatchewan Motor Club Travel Agency Ltd.* (1983), 149 D.L.R. (3d) 122 (Sask. Q.B.); *Stringer v. Domhar Travel Agencies Ltd.* (1983), 20 A.C.W.S. (2d) 42 (Ont. Co. Ct.).

¹¹⁵ The earlier authorities are collected in F.D. Rose, *Contract—Damages—Non-Pecuniary Losses—Injured Feelings and Disappointment—Remoteness* (1977), 55 *Can. Bar Rev.* 333, at footnote 8. See also Dawson, *loc. cit.*, footnote 89, who deals with a range of cases that did not run counter to *Addis, supra*, footnote 100.

¹¹⁶ *Supra*, footnote 14, per Lord Denning M.R., at pp. 238 (Q.B.), 74 (All E.R.).

¹¹⁷ "The right measure of damages is to compensate him for the loss of entertainment and enjoyment which he was promised and which he did not get": *ibid.*, per Lord Denning M.R., at pp. 238 (Q.B.), 75 (All E.R.). "The court is entitled, and indeed bound, to contrast the overall quality of the holiday so enticingly promised with that which the defendants in fact provided": *ibid.*, per Edmund Davies L.J., at pp. 239 (Q.B.), 76 (All E.R.).

¹¹⁸ *Supra*, footnote 15. See also *Matthews v. Insurance Corporation of British Columbia* (1981), 10 A.C.W.S. (2d) 227 (B.C.S.C.) (claim for damages for mental anguish caused by difficulties of negotiation leading to litigation; action dismissed).

bring about.¹¹⁹ The case concerned a firm of solicitors that was so dilatory in taking steps to protect by injunction a woman from molestation by a former male friend that she was subjected to a lengthy period of "mental distress and upset". According to Lord Denning M.R.: "Here the solicitors were employed to protect her from molestation causing mental distress—and should be responsible in damages for their failure".¹²⁰ Applying the remoteness rules, the court held that the plaintiff was entitled to recover damages for her distress and set the figure at £150, the very sum she had claimed. James L.J. made it plain that it was not always the case "that a failure by the solicitor to perform the contract will foreseeably occasion vexation, frustration or distress",¹²¹ and approved the earlier result in *Cook v. Swinfen*,¹²² which had denied damages for a nervous breakdown suffered by a woman whose solicitor had negligently failed to conduct a proper defence to divorce proceedings brought by the husband. Though the solicitor in *Cook* understood that his client was a highly strung woman, he had no reason to know that she had had "one nervous breakdown after another". The court was of the opinion that, if this particular factor had been disclosed to the solicitor at the time of the contract, the application of the reasonable contemplation rule might have made the solicitor liable.¹²³ If one makes the perfectly reasonable assumption that a normal person in the position of the plaintiff in *Cook* would have experienced some degree of upset and annoyance, a comparison of *Heywood* and *Cook* suggests that the remoteness rules are not satisfied merely because some degree of intangible loss is foreseeable. Rather, it seems that for such a loss to be compensable, it must cross a threshold of gravity or probability or a combination of the two in order to be regarded as a loss at all.

In the application of the remoteness rules, probability is affected by one party's disclosure to the other, and disclosure is a theme which emerges in cases involving carriers and the like. While the knowledge imputed to a carrier might not be enough in some cases to subject him to liability for emotional distress under the remoteness rules, special disclosure at the date of the contract can make a difference. This emerges from the careful judgment of Judge Borins in *Newell v. Canadian Pacific Airlines Ltd.*,¹²⁴

¹¹⁹ *Heywood v. Wellers*, *supra*, footnote 15, is in a similar vein. *Herbert Clayton & Jack Waller Ltd. v. Oliver*, [1930] A.C. 209 (H.L.) (repudiation by impresario of artist's performing engagement) and *Wilson v. United Counties Bank Ltd.*, [1920] A.C. 102 (H.L.) (contractual obligation to maintain a client's credit and reputation).

¹²⁰ *Supra*, footnote 15, at pp. 459 (Q.B.), 307 (All E.R.).

¹²¹ *Ibid.*, at pp. 461 (Q.B.), 308 (All E.R.).

¹²² [1967] 1 W.L.R. 457, [1967] 1 All E.R. 299 (C.A.). See also *Kolan v. Solicitor* (1969), 7 D.L.R. (3d) 481, [1970] 1 O.R. 41 (Ont. H.C.).

¹²³ *Ibid.*, at pp. 462 (W.L.R.), 303 (All E.R.). (per Lord Denning M.R., with whose judgment Dankwerts and Winn L.J.J. concurred).

¹²⁴ (1976), 74 D.L.R. (3d) 574, 14 O.R. (2d) 752 (Ont. Co. Ct.). For similar cases, see *Chappell v. British Airways Board* (1981), 9 A.C.W.S. (2d) 99 (Ont. Prov. Ct.),

the first Canadian case to explore at length the non-pecuniary loss problem in contract. In that case, the plaintiffs, at the time of purchasing tickets to Mexico City, left airline representatives in no doubt about the importance they attached to the welfare of their two lap dogs. They offered to purchase the entire first-class section of the aircraft to accommodate themselves and their dogs, but were required by the defendants to consign the animals to the cargo hold, where evaporating dry ice suffocated one of the dogs and almost killed the other. The plaintiffs themselves were, to the knowledge of airline representatives, in a fragile state of health and they claimed damages, *inter alia*, for the "anguish, loss of enjoyment of life and sadness" resulting from the defendant's breach of contract in failing to deliver the dogs safe and sound in Mexico City. Applying the remoteness rules, Judge Borins found for the plaintiffs and awarded them \$500 for this head of loss.

Judge Borins' judgment is interesting too for its reference to the distinction between commercial losses and emotional losses, which implicitly recognizes an underlying distinction between commercial and consumer contracts. Thus he said:¹²⁵

To the extent that one conceptualizes damages for breach of contract in terms of commercial losses only, there can be little quarrel with the proposition that, in ordinary commercial settings, only commercial losses are as a rule within the contemplation of the parties as a likely consequence of breach and so bargained for within the *Hadley v. Baxendale* test.

Any distinction between commercial and consumer matters is unlikely to provide a universal solvent for the admissibility of emotional loss claims¹²⁶ and will have to be tempered by the application of the remoteness rules to individual circumstances and in particular by the element of disclosure. If *Heywood v. Wellers* and *Jarvis v. Swan Tours* can be seen as cases where non-commercial interests in the performance of a contract were evident from the nature of the contract itself, *Newell* is a case where their existence is brought explicitly to the attention of the defendant. Quite where one should classify employment contracts is not obvious, particularly since any belief that the relationship of employee and employer is commercial and impersonal is fast receding.

Duemler v. Air Canada (1980), 2 A.C.W.S. (2d) 282 (Alta. Q.B.) and *Fuller v. Healey Transportation Ltd.* (1978), 92 D.L.R. (3d) 277, 22 O.R. (2d) 118 (Ont. Co. Ct.). Cases involving the hire of goods for holiday purpose are *Elder v. Koppe* (1974), 53 D.L.R. (3d) 705, 15 N.S.R. (2d) 688 (N.S.T.D.) and *Taylor v. Contidecor Ltd.* (1981), 11 A.C.W.S. (2d) 259 (Ont. Co. Ct.). These cases involve motor homes and it is a relatively short step from them to cases involving the purchase of a home whose defects occasion mental anguish: *Perry v. Sidney Phillips & Son*, [1982] 1 W.L.R. 1297, [1982] 3 All E.R. 705 (C.A.); *Widdrington v. Dickinson* (1982), 133 D.L.R. (3d) 472 (Ont. H.C.), with which contrast *Barbour v. G.H. Heating & Air Conditioning Ltd.* (1981), 7 A.C.W.S. (2d) 86 (Ont. H.C.).

¹²⁵ *Ibid.*, at pp. 591 (D.L.R.), 769 (O.R.).

¹²⁶ This can be attested to by anyone who has considered the scope and purpose of consumer protection legislation.

In recent years there has been a rash of cases dealing with claims for emotional distress arising out of wrongful dismissal. In terms of contract theory, these cases are not at all easy to place and one is tempted to conclude that, in difficult economic times, courts are increasingly sympathetic to the idea that certain breaches of contract may *per se* constitute torts, and to the idea that employees of long-standing have a proprietary right to their jobs. This may serve as some explanation of why the damages awards in some of these cases take a quantum leap.

The sequence starts with *Cox v. Phillips Industries Ltd.*¹²⁷ where, prior to being unlawfully dismissed with salary in lieu of notice, the plaintiff had in breach of contract been demoted to a position of lesser responsibility in the company, thereby experiencing "depression, vexation and frustration and indeed . . . ill health".¹²⁸ Lawson J., "[d]oing the best I can",¹²⁹ awarded the plaintiff the sum of £500. No reason was given by the learned judge for ignoring *Addis*, but he clearly relied on *Jarvis* in subjecting the plaintiff's case to the normal remoteness rules and was doubtless assisted by the fact that he was dealing with demotion rather than dismissal.

In the last few years, the Canadian common law courts have been especially active in this area. In *Pilon v. Peugeot Canada Ltd.*,¹³⁰ the defendant dismissed a regional service manager who had been in its employment or that of its dealers for all of his working life. The plaintiff emerged as a 'company man', "devoted and unswervingly loyal to his employer".¹³¹ Galligan J. concluded that twelve months was an appropriate period of notice so that the defendant was in breach of contract for giving only three months. This left the judge free to levy damages for the "vexation, frustration, distress and anxiety" experienced by the plaintiff when his world collapsed, for which he awarded damages of \$7,500.

Now this seems extraordinary. It cannot seriously be supposed that an application of the remoteness rules based on the reasonable contemplation of the parties at the date of the contract would have produced such a result: everything turned on the employer's knowledge of its employee at the date

¹²⁷ [1976] 1 W.L.R. 638, [1976] 3 All E.R. 161 (Q.B.D.). A materially similar case involving expulsion from a trade union, is *Tippett v. International Typographical Union Local 226* (1976), 71 D.L.R. (3d) 146, [1976] 4 W.W.R. 460 (B.C.S.C.), where *Addis* was distinguished as relating solely to commercial purposes and *Jarvis* relied on.

¹²⁸ *Ibid.*, at pp. 644 (W.L.R.), 166 (All E.R.). See also *DHSS v. South East Thames Regional Health Authority* (1983), *The Times*, December 13 (Q.B.D.) (doctor suspended by employer for not submitting to medical inspection).

¹²⁹ *Ibid.* This is a most common refrain in these cases.

¹³⁰ (1980), 114 D.L.R. (3d) 378, 29 O.R. (2d) 711 (Ont. H.C.). See also *Grant v. MacMillan Bloedel Industries Ltd.* (1982), 16 A.C.W.S. (2d) 91 (Ont. H.C.). But see *Peso Silver Mines Ltd. v. Cropper*, [1966] S.C.R. 673, (1966), 58 D.L.R. (2d) 1 *per curiam*, at p. 684, where *Addis*, *supra*, footnote 100, was tacitly approved.

¹³¹ *Ibid.*, at pp. 379 (D.L.R.), 712 (O.R.).

of breach. Nor is it at all easy to see how receiving three months' instead of the required twelve months' notice could have induced in the plaintiff feelings of "acute anxiety" with accompanying physical symptoms. It was not the breach but the loss of his job that injured the plaintiff, and that dismissal could have been engineered by lawful means. Unlike *Addis*, there appeared to be no humiliating aspect to the dismissal though the learned judge, keen to avoid the charge that he was levying punitive damages, found that the defendant dismissed the plaintiff "callously, suddenly and arbitrarily".¹³² All that this concatenation of pejoratives tells us is that the employer did not take time to prepare the plaintiff for harsh reality.

One can easily dismiss *Pilon* as an example of sentimental judicial intervention granting job security but lawyers have to assimilate developments such as these into a rational schema if they are not to be dismissed as isolated aberrations. Consequently, if the result in *Pilon* is to be justified, there seem to be two possibilities: first, that the case be regarded as an enlarged example of the tort of wilful infliction of emotional distress or the tort of negligence;¹³³ and secondly, that in employment contracts there is an implied term that an employer, even when lawfully discharging his employee, will do so with tact and humanity, possibly with the superadded obligation of assisting the employee's reintegration into the work force.¹³⁴ *Pilon* is not explicit authority for either of these approaches but in future years it may well be treated as an authority in favour of the second of them.

Signs of a reaction against *Pilon* are evident in the decision of Saunders J. in *Bohemier v. Storwal International Inc.*¹³⁵ The plaintiff was dismissed after working for the defendant in various non-managerial capacities for thirty-five years. The dismissal took the form of a brief letter delivered by taxi to the plaintiff's house and was effective on the same day. A cheque for eight weeks' severance pay was subsequently sent but the plaintiff was at no time contacted by anyone from work about his dismissal or future employment. Saunders J., having concluded that the plaintiff was

¹³² *Ibid.*, at pp. 384 (D.L.R.), 716 (O.R.).

¹³³ See *Wilkinson v. Downton*, [1897] 2 Q.B. 57 (Q.B.D.); *Bielitski v. Obadiak* (1922), 65 D.L.R. 627, [1922] 2 W.W.R. 238 (Sask. C.A.); *Purdy v. Woznesensky*, [1937] 2 W.W.R. 116 (Sask. C.A.). The enlargement of the tort would lie in its extension to cases of non-physical damage and the possibility is implicit in the judgment of Saunders J. in *Bohemier v. Storwal International Inc.* (1982), 142 D.L.R. (3d) 8, 40 O.R. (2d) 264 (Ont. H.C.), varied on appeal (1983), 4 D.L.R. (4th) 383 (Ont. C.A.).

¹³⁴ That there are signs of such an implied term emerging shows how far we have travelled since *Lister v. Romford Ice & Cold Storage*, [1957] A.C. 555, [1957] 2 All E.R. 125 (H.L.), which still repays careful reading, especially for the candid revelations that implying terms into contracts for the sake of business efficacy is posited on the demands of, for example, employment contracts as a class, rather than employment contracts individually considered.

¹³⁵ *Bohemier v. Storwal International Inc.*, *supra*, footnote 133.

entitled to eight months' notice, confessed that he would have been more comfortable dealing with the plaintiff's emotional distress claim if it had been framed in negligence¹³⁶ and he noted the difficulty of establishing that the distress flowed from the breach of contract rather than the fact of dismissal.¹³⁷ Nevertheless, the learned judge found that the "cold and perfunctory" manner of dismissal aggravated the mental suffering inevitably produced by the inadequate period of notice.¹³⁸ Doing the best he could, the learned judge fixed damages under this head at \$1,500, a sum considerably below that awarded in *Pilon*.

Even though *Bohemier* draws attention to the inadequacies of *Pilon*, one is still left with the difficulty posed by the likelihood that the plaintiff's distress would have been just as pronounced if the "cold and perfunctory" letter had promised an adequate period of pay in lieu of notice. Can it really be said that a failure to tender the necessary amount of money produces emotional distress? All that *Bohemier* accomplishes is to confine a somewhat irrational and covert claim within financially tolerable bounds.

It is not easy to predict the future of these unlawful dismissal cases. *Pilon* by no means represents the judicial consensus. Indeed, there are further signs of reaction in decisions demanding cogent evidence of mental distress,¹³⁹ or something in the nature of a special relationship between employer or employee,¹⁴⁰ or a special undertaking at the time of the contract to answer for mental distress produced by a breach of contract.¹⁴¹ In a similar vein is the recent decision of the Ontario Court of Appeal in *Brown v. Waterloo Regional Board of Commissioners of Police*,¹⁴² which displays a distinct hostility to the award of damages for emotional distress. The court stated that it was within the reasonable expectation of parties to an "ordinary commercial transaction" that the disappointed party would suffer rage and frustration but would be satisfied with a recovery of his

¹³⁶ *Ibid.*, at pp. 18 (D.L.R.), 273 (O.R.). But how easy is it to award damages for distress falling short of shock in the tort of negligence? *Supra*, footnote 25 and accompanying text.

¹³⁷ *Ibid.* The need to establish a causal link between breach and distress has also been made forcefully by the Ontario Court of Appeal in *Brown v. Waterloo Regional Board of Commissioners of Police* (1983), 150 D.L.R. (3d) 729, 43 O.R. (2d) 113, and by Wallace J. in *Fitzgibbons v. Westpres Publications Ltd.* (1983), 3 D.L.R. (4th) 366 (B.C.).

¹³⁸ *Supra*, footnote 135 at pp. 18 and 19-20.

¹³⁹ See *Cringle v. Northern Union Insurance Co.* (1981), 124 D.L.R. (3d) 22 (B.C.S.C.).

¹⁴⁰ See *Vorvis v. Insurance Corporation of British Columbia* (1982), 134 D.L.R. (3d) 727 (B.C.S.C.).

¹⁴¹ See *Dobson v. T. Eaton Co.*, [1983] 1 W.W.R. 418, (1982), 39 A.R. 354 (Alta. Q.B.) (necessity of showing that contract provided for distress damages, not the case for most contracts of employment).

¹⁴² (1983), 150 D.L.R. (3d) 729, 43 O.R. (2d) 113 (Ont. C.A.). This case clearly limits the rather vague and negative *dictum* of the Supreme Court in the *Peso Silver Mines* case, *supra*, footnote 130.

financial loss.¹⁴³ At one point, the court approved a passage from Corbin¹⁴⁴ which comes close to stating that, in addition to being sufficiently foreseeable, damages for mental suffering must be the product of a "wanton or reckless" breach in order to be recoverable.

Yet, before the decision in *Brown* has dried on the page, it is carefully, assiduously, and at length ignored by a puisne judge in *Speck v. Greater Niagara General Hospital*,^{144a} dealing with the unlawful dismissal of a nurse with a history of "reactive depression". Purporting to follow *Brown*, Southey J. performs the virtuoso feat of holding that the defendants committed a reckless breach of contract in good faith.^{144b} Worst of all, they did not even give her inadequate notice: *they gave her no notice at all* when they dismissed her for what they thought was cause. Hence, \$20,000 for the loss of future income that an adequate period of notice would have given her; \$10,000 for the continuing loss of income after that date caused by her mental state; and \$15,000 for suffering and loss of enjoyment of life. So much for *Brown*?

Given the peculiar circumstances of these employment cases, and the nature of the relationship between an employer and employee, it is submitted that they are not a safe guide in charting the progress of emotional distress claims in other areas of the law of contract. Running through all of these cases, whether openly or *sub rosa*, is the question whether punitive damages can be awarded for a breach of contract, which will be dealt with later in this article

E. Review of the Civil Law Authorities in Contract

The availability of "dommages moraux" in contract cases is not so well established as in delict. Indeed, it could not be said with any great confidence that such damages were recoverable according to French jurisprudence until after the Second World War. It can be said at the outset that the distinction between contract and delict seems largely immaterial to the

¹⁴³ *Ibid.*, at pp. 733 (D.L.R.), 118 (O.R.).

¹⁴⁴ *Ibid.*, at pp. 735-736 (D.L.R.), 120 (O.R.): "In my opinion the correct rule is stated in Corbin . . . Vol. 5, p. 429, citing the *Restatement of the Law of Contracts*, para. 341, as follows:

"There is sufficient authority to justify the statement that damages will be awarded for mental suffering caused by the wanton or reckless breach of a contract to render performance of such a character that the promisor had reason to know when the contract was made that a breach would cause such suffering, for reasons other than pecuniary loss".

Predictably, Southey J. in the later case of *Speck v. Greater Niagara General Hospital* (1983), 2 D.L.R. (4th) 84, 43 O.R. (2d) 611 (Ont. H.C.) treats this as *the rule*, not merely a rule. To a determined court, the introduction of recklessness or wantonness makes very little difference.

^{144a} (1983), 2 D.L.R. (4th) 84, 43 O.R. (2d) 611 (Ont. H.C.).

^{144b} *Ibid.*, at pp. 91 (D.L.R.), 618 (O.R.).

recovery of "dommages moraux" in principle, but differences at the technical level between the two regimes may make the distinction important in practical terms. It might, for example, be important to channel a *solatium doloris* claim in contract, so as to avoid the impact of Article 1056 of the Quebec code.¹⁴⁵ The different limitation rules for contract and for delict also favour the formulation of a claim in contract.¹⁴⁶ Conversely, the incidence of the causation rules may favour the formulation of a claim in terms of delict: foresight is tested in contract at the date of formation, whereas the foresight component in the requirement that delictual injury be "certain" is assessed at the date of the culpable conduct.¹⁴⁷

In recent years in Quebec, the doctrines of "cumul" and "option", concerned respectively with the combination of and choice between the different regimes, have been hotly debated.¹⁴⁸ The recent decision of the Supreme Court in *The National Drying Machinery Co. v. Wabasso Ltd.*¹⁴⁹ is evidence of a developing trend to allow the plaintiff choice in the formulation of his claim. French jurisprudence in the area of "dommage moral" has by no means been scrupulous in observing the distinction between contract and delict, the decision of the Cour de Cassation in the racehorse case¹⁵⁰ being the most prominent example of this.

Carbonnier¹⁵¹ writes that the recoverability of "dommages moraux" in contract cases was doubted in the nineteenth century because it was thought necessary that the object of an obligation have a pecuniary interest for the creditor of that obligation,¹⁵² an idea very similar to the proposition, referred to above, that the bargain theory of consideration encouraged common lawyers to view contract in pecuniary, commercial terms. The tendency for the conceptual unity of "responsabilité civile" to assert itself in the twentieth century has helped to dispel this notion, and the migration

¹⁴⁵ *Supra*, footnote 79 and the text accompanying footnote 85.

¹⁴⁶ See *Senez v. Chambre d'Immeuble de Montreal*, [1980] 2 R.C.S. 555.

¹⁴⁷ *Supra*, footnotes 31 and 65.

¹⁴⁸ "Le terme 'cumul' prête également à confusion en ce qu'il pourrait laisser croire à la possibilité pour le demandeur d'intenter deux recours lui donnant ainsi droit à une double indemnisation du préjudice subi. Sur ce point, au moins, tout le monde est d'accord: la victime ne saurait obtenir deux fois la réparation d'un préjudice unique. Enfin, il arrive souvent qu'on utilise le terme 'cumul' pour désigner deux problèmes pourtant distincts l'un de l'autre: l'option entre les régimes de responsabilité et le cumul de ces mêmes régimes": Crépeau, *loc. cit.*, footnote 8, at p. 529.

See *Wabasso Ltd. v. The National Drying Machinery Co.*, [1981] 1 R.C.S. 578, and the symposium dealing with the decision in (1982), 27 McGill L.J. 788-914.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Supra*, footnote 52. It might, however, be noted that litigants are unlikely to draw the distinction if it does not pay them to do so, and courts will not insist on it being drawn by litigants since it is not a question of "ordre public".

¹⁵¹ *Op. cit.*, footnote 34.

¹⁵² *Ibid.*, §§24 and 71.

in French jurisprudence of carriers¹⁵³ and doctors¹⁵⁴ liability from delict to contract can only have fostered this process. A further factor that might have delayed the reception of "dommage moral" claims is noted by Mazeaud.¹⁵⁵ Though the appropriate provisions of the Code Civil refer simply to "dommage", it was the opinion of Domat¹⁵⁶ and Pothier,¹⁵⁷ an opinion echoed in legislative debates leading to the adoption of the Code Civil in 1804,¹⁵⁸ that "dommage moral" should not be recoverable since it could not have been recovered in Roman law. Noting that fidelity to Roman law was the dominant theme in these opinions, Mazeaud deflects them with the observation that the opinions of Domat and Pothier were based on a misconception of Roman law, which in reality did allow "dommage moral" awards in contract cases.¹⁵⁹

Nevertheless, there has been a tendency for certain authors to drag their feet when discussing contract cases. A Belgian author, de Page,¹⁶⁰ writing as late as 1967, asserts that "dommage moral" recovery in contract is controversial,¹⁶¹ a proposition owing much to his citation of nineteenth century authors like Laurent,¹⁶² Huc¹⁶³ and Baudry-Lacantinerie.¹⁶⁴ Laurent, seeing contracts as having pecuniary interests for their objects, is prepared to allow "dommage moral" recovery only where the "dommage moral" indirectly brings about a pecuniary loss, for example, where a banker wrongfully dishonours his client's cheque,¹⁶⁵ interestingly enough a case seen for a long time as an exceptional example of intangible loss recovery at common law.¹⁶⁶ Modern authors tend to favour recovery.¹⁶⁷

¹⁵³ Civ. 21 nov. 1911, civ. 27 janv. 1913, civ. 21 avril 1913, D. 1913, I, 249, note Sarrut.

¹⁵⁴ Civ. 21 mai 1936, D. 1936, 88.

¹⁵⁵ *Op. cit.*, footnote 31.

¹⁵⁶ *Ibid.*, §§299 and 331.

¹⁵⁷ *Ibid.*

¹⁵⁸ See the references to the legislative debates in Mazeaud, *op. cit.*, footnote 31, §331.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Traité élémentaire de droit civil belge*, vol. III (3rd ed., 1967).

¹⁶¹ *Ibid.*, §115.

¹⁶² *Principes de droit civil*, vol. XVI (1887), §281.

¹⁶³ *Commentaire théorique et pratique du Code Civil*, vol. VII (1894), §147.

¹⁶⁴ G. Baudry-Lacantinerie de L. Barde, *Traité théorique et pratique de droit civil, Des Obligations* (3rd ed., 1907), vol. I §§480-81.

¹⁶⁵ *Op. cit.*, footnote 162.

¹⁶⁶ See *Rolin v. Steward* (1854), 14 C.B.595, 139 E.R. 245 (C.P.) and the remarks about this area of liability in *Addis, supra*, footnote 100, at p. 491 (per Lord Loreburn L.C.), and p. 495 (per Lord Atkinson).

¹⁶⁷ See for example Carbonnier, *op. cit.*, footnote 34 §71; Mazeaud, *op. cit.*, footnote 31, §§332 and 335; Starck, *op. cit.*, footnote 31, §2053; Weill et Terre, *op. cit.* footnote 57, §391; M. Planiol et G. Ripert, *Traité pratique de droit civil français*, vol. VII, *Obligations* (2nd ed., 1954), §857.

More equivocal support comes from Ripert et Boulanger¹⁶⁸ who take a clear step in favour of confining "dommage moral" claims to symbolic damages when stating that this process would remove the appearance of punitive damages in such cases.¹⁶⁹

Writing in 1939, Josserand¹⁷⁰ predicted a liberal evolution in this area of law and his judgment was borne out by the subsequent jurisprudence. As a result of the orthodoxy established in the delict cases, the award of "dommages moraux" in contract cases is not controversial in France and it simply remains to classify the cases in an acceptable way. They can usefully be broken down into four main categories: first, cases of disfiguring personal injuries where it would be invidious to deny a *pretium doloris* award that would certainly be recoverable in delict; secondly, employment cases, which in more than one legal system seem to be a law unto themselves; thirdly, cases of contracts where intangible interests are clearly and immediately engaged; and fourthly, contracts where "dommage moral" recovery is allowed as an alternative to damages for a pecuniary loss that is real, yet uncertain and unprovable. This last category comprises a group of pragmatic decisions with whose methodology a common lawyer would have no difficulty in coming to terms.

An example drawn from the first category is a woman's claim for skin damage to her back and elbow produced by the defendant pharmacist's lotion which prevented her from wearing a "robe décolletée" and caused her temporary absence from society. Her claim for 30,000 francs was reduced to a modest award of 3,000 francs.¹⁷¹ Later decisions consolidated a *pretium doloris* claim ("patrimoine affective") with a claim for aesthetic damage ("patrimoine sociale"),¹⁷² so that it is not easy to see whether this modest scale of recovery was continued for the latter type of claim, though it probably was.

Though there appears to be no extensive jurisprudence dealing with employment contracts, the Cour d'Appel de Paris¹⁷³ awarded a dress designer ("modéliste") 10,000 francs "dommages moraux" in an action brought for dismissal without sufficient notice against a fashion house. An interesting employer's claim comes from a decision of the Tribunal Civil de Marseille.¹⁷⁴ The claimant, sued for unfair dismissal, claimed that, as a result of her employee's grave breach of order and discipline in going on strike in breach of contract, she suffered a moral injury to her authority as an employer. The purpose of this judgment, granting her symbolic dam-

¹⁶⁸ *Op. cit.*, footnote 57.

¹⁶⁹ *Ibid.*, §998.

¹⁷⁰ Cours de droit civil positif français, vol. II (3rd ed., 1939), §629.

¹⁷¹ Trib. civ. Seine 11 oct. 1937, *Gaz. Pal.* 1937, 2, 792 (Princesse de Broglie).

¹⁷² Grenoble 4 nov. 1936, D. 1947, 79; Paris 23 nov. 1948, D. 1949, 57.

¹⁷³ Paris 12 mars 1964, J.C.P. 1964, II, 13642.

¹⁷⁴ Trib. civ. Marseille 20 dec. 1929, *Gaz. Pal.* 1930, 1, 426.

ages of one franc, seems to have been to impose on the employee the costs of the action since she had suffered no material damage. It is tempting to think that a French court today would not so readily conclude that an injury of this type would be compensable.

There have been a number of French decisions, similar in tone to the common law holiday cases and related cases, that have awarded "dommages moraux" where an extrapatrimonial interest was clearly and immediately engaged by the contract. A case in point is a decision awarding damages to a religious association of Moroccan Jews who received ordinary meat from a butcher instead of the kosher meat they had ordered.¹⁷⁵ The association had gone to a great deal of trouble to arrange the contract and fly in a rabbi from Morocco, and the butcher's action had "jet[é] le trouble et l'inquiétude parmi les adeptes des Sociétés demanderesses". The butcher could have been in no doubt whatsoever about the effect his actions would have on the plaintiffs. Much the same could be said about the funeral director who unlawfully retained the body of the deceased son of the plaintiff until a disputed bill had been paid, an action adjudged particularly odious by the court,¹⁷⁶ and about the stone mason who failed to renew the burial place of the plaintiff's child, with the consequence that the grave was desecrated and the parents denied the certainty that their child remained in the place where he had been laid to rest.¹⁷⁷

Of particular interest to common lawyers is the fourth category of cases, comprising instances where "dommages moraux" have been awarded, seemingly because a substantial injury of another kind cannot be established with the requisite degree of probity. A particularly graphic example is the case of the electrocuted racehorse¹⁷⁸ where, at the first level, the owner and trainer were unsuccessful in their attempts to recover damages based on the horse's chances of winning at the race meeting where the fatal accident occurred. The owner of the race horse recovered an

¹⁷⁵ Trib. com. Lyon 18 sept. 1936, *Gaz. Pal.* 1936, 2, 893.

¹⁷⁶ Trib. civ. Seine 20 dec. 1932, *S.* 1933, 2, 44.

¹⁷⁷ Paris 25 mai 1950, *D.* 1950. 439. The Court ruled explicitly that the "dommage moral" was "direct, actuel et certain".

Curiously, perhaps, the jurisprudence in France does not seem to have turned up contractual claims for "dommages moraux" arising out of disappointing holidays. French holidaymakers have had their disappointments but the primary legal problem appears to have concerned the nature of the relationship between the travel agent and the holidaymaker. In particular, it has not been at all certain whether the former is anything more than a "mandataire" liable only for "fautes personnelles" and not for the faults of others. It may also be the case that the failure of "dommage moral" claims to emerge in French holiday cases can be traced in part to the fact that the civil law is less likely to hang liability on oral and other informal promises than the common law. For a discussion of the problems actually arising in the French holiday cases, and of a recent ministerial "arrêté", see Boulanger, *loc. cit.*, footnote 11.

¹⁷⁸ *Supra*, footnote 52.

amount for "dommage moral" which was twice the figure recovered by the trainer for the same loss, despite the fact that the trainer would have had a more intimate day-to-day relationship with the horse. Damages for loss of a chance can certainly be awarded in French law, but given the sort of example that tends to be cited, typically the rising bureaucrat who is prevented by accident from attaining a certain career grade, a question surely of inevitability rather than chance, it may well be that the civil law's requirement that the damage be certain is more demanding in practice than the common law test.¹⁷⁹ It is hard, therefore, to resist Esmein's view that the "dommage moral" award amounted to disguised damages for the loss of a chance.¹⁸⁰

Other examples where a "dommage moral" award circumvents the difficulty of proving speculative losses can be seen in the cases where an actress recovered damages because her name did not receive the correct size of billing in advertisements publicizing a film;¹⁸¹ where the court found the existence of "un trouble commercial" when a bank failed to honour cheques despite the solvency of its customer's account;¹⁸² and where an artist was unable to display her works in a foreign city because of the defendant carrier's breach of contract in failing to clear customs on time.¹⁸³ In the last case, there was a clear reference to the plaintiff's lessened ability to sell her work.

Reading the French decisions, one finds little to shock the common lawyer hardened by recent developments in his own legal system to the possibility of awards for intangible loss. However, much as he might admire the pragmatism of the last group of cases, he would probably be disposed in most of them to consider awarding damages for a speculative, pecuniary loss rather than for an intangible loss as such. A reading of the Quebec authorities persuades one that it is perhaps a little premature to say whether Quebec decisions will follow the general trend of French and common law authorities, though there appear to be no obvious signs ruling out "dommage moral" claims in contract in principle. There is little in the doctrine. Tancelin, for example, simply refers to the courts' sovereign powers in levying damages¹⁸⁴ and Faribault states the now dated view that there is no liability outside exceptional cases.^{184a}

¹⁷⁹ See *Chaplin v. Hicks*, [1911] 2 K.B. 786 (C.A.) with which contrast *McRae v. Commonwealth Disposals Commission* (1950), 84 C.L.R. 377 (Aust. H.C.) and *Sapwell v. Bass*, [1910] 2 K.B. 486 (K.B.D.).

¹⁸⁰ *Loc. cit.*, footnote 53.

¹⁸¹ Trib. com. Seine 20 févr. 1932, *Gaz. Pal.* 1932, 1, 895 ("La douceur d'aimer").

¹⁸² Trib. com. Seine 22 déc. 1947, *Gaz. Pal.* 1948, 1, 93.

¹⁸³ Trib. gr. inst. Clermont-Ferrand 14 mai 1964, J.C.P. 64, II, 13894.

¹⁸⁴ M.A. Tancelin, *Théorie du droit des obligations* (1975), at §582.

^{184a} *Op. cit.*, footnote 65, at §454.

So far as Quebec jurisprudence is concerned, the migration of hospital's liability to contract¹⁸⁵ and the clear admissibility of *pretium doloris* claims means that "dommage moral" claims for injury to "la partie affective du patrimoine moral" can in principle be vindicated. Carriers' liability, another fruitful possibility for "dommage moral" claims, is not yet the clear example of contractual liability that it is in France, though if the judgment of Deschênes J. in *Surprenant v. Air Canada*¹⁸⁶ is supported, it eventually will be.

There are signs too of awards in the area of "la partie sociale du patrimoine moral". Such a claim was allowed in *Hunter v. Vandevoorde*,¹⁸⁷ where a sculptor recovered modest damages from a foundry which had destroyed his mould. The sculptor was under contract to supply a statue for a summer unveiling and, as a result of the defendant's action, had to make a fresh mould. This meant that the statue could not be delivered before December, when the impracticality of an outdoor unveiling ceremony hurt his reputation.

In addition to these developments, there is every likelihood that "dommages moraux" will be granted to disappointed holiday makers¹⁸⁸ and there is no reason to suppose that the field of labour relations in Quebec is so different from that in the common law jurisdictions as to render unthinkable an award of "dommages moraux" in unfair dismissal cases. Indeed, the recent decision of Pépin J. in *Jolicoeur v. Lithographie Montréal Ltée*¹⁸⁹ is an obvious straw in the wind: a lengthy period of notice was laid down and the learned judge made it plain that in appropriate cases an award could be made for loss of reputation brought about by dismissal. Furthermore, *Pilon v. Peugeot Canada*¹⁹⁰ was cited to the court, which

¹⁸⁵ *L'Hôpital Notre-Dame de l'Espérance v. Laurent*, *supra*, footnote 84. See also P.-A. Crépeau, *La responsabilité civile du médecin et de l'établissement hospitalier* (1956); P.-A. Crépeau, *La responsabilité médicale et hospitalière dans la jurisprudence québécoise récente* (1960), 20 R. du B. 433; P.-A. Crépeau, *La responsabilité civile de l'établissement hospitalier en droit civil canadien* (1981), 26 McGill L.J. 673. But see also A. Lajoie, P.A. Molinari et J.-L. Baudouin, *Le droit aux services de santé: légal ou contractuel* (1983), 43 R. du B. 675.

¹⁸⁶ [1973] C.A. 113.

¹⁸⁷ [1975] C.S. 633.

¹⁸⁸ *Lasry v. Air France* (Cour provinciale), *Le Devoir*, jeudi 21 août 1983 (holidaymaker, delayed four days in reaching Tel Aviv, entitled to \$800 calculated at the rate of \$200 a day); *Lepage v. Club Méditerranée* (Cour provinciale) (failure to provide babysitting services led to reimbursement of the whole cost of the holiday), *Montreal Gazette*, May 14, 1983. There is a summary of recent developments in T. Rousseau-Houle, *La responsabilité des agences de voyages: les tendances de la jurisprudence récente* (1983), 24 C. de D. 643, at pp. 664-66.

¹⁸⁹ [1982] C.S. 230.

¹⁹⁰ *Supra*, footnote 130. For recent developments, see *Faule v. Sun Life du Canada*, *Jurisprudence Express* No. 84-363 (C.S. Terrebonne 700-05-001272-792, 1984/03/28). But see also *Goulet v. Equipement de Bureau Astro-Tech Ltée*, *Jurisprudence Express* No. 84-364 (C.S. Hull 550-05-001414-823, 1984/03/31).

also made reference to the plaintiff's argument that a dismissal could give rise to an abuse of rights claim, though no firm opinion was expressed on the matter.

Implied recognition of "dommages moraux" entitlement was recently given by the Supreme Court in *Senex v. Chambre d'Immeuble de Montréal*,¹⁹¹ a case dealing with the "professional, personal and social humiliation, physical and mental suffering" arising from the dismissal of a real estate broker. The court was concerned primarily with the application of limitation periods, longer in the case of contract than delict. In the process, it confronted the argument that a plaintiff seeking recovery for such heads of loss had no "option" but to sue in delict and so in the present case would be out of time. According to the judgment of the court, this argument was not well-founded and the plaintiff was entitled to recover since he was within the contractual limitation period.

Senex appears therefore to take for granted the proposition that "dommages moraux" can be recovered in an appropriate contract case. Indeed, there seems absolutely no reason in principle why this should not be so, and the self-evident nature of such claims is also revealed by the starkly simple way that Article 293 of Book Five of the Draft Civil Code of Quebec¹⁹² states: "Material or moral damage is subject to reparation." The provision is applicable to contractual and delictual claims alike and the accompanying commentary in the Report reveals the paucity of doctrinal and jurisprudential sources in matters of contract.

II. The Problem

A. Defining and Controlling Intangible Loss Claims

It is useful at this point to step back and assess when an intangible loss claim can be expected to arise and how the courts are likely to filter it. The first and most obvious point to make is that it is expensive and time-consuming to assemble a case showing that such a loss has been suffered. This may not be true of pain and suffering (*pretium doloris*) awards in cases where the plaintiff has suffered personal injury: this is well-trodden ground and the pain and suffering is so graphic as to be almost palpable. But feelings of dissatisfaction, humiliation and distress will not be so easily proved to the satisfaction of a court, especially if it is operating on the perhaps tacit assumption that the injury must transcend a threshold of gravity before it can be compensated.¹⁹³ Consequently, one can strike out

¹⁹¹ *Supra*, footnote 146.

¹⁹² Civil Code Revision Office, Report on The Quebec Civil Code (1977), Vol. I (Draft Civil Code).

¹⁹³ Starck, *op. cit.*, footnote 31, at §123 requires the injury to be a serious one before eligibility for compensation arises. There are examples in the common law where courts take pains to create the appropriate rhetorical picture before awarding damages.

whole classes of contracts, where a measure of intangible loss in the event of breach can be easily predicted, simply on the ground that the amounts at stake are too trivial. The examples in mind concern parents who keenly feel their children's disappointment when Christmas toys do not work;¹⁹⁴ married couples finding on the occasion of their anniversary that the wine they bought is "corked"; customers upset by abusive altercations with a gas pump attendant; women whose hair is badly cut by their hairdressers; and restaurant clients who are served inferior meals. The cost of litigation, it should not be forgotten, also serves to exclude the assertion of trivial claims, though the dynamics of control are susceptible to being upset by an expansion in the class action industry. It is not impossible, however, that trivial claims might be vindicated in the legal sub-culture that we call small claims courts.

One therefore turns to contracts where a substantial investment is made by individuals: employment contracts, contracts to purchase houses, home computers and cars, and holiday contracts. Some of these cases will not be obvious candidates for intangible loss so that it will be necessary for a plaintiff to make a special disclosure at the time the contract is entered into if he is to recover anything under this head. The Nova Scotia decision of *Elder v. Koppe*¹⁹⁵ is a good example of this. The defendant there had to pay general damages of \$400 for the inconvenience, distress and disappointment stemming from his failure to provide a motor-home, which he knew was to be used for the plaintiffs' holiday.

In other cases, however, the possibility of intangible loss is so striking that no particular disclosure is called for. The holiday cases illustrate this well. But there remains a group of cases that are by no means easy to classify as regards disclosure of special loss. Difficulties, as we have seen, are posed by employment contracts. Moreover, a recent case that seems to be nicely poised is *Perry v. Sidney Phillips & Son*¹⁹⁶ where, relying on a negligently prepared survey report, the plaintiff purchased a house that turned out to have a leaking roof, a bulging wall and a defective septic tank system. He was held entitled to recover what at trial were referred to as "vexation damages" for the distress and discomfort of living in a defective house. In many cases of this type, the innovative quality of an intangible

¹⁹⁴ "I made a fair show of geniality throughout the day though the spectacle of a litter of shoddy toys and half-eaten sweets sickened me. Everything is so badly made nowadays that none of the children's presents seemed to work . . . A ghastly day": E. Waugh, *Diaries*, Christmas Day 1946.

¹⁹⁵ *Supra*, footnote 124. Rev'd on other grounds (1980), 108 D.L.R. (3d) 723, 37 N.S.R. (2d) 125 (N.S. App. Div.).

¹⁹⁶ *Ibid.* A case which is far too lax in awarding damages for mental distress in the absence of disclosure is *P.A. Wournell Contracting Ltd. v. Allen* (1979), 100 D.L.R (3d) 62, 35 N.S.R. (2d) 250 (N.S.T.D.) (negligent incorporation of company by a lawyer); contrast *Bernard v. Weiss* (1983), 24 A.C.W.S. (2d) 148 (B.C.S.C.) (vendor upset by purchaser's failure to complete).

loss judgment will be overshadowed by the accompanying award of damages for a recoverable pecuniary loss, such as the reduction in value of the house in *Perry*.

The civil law is no more favourable than the common law to the uncontrolled recovery of "dommages moraux" in contract. Both the French Code Civil and the Quebec Civil Code have remoteness of damage provisions similar in formulation to the common law rule. The two civil law provisions are almost identical. Article 1074 of the Quebec code provides:

The debtor is liable only for the damages which have been foreseen or might have been foreseen at the time of contracting the obligation, when his breach of it is not accompanied by fraud.

A few points flow from this provision.^{196a} First of all, there is no jurisprudence which raises the applicability of this formula to "dommage moral" cases. In France at least, this provision seems to be invoked most often in cases where claims are made against carriers for the loss of the contents of suitcases.¹⁹⁷ In principle, as we have seen, this provision poses a requirement different from the delictual rule that the injury be "certain", namely that the "dommages" (the quantum need not be estimated) be foreseeable at the date of the contract.

Such authority as there is in Quebec¹⁹⁸ suggests that the formula in Article 1074 will be applied in a way familiar to a common lawyer, yet one major difference between the civil law and the common law should be noted. Article 1074 makes an exception for cases of fraud ("dol") and the civil law definition of "dol", much wider than that of fraud in the common law,¹⁹⁹ is quite capable of encompassing a range of injurious or malicious acts that would not be fraud at all to a common lawyer. Some of the employment contract cases, so hard for a common lawyer to justify in terms of remoteness, could be classified in the civil law as cases of "dol" so that the plaintiff would not need to show that his "dommage moral" was "prévisible" at the contract date: it would be sufficient for it to satisfy the delictual standard by being "direct" and "certain". Where the civil law and the common law remain united, however, is in the fundamental position that the recoverability of "dommages moraux" is a question of remoteness of damage to be adjudged in the instant case.

^{196a} *Supra*, footnote 65.

¹⁹⁷ See for example Civ. 29 déc. 1913, D.P. 1916, I. 117; Civ. 29 janv. 1919, D.P. 1926, I. 228; Req. 11 juin 1928, D.P. 1930, I. 88.

¹⁹⁸ See *Remer Bros. Investment Corp'n. v. Robin*, [1966] R.C.S. 507, per Fauteux J. at p. 512: "La prévisibilité du dommage, envisagée au jour du contrat, doit s'apprécier *in abstracto*. Il ne s'agit pas, en effet, du dommage que le débiteur a pu prévoir, mais "qu'on a pu prévoir", dit l'art. 1074, du Code civil, ce qui veut dire: que le type abstrait du bon père de famille, de l'homme prudent et avisé a pu prévoir." See also *Le Sabot Inc. v. Blumer's (St. Jean) Ltd.*, [1972] C.S. 1; *Millette v. Courmoyer*, [1978] C.S. 337.

¹⁹⁹ See the discussion in *Kravitz, supra*, footnote 86.

It has been suggested by one writer²⁰⁰ that the idea of risk should be considered in deciding whether liability for intangible loss should arise in the event of breach. The principle is a useful one and, to a common lawyer at least, makes sense in the context of a legal system which permits parties to liquidate or limit recoverable damages in advance and, indeed, treats the obligation to pay damages as one created by and under the contract.²⁰¹ The civil law's tolerance of the setting of damages in advance by contracting parties, which extends traditionally to the sanctioning of penalty clauses,²⁰² could perhaps also extend to a willingness to consider the parties' implicit allocation of risk.

According to this principle of risk, the appropriate question to consider is how did the parties themselves allocate the risk of one party's distress and disappointment in the event of a contractual breakdown. Despite its initial attractions, this test might not be as helpful as it appears. Admittedly, the principle commends almost universal acceptance, since it is intimately connected to the idea that parties should be entitled to their reasonable expectations. But there is something of a tendency to overload risk, to expect of it more than it can deliver in practice. How often does a house surveyor give any real thought to the vexation that his client might experience in inhabiting a defective house? Do the travel agent and his customer really turn their minds to the scope of the travel agent's liability for intangible losses? If they did, one could certainly expect a clause limiting liability for intangible loss to be inserted into the written contract, or at least some measure of control by the travel agent over the euphoria of its copy writer. Does it make sense to ask solemnly whether the employer or employee implicitly undertook to bear the weight of disappointment in the event of the employee's unlawful dismissal?

This is not meant to suggest that the principle of risk allocation can never be useful, but rather that it is no universal solvent. In certain contracts, it can play a part and indeed its presence may be discernible in the very promise given by one party to another. A travel agent who makes extravagant promises of satisfaction and pleasure to his client can hardly be heard to say, in the absence of an exception clause, that he should not have

²⁰⁰ I. Ramsay, *Contract-Damages for Mental Distress—Injury to Feelings* (1977), 55 *Can. Bar Rev.* 169, at p. 175.

²⁰¹ *Supra*, footnotes 109-10.

²⁰² According to article 1076 of the Quebec Civil Code: "When it is stipulated that a certain sum shall be paid for damages for the inexecution of an obligation, such sum and no other either greater or less, is allowed to the creditor for such damages." A similar provision, Article 1152 of the French Code Civil, was supplemented by additional sentences in consequence of loi no. 75-597 du 9 juillet 1975, art. 1, so that it now reads as follows: "Lorsque la convention porte que celui qui manquera de l'exécuter payer une certaine somme à titre de dommages-intérêts, il ne peut être alloué à l'autre partie une somme plus forte, ni moindre. Néanmoins, le juge peut modifier ou augmenter la peine qui aurait été convenue, si elle est manifestement excessive ou dérisoire. Toute stipulation contraire sera réputée non écrite."

to pay damages for an intangible loss. Further, it can be said that sanguine promises create emotional expectations so as to make it all the more likely that damages may be recovered on breach for an intangible loss.²⁰³ Extravagant language tends to both satisfy the limits of remoteness rules and suggest risk assumption by the speaker.

A variation on the risk idea introduces the principle of insurance. Might it not be argued that the party better placed to effect insurance against disappointment and distress should bear the risk? The argument seems unacceptable for a number of reasons. First, even supposing that a consumer can buy cheaper insurance against a disappointing holiday than the travel agent can acquire in respect of his liability, it is hard to see why this should negative the liability of travel agents who choose to make extravagant promises in order to acquire a competitive edge in the market. Indeed, it could be argued that liability will expel inefficient operators from the market and will induce travel agents to bring pressure to bear on hotels to maintain quality standards. Secondly, while it may well be possible to insure against financial loss incurred in the course of a disappointing holiday, such as the cost of airline tickets for an early return home or the cost of alternative hotel accommodation, it seems inherently unlikely that an insurance company will provide cover for an intangible loss and at a rate that is cheaper than that available to the travel agent in respect of his tangible, liquidated liability to pay damages. The travel agent's liability premium is, in any case, unlikely to be affected much by his liability in respect of intangible loss. Furthermore, an insurance company would probably be just as sceptical as courts have until recently been when faced with a claim for intangible loss. If the award of damages for such losses is regarded as an advance for its enlightened recognition of the scope of contractual expectations, substituting insurance companies for the courts would inevitably produce a set-back. Thirdly, if the insurance argument has any substance to it at all, it would by no means be coterminous with the subject of contractual liability for intangible loss. Certain types of intangible loss, arising out of employment contracts for example, might not be susceptible to the insurance argument at all, while the insurance argument could easily be applicable to certain heads of tangible loss, for example personal injuries. It might be less expensive for the holiday maker to insure himself against personal injury in the hotel swimming pool than it would be for the travel agent or the hotel to insure against their liability. These factors suggest that, if the insurance argument is to be canvassed properly, it should be at a more general level, involving a consideration of how the parties' reasonable expectations are to be integrated into existing principles

²⁰³ If a doctor guarantees a skin-grafting operation will produce a hand that is as good as new and subsequently fails to fulfil his promise, it is likely that the patient's disappointment will be greater than if the doctor had promised to do his best and had been negligent. Cf. *Hawkins v. McGee*, 146 A. 641 (N.H., 1929).

of interpretation, implied terms, express terms and remoteness of damages.²⁰⁴

It can be predicted that, over the next few years, remoteness rules, coupled with a judicial disinclination to compensate for trivial emotional losses, will be refined so as to control and rationalize intangible loss claims. In the process, one can anticipate a tendency for the courts, in dealing with certain factual categories such as employment and holiday contracts, to take almost for granted an entitlement to compensation.

B. *The Assessment of Damages in Claims For Intangible Loss*

It is not at all easy to see how one should set about quantifying an intangible loss claim. If the matter were left to a jury, one could simply sit back and leave it to the common sense of the jury to settle an appropriate figure. The deliberations of the jury would be both confidential and impenetrable, and the function of an appellate court would be to ensure a minimum level of consistency among the various jury awards. But it is most unusual now for juries to sit in civil cases and, ironically, it has recently been held that contractual liability for intangible losses is so uncertain a body of law that it cannot be entrusted to a jury.²⁰⁵ Yet the sense of inadequacy felt by a judge sitting alone is almost palpable when it comes to the quantification of damages. The "I am doing the best I can" theme is rife in these cases. In the face of such judicial helplessness, the bold statement of a Quebec judge that a well-reasoned guess is as good as any way of quantifying "dommages moraux" is quite refreshing.²⁰⁶

So what factors should a court consider in setting the level of the damages award? One consideration is the extent to which an intangible loss claim can be made to serve as a surrogate for a loss that is hard to establish or quantify. Eligible for such an award might be an employee unlawfully dismissed in a way that undermines his confidence and inhibits his efforts to mitigate his damages by finding new employment.

Where goods and services are concerned, it might be useful to stress a theme that is constantly articulated in the civil law, namely to consider how much it would cost to provide the plaintiff with a source of satisfaction, a diversion, that would appease the hurt or the distress he has suffered. At the risk of sounding mundane, one might suggest the cost of a modest holiday

²⁰⁴ See also the quite curious views of Savatier, *op. cit.*, footnote 93, §287.

²⁰⁵ *Fulton v. Town of Fort Erie* (1982), 40 O.R. (2d) 235 (Ont. H.C.). Perhaps one cannot trust all judges. A magistrate awarded damages of \$400 for mental distress and physical inconvenience in the court below in *Falcko v. James McEwan & Co.*, [1977] V.R. 447. The action was brought against an electrician who refused to complete the wiring of a house and, when asked how he had arrived at the figure of \$400, the magistrate replied: "Pick a number": *ibid.*, at p. 449.

²⁰⁶ *Langlois v. Drapeau*, [1962] B.R. 277, per Casey J., at p. 290.

for someone suffering vexation after purchasing a defective house on the recommendation of a negligent surveyor; and a substitute holiday paid for by the travel agent where the first holiday is substandard.²⁰⁷ In the case of a holiday contract, the cost of procuring a substitute holiday might be appropriate. Obviously, this damages assessment approach cannot be intellectualized to any great extent, but it is superior to random number selection.²⁰⁸

A common lawyer would not be quite as susceptible as a civilian to the notion that, since substantial damages for a loss that cannot be quantified must be punitive, intangible losses should be compensated by the award of symbolic and nominal damages. To recover such damages at common law, it is enough to establish merely that there has been a breach of contract, so the common lawyer is not in tune with the idea of recovering nominal damages to vindicate an intangible loss claim.

At the other end of the scale from nominal damages lie punitive damages. Earlier in this article, it was noted that there is a strong tendency for French jurists to rationalize the award of "dommages moraux" by reference to the punitive principle, which would not be accepted in Quebec given the hostility to punitive damages in that province. In the common law, punitive damages have traditionally been regarded as unavailable in matters of contract.²⁰⁹ There has also been a considerable debate as to the extent to which they can be awarded in tort,²¹⁰ a debate unduly complicated by the tendency of some common lawyers to confuse the award of aggravated damages and of punitive damages. Aggravated damages are "a balm for mental distress" and could, for example, be awarded to compensate a plaintiff who suffers an intangible loss as a result of the defendant's high-handed breach of contract. In fact, the award of a substantial sum to the plaintiff could be seen by advocates of the punitive damages approach as condign punishment of the defendant for his contumacious behaviour; supporters of the aggravated damages approach might see the award of that same sum as a genuine attempt to fix at large a sum of money equivalent to an injury which is not precisely quantifiable in monetary terms.²¹¹

²⁰⁷ The major difficulty with such an approach is that it is somewhat banal and could, conceivably, present the unedifying spectacle of a court engaging in a search for sumptuary possibilities for someone who is not lacking in the luxuries of life. If the plaintiff already has a colour television, an affectionate dog, a good stereophonic system etc., should the court be pricing jacuzzi baths? See footnote 96, *supra*, (last paragraph).

²⁰⁸ *Supra*, footnote 205.

²⁰⁹ *Addis v. Gramophone Co.*, *supra*, footnote 100.

²¹⁰ See G. Fridman, *Punitive Damages in Tort* (1970), 48 *Can. Bar Rev.* 373.

²¹¹ One can sympathize with the commentator who refers to the "theoretical" distinction between aggravated and exemplary (punitive) damages: Rose, *loc. cit.*, footnote 115, at footnote 11.

The possibility of punitive damages awards has been debated recently in Ontario. Perhaps the most eloquent advocate of this approach is Linden J. in *Brown v. Waterloo Regional Board of Commissioners of Police*.²¹² In that case, the learned judge, carefully distinguishing aggravated and punitive damages, concluded that punitive damages should be awardable, albeit in rare cases. He made it plain that punitive damages should not be confined to those contract claims that could be asserted also in tort, and approved the award of such damages in cases where the defendant's behaviour was "particularly shocking",²¹³ though he did not consider that the defendant in the present case fell into that category.

While one can sympathize with judges whose liberal, humane values are affronted by having to view from close quarters the nasty side of human nature, one must stress the danger of judges becoming so emotionally involved as to forget the purpose of damages awards for breach of contract. They are designed to compensate the plaintiff, and the plaintiff is amply cared for if he is permitted to recover an award for an intangible loss that he cannot quantify in monetary terms. If the defendant is to be punished, why should he not be arraigned in the usual way for an offence set out in the Criminal Code with the benefits of due process and the criminal standard of proof? When *Brown* went up to the Ontario Court of Appeal,²¹⁴ it was reversed in part on different grounds, but the frigid response given to the emotional distress claim suggests that the court would have been at the very least equally inhospitable to a punitive damages claim.

Surrendering to the punitive principle indicates a perhaps unnecessary despair at ever finding an appropriate figure to set against an intangible loss. A theme that might legitimately be considered in such loss claims is the principle of "consumer surplus",²¹⁵ which has been defined as the excess utility or subjective value obtained from what economists call a "good" over and above the utility associated with its market price.²¹⁶ The

²¹² (1982), 136 D.L.R. (3d) 49, 37 O.R. (2d) 277 (Ont. H.C.), reversed on appeal on different grounds, *supra*, footnote 142. This is inconsistent with *Cardinal Construction Ltd. v. The Queen in Right of Ontario* (1981), 122 D.L.R. (3d) 703, 32 O.R. (2d) 575 (Ont. H.C.), aff'd (1981), 128 D.L.R. (3d) 662, 38 O.R. (2d) 161 (Ont. C.A.), but a motion to amend pleadings so as to claim punitive damages was allowed in *Centennial Centre of Science and Technology v. VS Services Ltd.* (1982), 40 O.R. (2d) 253 (Ont. H.C.), where a number of authorities are collected. At present, the Ontario position seems to be that punitive damages is being pressed to some degree at first instance, but there are no signs of success at the appellate level. Other provinces have yet to show the same sympathy for punitive damages that Ontario has so far revealed.

²¹³ *Ibid.*, at pp. 64 (D.L.R.), 292 (O.R.). What does the qualifying epithet add?

²¹⁴ *Supra*, footnote 142.

²¹⁵ See D. Harris, A. Ogus and J. Phillips, *Contract Remedies and the Consumer Surplus* (1979), 95 Law Q. Rev. 581.

²¹⁶ *Ibid.*, at p. 582.

consumer surplus anticipated by someone who intends to use a "good" has been defined as the equivalent of the profit which a business man makes from a contract.²¹⁷

This approach is useful in revealing that a consumer who bargains for a subjective feeling of satisfaction and is denied it by the defendant's breach of contract has just as much right to be compensated as the plaintiff who is denied a profit. It therefore legitimizes the award of damages for intangible losses. The difficulty lies in quantifying the loss. Taking, for example, a holiday contract, one would calculate the loss of satisfaction by subtracting the agreed cost of the holiday from the maximum amount that the consumer would have been prepared to pay for the agreed holiday in view of his priorities and ignoring the possibility of competition to provide the same type of holiday from other sources. One only has to state this approach, however, to realize just how impossible it is to apply. How can this consumer surplus be conceivably quantified?

Another drawback to this approach is that it is useful only in calculating lost expectations; it does not help in quantifying reliance losses. While the consumer surplus idea may be an intelligible guide to the calculation of benefits that would have improved the contract-date position of the plaintiff, it is of no use in calculating the damages of a plaintiff whose contract-date position has deteriorated as a result of the defendant's breach.²¹⁸ This plaintiff is not merely denied happiness; he is positively made miserable by the defendant's breach. Consequently, there seems little in the consumer surplus idea that would actually help lawyers in the practical handling of intangible loss claims.

A final possibility is suggested by one of the judgments in *Snyder v. Montreal Gazette*.²¹⁹ Taking his cue from decisions of the Supreme Court limiting pain and suffering and loss of amenities awards to a maximum figure of \$100,000 in personal injuries cases,²²⁰ Owen J. stated that this same figure should set a ceiling for all "dommage moral" claims. *Snyder* concerned a claim for defamation under Article 1053 of the Quebec code. At trial, \$135,000 were awarded as "dommages moraux", but on appeal this figure was reduced drastically to \$13,500 in a way that is very much

²¹⁷ *Ibid.*, at pp. 582-83.

²¹⁸ Only the most fervent advocate of the law and economics movement could enter an unreal masochistic world to ask someone how much money he would require before suffering an intangible loss. It might not be an impossible inquiry: the English Common Cold Research Institute has no shortage of volunteers willing to incur the risk of infection in return for a free holiday in tranquil surroundings.

²¹⁹ (1983), 5 D.L.R. (4th) 206 (Que. C.A.).

²²⁰ *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R., (1978), 83 D.L.R. (3d) 452; *Thornton v. Board of Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, (1978), 83 D.L.R. (3d) 480; *Arnold v. Teno*, [1978] 2 S.C.R. 287, (1978), 83 D.L.R. (3d) 609.

consistent with the civil law's tendency to grant modest awards in "dommage moral" cases.

As we have seen, the civil law has much more of a global view than the common law of "dommage moral" and it is therefore not surprising to see this initiative coming from a civilian jurisdiction. In so far as it tends towards consistency in the law, this approach has much to commend it. There is something odd about a legal system which often awards more to defamation claimants than to claimants who are physically crippled. Nevertheless, a number of factors should be considered before Owen J's initiative is given too enthusiastic a reception. In personal injuries cases where a large amount is given for pain and suffering and loss of amenities, there will usually be very substantial awards for loss of future earnings and for special damages covering constant medical attendance and the related physical needs of seriously injured individuals. Indeed, large as the loss of amenities award may be, it will often pale into insignificance against the amounts given for these other losses. The amount of \$100,000 may therefore not be a wholly reliable figure to serve as a base for calculating a purely intangible loss. Secondly, it should be remembered that an intangible loss award frequently serves as a substitute for an award that is not given for another, unprovable loss. This factor should be borne in mind if the adoption of the Owen formula arises for consideration. Thirdly, the formula provides a ceiling without giving any indication as to how awards are to be distributed below that ceiling, so that it may not advance the inquiry much.

On balance, it is hard to make scientific the process of awarding damages for intangible losses in contract cases. The most one can hope for is internal consistency in awards and in the values espoused by our legal system. The Owen formula is an interesting one that might be harnessed in contract cases if the anticipated flood of intangible loss claims, suggested by developments dealt with in this article actually does materialize. It is likely, however, that the formula, as a universal guide to the calibration of intangible loss claims, will probably be rejected by the jurisdictions under review in this article as too ambitious. Money, as a medium of exchange, is unlikely ever to supply a satisfactory evaluation of intangible losses and it can be predicted that courts, treading a fine line between punishment and compensation, will move in the majority of cases²²¹ towards the reduction of awards to the level of conventional, palliative sums. If this does occur,

²²¹ A likely prediction is that the type of contract where intangible loss is the major item, such as a holiday contract, will probably yield substantial though not spectacular damages awards. Contracts, such as employment contracts and sale of land contracts, yielding substantial amounts of damages for items of pecuniary loss will probably produce modest awards for intangible loss. It is easy to forget that contractual damages are sometimes pressed into service to fulfil a deterrent function, which suggests that intangible loss awards will in some cases have major functions to perform.

and if the range of allowable cases becomes settled, it is likely that the habit of making these awards will pre-empt intellectual inquiry into the purpose of granting damages for intangible loss.

Conclusion

These developments in the area of intangible loss show that there is no obvious answer to the question why the incidence of such damages awards is accelerating. At the very least, one has to concede that the reasons are probably not the same for all types of contracts, though the consciousness that intangible losses can be compensated is probably responsible for a push-and-pull effect in which, for example, employment cases support travel cases and *vice versa*. To this limited extent it can be said that one is dealing with a general contractual phenomenon, though it must be suggested that employment awards are probably a response to economic recession and the dehumanizing effect of unemployment while holiday awards, for example, may well be motivated by an inchoate sentiment that a consumer loss is the private citizen's equivalent of a businessman's loss of profit or trading loss, as well as by admiration for the aggressive hedonism required to pursue such claims in the face of discouragement and set-backs.

Though the legitimacy of intangible loss awards is now established in the common law, and has been so for a long time in the civil law where doctrinal-conceptual justifications have obviated the need for pragmatic justifications, neither system of law can give definite guidance on the quantification of such awards. Predictability in this matter is probably a hopeless venture and perhaps the most one can expect is an informal tariff established at an authoritative judicial level. High-ranking decisions are still somewhat sparse in this area of law and there are no obvious signs that the development of intangible loss awards has run its course.

A number of points remain. First, the award of contractual damages for intangible losses may be seen by some common lawyers as evidence that contract and tort are in the process of merging to produce a single body of obligations possessed of a conceptual unity that would be comprehensible to a civil lawyer, for whom "dommages moraux" and non-fulfilment of obligations is an integral subject. There are a number of developments in the area of contributory negligence and remoteness of damage²²² suggestive of such a process and, indeed, the invasion by contractual damages of the intangible zone also lends some support to the thesis. It would, however, be misguided to believe that contract is simply assuming the clothing of tort because, as seen above, the law of tort is by no means

²²² Bridge, *loc. cit.*, footnote 16 at pp. 906-13; M.G. Bridge, Defective Products, Contributory Negligence, Apportionment of Loss and the Distribution Chain: *Lambert v. Lewis* (1982), 6 Can. Bus. L.J. 184.

systematic and comprehensive in providing compensation for intangible loss.

Secondly, it is clear that the civil law is conceptually better equipped to deal with intangible loss, though the common law has made great strides over the last ten years. Until recently, nevertheless, there has been little evidence of "dommage moral" recovery in contract in Quebec civil law, a phenomenon that can probably be attributed to the low density of litigation and the innate conservatism of Quebec legal life. There are recent signs of an increasing consciousness on the part of Quebec litigants and courts of the possibilities inherent in making a claim for "dommages moraux". It might be said that this is symptomatic of a belated awareness of the characteristics and scope of a general civil law of obligations but it is more likely that Quebec, an integral part of North America, has become aware of the fact, for example, that overenthusiastic travel agents can be sued by disappointed holidaymakers in other continental jurisdictions.

Finally, one is left with the paradox that a belief that there is more to life than money and property has led to the pecuniary vindication of non-pecuniary interests. This truly is the bottom line.
