

## Quantification of damages for non-pecuniary losses deriving from breach of contract

Zlatin Zlatev\*

**Abstract:** The existing principles of quantification of damages for non-pecuniary losses deriving from breach of contract which are adopted by the courts or advanced in the legal scholarship appear to be arbitrary and founded on certain misconceptions. This article proposes three different models for assessment based on the consequences of breach. When the performance is possible after the breach, the damages are equal to the value of an alternative subject matter if such is available from elsewhere. If there are no other sources from where the bargained-for subject matter can be obtained, then the amount of the damages is based on the value of a substitutive benefit which leads to attainment of the initial contractual aim. If the promisee has no interest in delayed performance, the damages are quantified with respect to a different non-pecuniary benefit which is commensurable to the one that was pursued with the contract initially.

**Keywords:** breach of contract, non-pecuniary losses, quantification of damages

### 1. INTRODUCTION

The principles of recoverability of damages for non-pecuniary losses have undergone significant development during the last few decades.<sup>1</sup> As a result of this evolution it is now established that non-pecuniary losses can be recovered, subject to the principles of limitation of damages,<sup>2</sup> only in two exceptional cases: where the important or major part<sup>3</sup> of the

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\*Lecturer, Northumbria University. I would like to express my gratitude to Charlie Webb, Jonny Hall, David McGrogan, and the two anonymous reviewers of the *Legal Studies* for their comments on earlier drafts of this article.

<sup>1</sup> For general analyses of the recovery of damages for non-pecuniary losses, see E Peel (ed.) *Treitel on The Law of Contract* (London: Sweet & Maxwell, 15th edn, 2020), para. 20-082 – 20-092; Mayson, Burrows and Cartwright (eds.) *Anson's Law of Contract*, (Oxford: Oxford University Press, 30th edn, 2016) pp 566-568 and Beale, H. (ed.), *Chitty on contracts* (London: Sweet & Maxwell 33rd edn, 2018) para 26-151 – 26-159. See also Andrew J Bowen 'Watts v Morrow and the Consumer Surplus' (2003) *Scots Law Times*, 1, 1 – 6; Michael G Bridge 'Contractual Damages for Intangible Loss' (1984) *The Canadian Bar Review*, 62, 323 – 370; A S Burrows 'Mental Distress Damages in Contract – a Decade of Change' (1984) *LMCLQ*, 1984, 119 – 134; A Burrows 'Metal distress damages for breach of contract' (1990) *New LJ*, 140 (27 April 1990), 596 – 599; David Capper 'Damages for distress and disappointment – the limits of Watts v Morrow' (2000) *LQR*, 116 (Oct), 553 – 557; David Capper 'Damages for Distress and Disappointment – Problem Solved' (2002) *L.Q.R.*, 118 (April), 193 – 196; Adrian Chandler and James Devenney 'Breach of Contract and the Expectation Deficit: Inconvenience and Disappointment' (2007) *Legal Studies*, 27 (No. 1, March 2007), 126 – 154; Mysty Clapton and Mitchell McInnes 'Contractual Damages for Mental Distress' (2007) *LQR*, 123 (Jan), 26 – 29; Hugh Collins 'Compensation for the Manner of Dismissal' (2004) *ILJ*, 33(2), 152 – 158; Hugh Collins 'Compensation for Dismissal: In Search of Principle' (2013) *ILJ*, 41 (2, 1 June 2012), 208 – 227; Brain Coote 'Contract Damages, Ruxley, and the Performance Interest' (1997) *CLJ*, 56, 537-570; Nelson Enonchong 'Breach of Contract and Damages for Mental Distress' (1996) *OJLS*, 16, (No. 4, Winter, 1996), 617 – 640; Nelson Enonchong 'Contract Damages for Injury to Reputation' (1996) *MLR*, 59, 592 – 640; Stuart Hetherington 'Passenger's Damages for Disappointment and Distress' (1993) *LMCLQ*, 1993 (part 4, November 1993), 289 – 291; Jackson, Bernard S., 1977. Injured Feelings Resulting from Breach of Contract. *ICLQ*, 26 (Issue 03, July 1977), 502 – 515; R G Lawson 'Breach of Contract and Damages for Disappointment' (1974) *The Solicitors' Journal* 118 (11 January 1974), 16; Ter Kah Leng 'Contractual Damages for Mental Distress' (2002) *Nottingham LJ*, 11, 65 – 69; Jonathan Lewis 'Can Damages Buy You Happiness: Damages for Distress after *Farley v. Skinner*' (2008) *King's College LJ*, 19, 113 – 134; Elizabeth Macdonald 'Contractual Damages for Mental Distress' (1994) *JCL*, 7, 134 – 155; Mitchell McInnes 'Contractual Damages for Mental Distress – Again' (2009) *L.Q.R.*, 125 (Jan), 16 – 20; Ewan McKendrick and Martin Graham 'The Sky's the Limit: Contractual Damages for Non-Pecuniary Loss: *Farley v Skinner*' (2002) *LMCLQ*, 2002 (Part 2), 161 – 169; Catherine Mitchell 'Promise, Performance and Damages for Breach of Contract' (2003) *Journal of Obligations and Remedies*, December 2003, 67 – 86; Janet O'Sullivan 'Contract Damages for Failed Fun—Taking the Plunge' (1995) *CLJ*, 54 (Issue 03, November 1995), 496 – 499; David Pearce '*Farley v Skinner*: Right or Wrong?' (2002) *C.L.J.*, 61 (1), 24 – 27; Andrew Phang 'Subjectivity, Objectivity and Policy – Contractual Damages in the House of Lords' (1996) *JBL*, 1996 (July), 362 – 381; Andrew Phang 'The crumbling edifice? The award of contractual damages for mental distress' (2003) *JBL*, 2003 (July), 341 – 388; Samuel A Rea Jr 'Nonpecuniary Loss and Breach of Contract' (1982) *JLS*, 11 (No. 1, Jan., 1982), 35 – 53; David Yates 'Damages for Non-Pecuniary Loss' (1973) *MLR*, 36 (5), 535-541.

<sup>2</sup> The recovery of damages for non-pecuniary losses is subject to the requirements of causation – *Abbott v RCI Europe* [2016] *EWHC 2602* (Ch) at 116-117, remoteness – *Koufos v C. Czarnikow Ltd (The Heron II)* [1969] 1 A.C. 350, and mitigation – *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2015] *EWHC 1250* (Comm), [2015] 1 C.L.C. 765 at 31-38.

<sup>3</sup> See *Farley v Skinner*, [2002] 2 A.C. 732, per Lord Steyn, at 747 et. seq., where the previous law, allowing recovery only in cases where the sole object of the contract was to provide pleasure, relaxation and peace of mind, is compared to the new rule established in *Farley*, where it was held sufficient that the major or important part of the contract was to give any of these non-pecuniary benefits to the claimant. About the requirement of the old law where it was required that the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation see *Watts v Morrow* [1991] 1 W.L.R. 1421 at 1445.

contractual object is to provide a non-pecuniary benefit to the promisee<sup>4</sup> or where the non-pecuniary losses cause personal injury,<sup>5</sup> physical inconvenience or discomfort.<sup>6</sup> And while there are some concerns<sup>7</sup> about the appropriateness of this scope of recoverability of damages, the cases<sup>8</sup> where non-pecuniary losses are compensable are relatively clear.<sup>9</sup>

This is not true with respect to the principles applied for assessment of damages for non-pecuniary losses. There are no scholarly works exploring this issue in a general and comprehensive manner. Moreover, there are not many guidelines for quantification of damages for non-pecuniary losses to be found in the case law. The purpose of this article is to address both of these issues. It aims to represent a critique of the existing principles for assessment of damages and to suggest better theoretical foundations on which the awards for compensation of non-pecuniary losses can be based.

The present article explores first the existing rules for quantification of damages for non-pecuniary losses as they can be derived from the cases. It argues that there is not sufficient clarity for a principled and fair assessment of damages for non-pecuniary losses suffered by the promisee.<sup>10</sup>

This is the first article that proposes clear and comprehensive principles for assessment of damages for non-pecuniary losses in the common law. It is submitted that the quantification of the damages should be based on three alternative models whose application depends on the consequences of the breach. Firstly, if the contractual performance is possible after the breach and there are other sources from where the bargained-for subject matter<sup>11</sup> can be procured, then the damages are equal to the value of an identical subject matter. Secondly, there might be no alternative sources from where this subject matter could be obtained, but the aim<sup>12</sup> pursued by the promisee – the outcome resulting from the stipulated performance, might still be able to be achieved. In these cases, the assessment should be based on the value of a substitutive benefit which leads to attainment of the initial contractual aim. Lastly, if the promisee has no interest in delayed performance, the damages should be quantified with respect to another non-pecuniary benefit which is commensurable to the one that was pursued with the contract initially.

## 2. EXISTING PRINCIPLES OF QUANTIFICATION OF DAMAGES FOR NON-PECUNIARY LOSSES

There are few authorities which analyse the principles of quantification of damages for non-pecuniary losses. On the one hand, this is due to the limited type of cases where non-pecuniary losses might be compensable – only when some physical inconvenience or discomfort is caused by the breach, or where one of the major or important objects of the contract is to provide enjoyment or other sentimental benefit to the promisee.<sup>13</sup> On the other hand, the cases where non-pecuniary losses are inflicted tend to discuss whether the damages for non-pecuniary losses should be recoverable rather than

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<sup>4</sup> Throughout this article the parties to a contract who can suffer non-pecuniary losses as a result of breach are referred to as ‘promisees’ irrespective of the fact that they might be promisors with regard to another obligation in a synallagmatic contracts. Appellations denoting their procedural roles like ‘claimants’, ‘defendants’, ‘respondents’ and ‘appellants’ are used only where citations or references to particular proceedings are provided.

<sup>5</sup> See *Godley v Perry* [1960] 1 W.L.R. 9.

<sup>6</sup> See *Watts v Morrow* [1991] 1 W.L.R. 1421 at 1445. With respect to the distinction between damages for person injury, damages for pain and suffering and damages for distress, vexation and frustration where the very object of the contract has been to provide pleasure, relaxation or freedom from molestation, as it is understood in Australia, see *Moore v Scenic Tours Pty Ltd* [2020] HCA 17.

<sup>7</sup> Enonchong, Nelson, *op. cit.*, at 619 et. seq.

<sup>8</sup> For a summary of English law on recovery of damages for non-pecuniary losses, as it was in 1992, see the leading Australian case *Baltic Shipping Co v Dillon* (1993) 176 C.L.R. 144.

<sup>9</sup> Ewan McKendrick and Katherine Worthington, ‘Chapter 13: Damages for Non-Pecuniary Loss’ in Nili Cohen and Ewan McKendrick (eds.) *Comparative Remedies for Breach of Contract* (Oxford and Portland, Oregon: Hart Publishing, 2005), 287 – 322.

<sup>10</sup> Throughout this article the parties to a contract who can suffer non-pecuniary losses as a result of breach are referred to as ‘promisees’ irrespective of the fact that they might be promisors with regard to another obligation in a synallagmatic contracts. Appellations denoting their procedural roles like ‘claimants’, ‘defendants’, ‘respondents’ and ‘appellants’ are used only where citations or references to particular proceedings are provided.

<sup>11</sup> In this work the result or the performance the promisor is obligated to provide to the other party is referred to as subject matter of the agreement. For more details about its general nature and effects, see *Chitty on contracts, op. cit.*, para 21-001 et. seq.

<sup>12</sup> The notion of contractual aim is new and has not been examined in the legal literature previously. For more details about its importance for the assessment of damages for non-pecuniary losses, see below, section V, subsection A.

<sup>13</sup> For more details about the recoverability of damages for non-pecuniary losses, *Chitty on contracts, op. cit.*, para 26-151.

providing very detailed accounts of the methods of their quantification. The present section explores in chronological order the leading authorities where damages for non-pecuniary losses were awarded. This examination demonstrates that despite the relatively detailed analyses of the circumstances in which damages might be compensable, the present law does not establish a sufficiently clear basis on which the assessment of these damages is founded.

One of the earliest examples where damages for non-pecuniary losses were awarded is *Hobbs and Wife v The London and South Western Railway Company*.<sup>14</sup> In this case the plaintiff, along with his wife and two children, bought tickets and boarded the midnight train from Wimbledon to Hampton Court from where they planned to walk to their house. The train went onto another branch of the railway line and the plaintiffs had to alight at a different station which was between four and five miles away from their house. Being unable to find an alternative conveyance or accommodation,<sup>15</sup> they had to undertake a long and unpleasant walk on a drizzling and cold night. They raised a number of claims for damages for non-pecuniary losses, but the court upheld only one of them. For 'the inconvenience suffered by the plaintiffs in being obliged to walk home'<sup>16</sup> they were awarded 8l.

It is unclear how the jury from the court of assizes determined the amount of this compensation. The divisional court, where the appeal was held, did not interfere in the quantification of the damages. Nevertheless, the judgement delivered by Blackburn J.<sup>17</sup> contains an interesting remark about the approach that should be taken in such circumstances:

Now ... what the passenger is entitled to recover is the difference between what he ought to have had and what he did have; and when he is not able to get a conveyance at all, but has to make the journey on foot ... the jury were to see what was the inconvenience to the plaintiffs in having to walk, as they could not get a carriage. ... [T]hey view they were certainly entitled to recover for that, and if it had been left to me, I am not sure whether or not I should have given 8l., ... but that is not the question for us.

Almost a century later, damages for non-pecuniary losses were awarded in a series of cases of substandard holidays.<sup>18</sup> In *Jarvis v Swans Tours Ltd*.<sup>19</sup> the plaintiff went to a ski resort in Switzerland where he was promised to have an entertaining winter vacation within a picturesque Alpine setting. He did not receive some of the promised services at all, while others were significantly inferior to those promised. The county court judge found that during the first week the plaintiff had a holiday which was partially inferior and, during the second week, very largely inferior to what he had been led to expect, and he awarded him £31.72 damages. The Court of Appeal held, allowing the plaintiff's appeal against the quantum of damages, that he was entitled to be compensated for his disappointment and distress deriving from the loss of the entertainment and facilities for enjoyment which he had been promised, and his compensation was increased to £125.

There are some clues about the principles which were applied for quantification of the plaintiff's damages. Lord Denning M.R. clarifies that the difference between the value of the promised and actually delivered services, which was applied by the county court, is not the appropriate measure of damages. He acknowledged the challenges in the process of quantification, but added that 'it is no more difficult than the assessment which the courts have to make every day in personal injury cases for loss of amenities'.<sup>20</sup> He then stated that '[l]ooking at the matter quite broadly, I think the damages

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<sup>14</sup> (1874-75) L.R. 10 Q.B. 111.

<sup>15</sup> But see *Hamlin v The Great Northern Railway Company* 156 E.R. 1261, where it was held at 410 that 'the inconvenience or injury to the feelings of the plaintiff cannot be taken into consideration in assessing the damage' in a case where the promisor did not provide transportation to a certain station and as a result, the promisee had to arrange overnight accommodation.

<sup>16</sup> *Hobbs v London and SW Ry Co* (1875) L.R. 10 Q.B. 111, (1874-75) L.R. 10 Q.B., at 111.

<sup>17</sup> *Hobbs v London and SW Ry Co* (1875) L.R. 10 Q.B. 111, (1874-75) L.R. 10 Q.B., at 120.

<sup>18</sup> In other cases where substandard holidays were provided, the damages for non-pecuniary losses were calculated in similar ways: *Feldman v. Allways Travel Service* [1957] C.L.Y. 934, *Stedman v. Swan's Tours* (1951) 95 S.J. 727, C.A., *Jackson v Horizon Holidays Ltd* [1975] 1 W.L.R. 1468; *Wings Ltd v Ellis* [1985] A.C. 272; *Baltic Shipping Co v Dillon* (1993) 176 C.L.R. 144; and *Milner v Carnival Plc* [2010] EWCA Civ 389; [2010] 3 All E.R. 701.

<sup>19</sup> [1973] Q.B. 233.

<sup>20</sup> *Jarvis v Swans Tours Ltd*. [1973] Q.B. 233, at 238.

in this case should be the sum of £125'.<sup>21</sup> Nevertheless, he did not provide any details for the manner in which he arrived at this figure. Edmund Davies L.J.'s judgement does not contain further details either: 'To arrive at a proper compensation for the defendants' failure is no easy matter. But in my judgment we should not be compensating the plaintiff excessively were we to award him the £125 damages proposed by Lord Denning M.R.'<sup>22</sup> Stephenson L.J. provided similar justification for the quantification of the damages: 'rather than try to put a value on the subject matter of this contract, first as promised and then as performed and to include the inconvenience to the plaintiff in the process, we should award the plaintiff a sum of general damages for all the breaches of contract at the figure suggested by Lord Denning M.R.'<sup>23</sup>

Another case where damages for non-pecuniary losses were recovered was *Watts and Another v Morrow*.<sup>24</sup> The plaintiffs instructed the defendant to survey and advise them on the structural and general condition of a property in the countryside which they wanted to purchase and use as a summer residence. In reliance on the information provided by the defendant, they bought the property, but defects beyond those described in the defendant's report were discovered. The Court of Appeal confirmed that in circumstances where physical inconvenience and discomfort were caused, damages for non-pecuniary losses were recoverable, but held that the amount of damages awarded by the county court was excessive and reduced it accordingly from £4000 to £750 for each plaintiff.

The judgement contains a lengthy discussion about the measure of damages for pecuniary losses in cases of surveyor's contracts, but it is less detailed with regard to the award of the damages for distress and inconvenience. Ralph Gibson L.J. justifies his decision to decrease the amount of damages to £750 for each plaintiff by comparing identical cases where the plaintiffs suffered inconvenience and discomfort in their own homes. He took into account the degree and the period during which these non-pecuniary losses were caused and concluded that the compensation should be modest.<sup>25</sup>

In *Ruxley Electronics and Construction Ltd v Forsyth*<sup>26</sup> the defendant contracted for a swimming pool to be built with a specific depth. The pool built by the plaintiffs was shallower, but it was still entirely safe for swimming and diving and the value of the defendant's property was not affected by this breach of contract. When the building companies sued the defendant for the balance of the contractual price, which the defendant refused to pay, he counterclaimed for the cost of rebuilding the pool to the initially agreed depth. The county court dismissed the defendant's counterclaim and awarded him damages for his loss of amenity in the amount of £2,500. The defendant appealed this decision. The Court of Appeal<sup>27</sup> allowed his appeal and held that he should be awarded the amount that was needed to rebuild the pool. Then the plaintiffs appealed the decision. The House of Lords<sup>28</sup> allowed the appeal of the plaintiffs and upheld the county court's award of £2,500 for loss of amenity.

The award of £2,500 aims to compensate the defendant for his non-pecuniary losses. It is not entirely clear how the county court calculated this amount. The Court of Appeal did not uphold it and therefore its decision does not contain any references about the quantification of the damages for non-pecuniary losses.<sup>29</sup> The House of Lords decided that the plaintiff should not be allowed to receive the cost of reinstatement and restored the decision of the county court without reconsidering the amount that the defendant was due to receive for his loss of amenity. Lord Mustill made an interesting comment about the possible route that can be used for assessment of this type of loss: 'The amount may be small, and since it cannot be quantified directly there may be room for difference of opinion about what it should be. But in several

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<sup>21</sup> *Jarvis v Swans Tours Ltd*. [1973] Q.B. 233, at 238.

<sup>22</sup> *Jarvis v Swans Tours Ltd*. [1973] Q.B. 233, at 240.

<sup>23</sup> *Jarvis v Swans Tours Ltd*. [1973] Q.B. 233, at 241.

<sup>24</sup> [1991] 1 W.L.R. 1421.

<sup>25</sup> *Watts v Morrow* [1991] 1 W.L.R., at 1443.

<sup>26</sup> [1996] A.C. 344

<sup>27</sup> [1996] AC 344.

<sup>28</sup> [1996] A.C. 344.

<sup>29</sup> The award of the Court of Appeal aims to ensure that the performance that was initially agreed could be procured, and it represents an alternative way than the one adopted by the House of Lords in which the inconvenience and discomfort, suffered by the defendant, were going to be addressed. For more details about this quantification, see section V below. For a more general discussion about the relationship between cost of reinstatement and cost of repair, see *Treitel on The Law of Contract, op. cit.*, para 20-039.

fields the judges are well accustomed to putting figures to intangibles, and I see no reason why the imprecision of the exercise should be a barrier, if that is what fairness demands.’<sup>30</sup>

The most recent case where the compensation of non-pecuniary losses was discussed in length was *Farley v Skinner*. The plaintiff was considering buying a house which was not far from a busy international airport and hired the defendant as his surveyor to check, among other things, if the property was affected by aircraft noise. The surveyor reported that it was unlikely to be so, but in fact aircraft noise substantially affected the house. Having decided not to sell,<sup>31</sup> the plaintiff sued the surveyor in the tort of negligence and for breach of contract. The High Court awarded him £10,000 for the inconvenience and discomfort caused by the aircraft noise. On appeal, a two judge Court of Appeal<sup>32</sup> was unable to reach an agreement on this case, and then the case was examined by a panel of three judges who held<sup>33</sup> (Clarke L.J. dissenting) that in this case damages for non-pecuniary losses could not be recovered. The plaintiff appealed and the House of Lords<sup>34</sup> allowed his appeal and restored the High Court order for payment of £10,000 as compensation for the non-pecuniary losses suffered as a result of the inconvenience and discomfort caused by the aircraft noise.

The High Court case is not reported and the way in which the damages were quantified there cannot be established with sufficient certainty. They were assessed at £10,000 following evidence about the level of aircraft noise.<sup>35</sup> In the first proceeding before the Court of Appeal, Lord Justice Judge’s opinion was that the appeal should not be allowed. He provides a relatively detailed justification of the principles that were applied for quantification of the damages:

£10,000 reflected his judgment of Mr Farley, the impact of the noise on him, evidence from others living locally, his conclusion that the value of the property was undiminished, and the impact of video and uncontradicted expert evidence about the noise, its nature and extent, advanced on behalf of Mr Farley. He considered the relevant circumstances including the time during which the noise had already been endured and some of the future imponderables.

When I first read the articles my immediate reaction was that this award was a very high one. However given the particular features of this unusual case, and the length of time during which the problems have already been endured, and will continue, no basis for a justifiable reduction in these damages has been shown. For the same reasons, what appears in any event to be a generous award, should not be increased.

In the second appeal before the same court, Clarke L.J. considered the quantum of the damages in a separate section of his judgment. There he reproduced the above two paragraphs in their entirety and added that this case was unusual and this justified the relatively high amount of damages: ‘The judge had to do his best to arrive at a fair figure for compensation over a very much longer period than in any previous case.’<sup>36</sup> It could be concluded that, similarly to previous cases, the decisive elements that were taken into consideration for quantification of damages are related to the extent and duration of the inconvenience and discomfort which were caused to the plaintiff.

The decision of the House of Lords supports the finding that the assessment of damages has to take into account the particular factual circumstances in which the losses were inflicted. Lord Steyn stated that, despite the fact that the award of £10,000 was high, he was ‘not prepared to interfere with the judge’s evaluation on the special facts of the case’.<sup>37</sup> All judges who commented on the quantity of the damages acknowledged that the amount and the duration of the plaintiff’s

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<sup>30</sup> *Ruxley Electronics and Construction Ltd v Forsyth*, [1996] AC 344, at 361.

<sup>31</sup> This decision was found to be in line with the promisee’s duty to mitigate all losses, see *Farley v Skinner*, [2002] 2 A.C. 732, at 740.

<sup>32</sup> 1999 WL 1048346.

<sup>33</sup> [2000] P.N.L.R. 441.

<sup>34</sup> [2002] 2 A.C. 732

<sup>35</sup> *Farley v Skinner*, 1999 WL 1048346, at 3.

<sup>36</sup> *Farley v Skinner*, [2000] P.N.L.R. 441, at 468.

<sup>37</sup> *Farley v Skinner*, [2002] 2 A.C. 732, at 751

suffering was decisive. They further stated that the awarded amount was high<sup>38</sup> and that in such cases the amount of damages should be restrained and modest: 'It is important that logical and beneficial developments in this corner of the law should not contribute to the creation of a society bent on litigation.'<sup>39</sup>

None of these qualifications can be used for a basis on which the quantification of damages for non-pecuniary losses could be founded. While in cases where pecuniary losses are suffered, there is a measure on which the assessment is based – the market value of the promised subject matter,<sup>40</sup> the difference in value between the promised and actually delivered performance<sup>41</sup> and so on,<sup>42</sup> this does not seem to be the case where damages for non-pecuniary losses are quantified. In these instances, the figures that are put to the non-pecuniary losses are not associated with a specific measure and thus seem arbitrary.

### 3. QUANTIFICATION WHEN THE DELIVERY OF THE CONTRACTUAL SUBJECT MATTER IS STILL POSSIBLE

There is no universal method for quantification of damages for non-pecuniary losses that can be used in all cases of breach of contract. In some instances, the breach will not affect the promisee's interest in the contractual performance and later delivery of the stipulated subject matter will lead to the same substantive result despite the delay.<sup>43</sup> In this case the traditional principles for quantification of damages would be suitable even though the breach causes non-pecuniary losses. These instances are explored in the present section. It commences with a description of the cases where the promisee has an interest in delayed performance and then examines how the value of the stipulated subject matter can be used for assessment of the damages caused by the breach.

#### (a) Cases when the promisee has an interest in delayed performance

In a number of cases the promisee has an interest in obtaining the stipulated subject matter of the contract even after the time of performance. A few examples can illustrate this situation. If a family portrait is commissioned, its belated completion will not always affect its value to the promisee and the contractual aims that he pursues with the performance would still be achievable. If the painting is delivered a few weeks later, he will still be able to preserve a fond memory of his relatives who were to be depicted in it and to enjoy its artistic qualities. Similarly, in *Hobbs*, the plaintiff and his companions would have benefitted from a later train or alternative conveyance to their house as long as they would have been transported to Hampton Court station at a reasonable time, allowing them to walk to their house and to spend the night there. In both examples the performance would have prevented prospective non-pecuniary losses and would have led to satisfaction of the plaintiffs' interest despite the delay.<sup>44</sup>

The existence of an interest in delayed performance depends on the particular facts of each case. Although it concerns the promisee, this interest must be assessed objectively so that it does not provide an escape route from bad bargains. If the delayed performance leads to the same factual or legal position of the promisee, as the one in which he would have been, had the contract been performed on time, then it should be considered that he has an interest in delayed performance.

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<sup>38</sup> *Farley v Skinner*, [2002] 2 A.C. 732, per Lord Steyn at 751, per Lord Hutton at 763 and per Lord Scott of Foscote at 772.

<sup>39</sup> *Farley v Skinner*, [2002] 2 A.C. 732, per Lord Steyn, at 751.

<sup>40</sup> *Treitel on The Law of Contract*, op. cit., para 20-047.

<sup>41</sup> *Chitty on contracts*, op. cit., para 26-039.

<sup>42</sup> A Kramer *The Law of Contract Damages* (Oxford and Portland, Oregon: Hart Publishing, 2nd edn, 2017) at 540.

<sup>43</sup> For a detailed analysis of the importance of timely performance and when the time is of the essence, see J Stannard *Delay in the performance of contractual obligations* (Oxford: Oxford University Press, 2nd edn, 2018) para 2.01 et. seq.

<sup>44</sup> Nevertheless, these delayed performances would not eliminate the losses which would have been suffered between the time when the performance was due and its actual conferment. The recoverability of non-pecuniary losses caused as a result of delayed performance follows the same principles as those examined in section VI below. Generally, about the damages for delay, see Stannard, J., op. cit., para 9.01 et. seq.

The assessment is made by an objective comparison between these two situations. The promisee's personal viewpoint on this matter should not be decisive.<sup>45</sup>

The period in which delayed performance can lead to achievement of an identical outcome as the one which would have been attained, had the contract been performed on time, is always limited. If the promisee commissions a family portrait, he would not be able to wait for a few years after performance was due. In *Hobbs* the morning service to Hampton Court station would not provide an opportunity to the plaintiff and his family to walk to their house and to spend the night there. The duration of the delay is also a question of fact and should be based on an objective assessment of the circumstances of each case.

### (b) Quantification based on the value of the subject matter

In some cases of delay, the promisee will not only have an interest in delayed performance, but there will be alternative sources from where that performance could be obtained. Although this was not the case, it might be imagined that in *Hobbs* there may have been a substitutive means of transportation to Hampton Court station where the plaintiff and his family wanted to go. In such circumstances their damages would have been equal to the price of this alternative conveyance. It would not matter if the plaintiff and his family had used this opportunity. They have an obligation to mitigate<sup>46</sup> their losses which in such cases requires them to use alternative transportation to their final destination. In these instances, the fact that the non-performance causes non-pecuniary losses to the plaintiff does not lead to any specific rules for assessment of damages and the general principles should apply.<sup>47</sup> If the plaintiff and his companions were able to use an alternative conveyance, they would have received what they initially contracted for and would have suffered no non-pecuniary losses beyond their deprivation of the stipulated subject matter between the time of the promised and actually rendered performance. Then the stipulated outcome of the agreement would have been achieved at a cost that is equal to the price of the alternative conveyance.

The importance of the value of the covenanted subject matter can be seen also in cases where the damages are assessed with regard to the cost of completion, reinstatement or repairs.<sup>48</sup> The general principle is that if there is a delay in the performance, the damages are equal to the cost of a substitutive subject matter.<sup>49</sup> However, if a partial or defective performance is provided, then the damages would be equal to the cost of its completion or repairing provided that the amount is not unreasonably high compared to the advantages that a reinstatement would provide.<sup>50</sup> In both cases separate damages for the delay are also due. Their aim would be to compensate the promisee for the time in which he was deprived of the promised performance.

In *Ruxley* the defendant received defective performance, but it was found that it is unreasonable to insist on its repairing. It was established that such reinstatement would not have provided any additional non-pecuniary benefit to him apart from what he had already received from the defective performance. He was able to dive safely in the swimming pool despite it being shallower than agreed.<sup>51</sup> It was unreasonable for the defendant to insist on exact performance as it would have not led to anything more than what was already provided to him as a result of the defective performance. However, it is not clear how this case would have been decided if the defendant had been unable to dive safely in the shallower pool.

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<sup>45</sup> This would be when the promisor insists on the promisee's acceptance of a delayed performance along with damages for delay instead of compensation for full non-performance. The amount of the latter might be significantly higher. Generally, about the promisor's right to offer delayed performance instead of damages for non-performance, see Stannard, J., *op. cit.*, para 6.01 et. seq.

<sup>46</sup> There are no works exploring the mitigation of damages for non-pecuniary losses, but generally about the principles of mitigation, see *Chitty on contracts*, *op. cit.*, para 20-087 et. seq.

<sup>47</sup> *Treitel on The Law of Contract*, *op. cit.*, para 20-039 et. seq.

<sup>48</sup> *Chitty on contracts*, *op. cit.*, para 26-039.

<sup>49</sup> See Stannard, J., *op. cit.*, para 7.01 et. seq.

<sup>50</sup> This rule is examined in *Ruxley Electronics and Construction Ltd v Forsyth*, [1996] AC 344 at 365, where it is accepted that this rule is applicable to all cases despite the type of losses suffered as a result of a defective or partial performance. The same opinion in *D Winterton Money Awards in Contract Law* (Oxford and Portland, Oregon: Hart Publishing 2015) at 189.

<sup>51</sup> *Ruxley Electronics and Construction Ltd v Forsyth*, [1996] AC 344, *per* by Lord Jauncey of Tullichettle, at 358.

It is very likely that in such instance he would have been awarded the cost of reinstatement. It could be assumed that in all cases where the promisee has suffered a non-pecuniary loss and he still has an interest in the contractual performance, the damages that are due for compensation are equal to the cost of obtaining an alternative subject matter, of completion of the partial performance or lastly, of repairing the defective performance, whichever is lower.

#### 4. QUANTIFICATION WHEN THE ACHIEVEMENT OF THE CONTRACTUAL AIM IS STILL POSSIBLE

There are cases where the promisee has an interest in delayed performance, but there are no alternative sources from where the stipulated subject matter might be procured, the partial performance cannot be completed, or the defective performance cannot be repaired. However, the further outcome which the promisee pursues with the contract could still be attainable via other means. The present section examines these instances. It commences with identification of the contractual interest that the promisee might have beyond the delivery of the subject matter of the agreement. Then the contractual aim, which, along with the stipulated subject matter, forms the promisee's contractual interest, is explored. Finally, this section describes the method that can be used for assessment of damages for non-pecuniary losses in these cases.

##### (a) Contractual interest beyond the promised subject matter

In many instances the non-pecuniary value that the performance provides to the promisee is not incorporated in the subject matter that he is due to receive. His contractual interest<sup>52</sup> exceeds the traditional way in which his expectation<sup>53</sup> or performance interest<sup>54</sup> is perceived<sup>55</sup> as a mere measure of damages for his loss. The contractual interest as it is comprehended in the present article is related to the outcome that would follow as a result of the performance. This result is not solely the conferment of the subject matter of the contract, but the further consequences of the performance. This conception is particularly important with regard to contracts where non-pecuniary losses are caused. The non-pecuniary value that these contracts provide to the promisee is not confined to the mere delivery of the goods or services that are due. These contracts are important to the promisee as their performance leads to further non-pecuniary benefits for which he would have concluded the agreement.

In *Watts* the plaintiffs wanted to buy a country house for use at weekends and holidays. They 'wanted a house which would be, so far as possible, trouble free and into which they could move without the need for any substantial works of repair.'<sup>56</sup> This was the scope of the plaintiff's contractual interest. The contract where this interest was to be satisfied required the provision of a structural report of the property, but the plaintiffs were interested in the survey only in so far as it might have led to fulfilment of their further aim – to be able to purchase a suitable house. For this reason, the agreed subject matter – a property survey – could be used neither for identification of the plaintiffs' contractual interest nor could it provide a guide to the level of damages that were caused as a result of the breach. The only measure that might be used for such purpose was the plaintiffs' desire to obtain a property which did not need any extensive refurbishment work.

In *Ruxley* the defendant commissioned the construction of a swimming pool to be used by him for recreational purposes. In this case, the non-pecuniary value that he wanted to obtain from the contract was not related to the construction work

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<sup>52</sup> The concept of contractual interest is new and it is introduced in the present paper as aiming to denote the promisee's interest in fulfilment of his contractual aim as a result of the contractual performance. For a critique on finding new 'interests' or creating new labels for existing ones, see D. McLauchlan, 'Reliance Damages for Breach of Contract' (2007) *NZ Law Rev* 417, 424–7 (reprinted in J. Berryman and R. Bigwood (eds), *The Law of Remedies: New Directions in the Common Law* (Irwin Law 2010) 33, 41–4).

<sup>53</sup> Generally, about the nature of the expectation interest, see *Treitel on The Law of Contract*, *op. cit.*, para 20-020 and *Chitty on contracts*, *op. cit.*, para 26-023.

<sup>54</sup> For comparison of the terms 'performance' and 'expectation interest' see D Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 *LQR* 628 at 632 who states that '[t]he expectation interest is simply an inappropriate term [t] describing the performance interest' and see also Charlie Webb 'Performance and Compensation: An analysis of Contract Damages and Contractual Obligation' (2006), *OJLS*, 26(1), 41–71.

<sup>55</sup> *Chitty on contracts*, *op. cit.*, para 26-024.

<sup>56</sup> *Watts v Morrow* [1991] 1 W.L.R., *per* Lord Justice Ralph Gibson, at 1424.



itself, but to some of the outcomes that would have followed upon its completion. Although it might be questionable if the partial or defective performance of the contract was able to satisfy the defendant's contractual interest,<sup>57</sup> it is uncontroversial that this interest was not based on the particular building works, which were the subject matter of this relationship. The defendant's non-pecuniary contractual interest was founded on his ability to use the swimming pool for specific leisure purposes. The breach deprived the defendant of this opportunity, or at least so he claimed,<sup>58</sup> and his damages for non-pecuniary losses were to be assessed not with regard to the value of the swimming pool, but in relation to his inability to use the swimming pool for the purposes for which it was constructed.<sup>59</sup>

In *Farley* the plaintiff also commissioned a survey which had to assess, inter alia, if the house that he wanted to buy was affected by aircraft noise. His non-pecuniary interest in the contractual performance was related not to the survey itself, but to his desire to choose a house in a quaint and peaceful location. This predetermined the nature and the extent of the losses which he suffered.

### (b) Identification of the contractual aim

The contractual aim is the immediate purpose for which the promisee concludes the contract and which is achievable as a result of the performance. It is the subsequent outcome that the promisee attains after the contractual subject matter is conferred to him. There are three distinctive ways in which the aim could be identified. Firstly, it might be explicitly or implicitly derivable from the contractual terms. The parties could choose not only to agree on the subject matter that the promisee is due to receive, but also on the purposes for which this subject matter is to be used. Secondly, the aim could be inferable from the factual circumstances in which the agreement is concluded. Lastly, it may follow necessarily from the nature of the promised subject matter.

The contract could be concluded within some distinctive factual circumstances. These circumstances can reveal in part or in whole the promisee's aim for entering into the agreement. No reference in the terms of the contract to any of the facts surrounding the contractual formation need have been made as the parties consider the aim so apparent that it does not have to be explicitly specified. Such a case was when premises with a good view over a central avenue were hired. The promisee's aim was to observe a public event which was to be held on this avenue.<sup>60</sup> In the terms of the agreement no references to this occasion had been made, but the court decided that the purpose for which the contract had been concluded was nothing other than the observation of this public event.

The contractual aim might also be derivable from the nature of the stipulated subject matter. In many cases, there would only be one apparent goal that the promisee would be able to achieve with the performance. In such instances this aim need not have been explicitly agreed. The identification of the aim would be established after the formation of the agreement, based on the individual features and properties of the stipulated subject matter.

Thus, in *Hobbs*<sup>61</sup> there is no information that at the time when the promisee bought the railway ticket, the promisor had known his final destination or any other details with respect to his further travel plans. Nevertheless, the court later held that the aim of the obligation was to convey the promisee and his family to a place from where they could have walked to their house. In deciding so, the court would have been led by the essence of the contractual subject matter. A railway journey at a later time of the evening towards a residential suburban area could prompt the conclusion that the aim which

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<sup>57</sup> The defendant was able to dive safely in the defective swimming pool and therefore it could be concluded that his non-pecuniary contractual interest was satisfied despite the defective performance. For more detailed justification of this interpretation see Zlatin Mitkov Zlatev. *Approaches towards the concept of non-pecuniary losses deriving from breach of contract* (PhD thesis, The London School of Economics and Political Science (LSE), 2019, <http://etheses.lse.ac.uk/4065/>), at 100 et. seq.

<sup>58</sup> *Ruxley Electronics and Construction Ltd v Forsyth*, [1996] AC 344, at 349 et. seq.

<sup>59</sup> For other explanations of this case see Coote, B., op. cit., at 538-544 and 559- 566 and McKendrick, E., 1999. *Breach of Contract and the Meaning of Loss*. *C.L.P.*, 52(1), at 41-46.

<sup>60</sup> See *e.g. Chandler v Webster* [1904] 1 KB 493.

<sup>61</sup> *Hobbs v London and SW Ry Co (1875) L.R. 10 Q.B. 111* at 112.

the promisee pursued was to be transported to a closer location from where he would have been able to walk to his house or to a place where he could spend the night. Such a conclusion was established despite the lack of any knowledge on behalf of the railway company about the specific purpose of the promisee's trip at the time of the contractual formation. An analogous assumption would have been reached if the trip was undertaken in the opposite direction during earlier hours of the day when it would be apparent that the promisee would have wanted to reach a certain destination where his planned daily engagements were.

When the contractual subject matter is agreed, the promisor should be aware that the other party would need the performance in order to exploit some of its beneficial features. The promisee should be free to choose which of these beneficial features he would like to use – he is equally free either to enjoy the aesthetic features of a particular painting that he had commissioned or to preserve a fond memory of a dear family moment that had been captured in that same painting. Sometimes at the time when the agreement is concluded this specific purpose will not be known to the promisor, but this does not affect the existence of the aim in any way. Whatever this aim is, it would never extend the contents of the promisor's responsibility beyond the terms that would have been agreed initially. This is because he is only obligated to confer the agreed subject matter. The aim is something that follows as a result of the conferment of the subject matter and does not require any further acts or omissions on behalf of the promisor. It is for the other party to achieve his contractual aim as an outcome of the stipulated performance.

### (c) Quantification based on the achievement of the contractual aim

In some cases, the promisee will still have an interest in delayed performance, but there will be no other sources from where the subject matter of the contract could be procured. *Hobbs* provides a good illustration of these instances. The plaintiff and his family could have been transported to their station even later that night, but there were no other trains scheduled to run to Hampton Court. It seems that no alternative conveyance was available either. In these circumstances an interesting suggestion was made by Cockburn C.J.: 'The plaintiffs did their best to diminish the inconvenience to themselves by having recourse to such means as they hoped to find at hand; they tried to get into an inn, which they were unable to do...'<sup>62</sup> It seems that if the plaintiffs had been able to find an alternative accommodation for the night, its value would be the basis on which their damages for non-pecuniary losses would be assessed. This conclusion might look surprising as the defendant promised a transportation to a certain destination only. The contractual subject matter was rather different than ensuring an overnight lodging.

The quantification of losses in such cases should be based not on the price of the promised subject matter, but on the value of the further aims that are pursued with the agreement. The damages ought to be able to provide an alternative source from which the contractual aims could be achieved. In *Watts* the plaintiffs suffered non-pecuniary losses due to the discomfort of having to live in a house whilst substantial renovation work was being done. The appropriate measure of damages in such case might be equal to the amount needed for hiring another property providing the levels of comfort that were described in the survey, along with the expenses of engaging a project manager who could supervise the renovation works for the plaintiffs.

There could be other cases where the quantification of damages will be based on the value of alternative benefits that the promisee might get instead of the stipulated subject matter. If the only opera concert in the promisee's town is cancelled, then he might decide to buy a ticket for a theatrical performance. This would still provide an opportunity for spending a pleasurable night out during which the promisee can enjoy an artistic performance to his liking. A suspended train trip from London to Paris where the promisee would have planned to visit the Palace of Versailles might be replaced with a plane trip. There could be numerous examples where the contractual subject matter is changed for alternative services or goods, aiming to provide the same outcome as the one which was initially agreed between the parties.

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<sup>62</sup> *Hobbs v London and SW Ry Co (1875) L.R. 10 Q.B. 111* at 114.

There is little guidance from the cases about the manner in which these substitutions could be made. Nevertheless, some rules of a general nature can be deduced from the principles<sup>63</sup> applied in the law of damages. The promisee has a duty to mitigate his losses.<sup>64</sup> He is expected to take all reasonable steps to limit the level of harm that is caused by the breach. This rule is particularly important when non-pecuniary losses are inflicted for their scope and amount could be more extensive, and their recovery more challenging. If the promisee can have his non-pecuniary contractual interest satisfied by resorting to alternative benefits, he should be expected to do so. Thus, a train trip can be undertaken in order to allow the promisee to get to a place where he can spend the night. If the same result can be achieved via alternative arrangements, there should be no reason to reject his entitlement to them. If no alternative transportation to the promisee's house is available, then he should be allowed to spend the night elsewhere and his damages should be assessed with regard to the expenses that he made for such alternative arrangements.

In all cases where the contractual outcome pursued by the promisee is achievable after the breach, but there are no sources from where the stipulated subject matter could be procured, the damages for non-pecuniary losses should be quantified on the basis of the costs that are needed for fulfilment of the contractual outcome via other means. This method of assessment should be perceived as a way for pre-empting future losses. Its function is to stop the prospective infliction of harms by providing a substitutive performance which should satisfy the promisee's contractual interests by leading to the same outcome as the one which was pursued originally. It ensures that the initial aim that was purported within the contract is achieved and thus prevents suffering prospective consequential non-pecuniary losses which would be otherwise sustained.

## 5. QUANTIFICATION WHEN THE PROMISEE HAS NO INTEREST IN DELAYED PERFORMANCE

There are other cases where the promisee does not have an interest in delayed performance. In *Watts* a corrected survey after the purchased property had undergone the required renovation would not relieve the plaintiffs from the inconvenience and discomfort experienced during the refurbishments. In *Farley* a delayed performance would not lead to the plaintiff's opportunity to select a property which was not affected by aircraft noise. In *Diesen v Samson*<sup>65</sup> the photographer's visit to the wedding venue after the end of the celebrations would not allow him to take photographs of the festivities. There are numerous instances where a delayed contractual performance would not be able to provide the same outcome as a timely delivery of the stipulated subject matter would do. In these cases, the promisee will not need the subject matter of the agreement anymore and the assessment of the damages for non-pecuniary losses cannot be made with regard to the value of this subject matter.

For such instances<sup>66</sup> the quantification of damages should be based on the non-pecuniary value of the outcome that the promisee would have received as a result of the performance had there been no breach. As this outcome cannot itself be quantified in money, it is proposed that an equivalent non-pecuniary benefit is found, and its assessment is used for determination of the amount of damages due for compensation of the non-pecuniary losses.

### (a) Why search for a new measure?

A more accurate measure for quantification of damages could be based not on the value of the stipulated subject matter, but on the non-pecuniary aim that the promisee achieves as a result of the performance. Although such principle has not been established in the leading authorities explicitly, it has been followed in many cases where breach inflicted non-

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<sup>63</sup> All damages, including those for non-pecuniary losses, are subject to limitations, which are beyond the scope of the present work, but see more generally *McGregor on Damages, op. cit.*, para 8-001 et. seq.

<sup>64</sup> *Chitty on contracts, op. cit.*, para 26-087.

<sup>65</sup> 1971 S.L.T. (Sh. Ct.) 49.

<sup>66</sup> The assessment of damages proposed in this section is also applicable to cases where the promisee seeks compensation for the period of delay in which he is deprived of the beneficial effect of the promised performance. This would be so as during this period the promisee could not enjoy the non-pecuniary benefits that he was entitled to and the other manners of compensation, proposed in the preceding two sections, cannot provide such an outcome. For more general overview of the compensation for delay, see Stannard, J., *op. cit.*, para 9.01 et. seq.

pecuniary harms. In *Hobbs* the amount of damages was established not with respect to the railway journey that the plaintiff and his companions had taken, but on their inability to reach their house within a short walk from their destination and to spend the night there. In *Jarvis*, the plaintiff wanted to enjoy his annual holiday in a picturesque Alpine scenery. His losses were identified not in relation to the price that he paid for his vacation, but with regard to the missed pleasurable time that he would have had if the contract had been performed as promised.

In all cases where the promisees' contractual interest cannot be achieved because of the breach, the assessment of the compensation should be based on securing an alternative non-pecuniary benefit that can substitute the original contractual aim to the extent that this is possible. If the law cannot provide what was initially agreed, it can try to off-set the losses by ensuring that some alternative non-pecuniary gratification is offered. The sub-standard vacation in the Alps cannot be provided retroactively, but the promisee can receive the opportunity to watch a few ballet performances at Covent Garden instead, provided that this is found to be a just and fair substitution.

This wider understanding of the contractual interest is not incompatible with the principles of quantification of damages established in earlier cases. Similarly to them, it also takes into account the position in which the promisee would have been, had the contract been performed as stipulated.<sup>67</sup> Nevertheless, in contrast with the classical formulation where this is understood only<sup>68</sup> or mainly<sup>69</sup> with respect to the promisee's financial standing, in cases where non-pecuniary losses are caused the outcome of the performance should be seen more broadly to include the non-pecuniary aims, pursued with the agreement. This wider perception of the contractual interest reflects more accurately the purpose for which the promisee concludes the contract. He is not attracted merely to obtaining the stipulated subject matter, but to the subsequent non-pecuniary advantages that its conferment provides.

The challenge that this measure poses is that the non-pecuniary outcome which the promisee would have received as a result of the performance cannot be achieved any longer. The promisee would not have an interest in delayed performance even if that could be possible. Thus, a delayed transportation to the opera house will not lead to achievement of the promisee's contractual aim after the performance has finished. Further to that, the pursued contractual aim cannot be quantified objectively. Any figure that is placed on the non-fulfilled non-pecuniary benefit pursued with the agreement would not reflect its inherent significance to the promisee. There will always be a significant level of doubt about the adequacy of compensation when a certain amount of money is intended to substitute a missed opera performance. The aim of the present section is to provide an alternative response to this conundrum. It proposes a more principled justification of the manner in which the compensation for non-pecuniary losses can be calculated.

### **(b) An Equivalent Non-Pecuniary Benefit**

If the outcome that is pursued with the agreement cannot be quantified in monetary terms, its non-pecuniary significance could still be subjected to some valuation. There must be an alternative benefit that could provide an equivalent non-pecuniary gratification to the promisee similar to the one which he expected initially. This new substitutive non-pecuniary benefit could be the foundation on which the quantification of non-pecuniary loss is based.

In *Farley* the plaintiff will always be disturbed by aeroplane noise. His purported 'pleasure, relaxation, and peace of mind'<sup>70</sup> whilst residing at his new countryside house could not be achieved regardless of the legal or factual measures that could have been taken. However, the plaintiff could get something else instead that could off-set his suffering. He could spend two or three weeks per year in the Scottish Highlands where he could enjoy the tranquillity and the composure of the picturesque lochs and the forests surrounding them. This could be a suitable substitution for his missed opportunities to

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<sup>67</sup> *Robinson v Harman* (1848) 154 E.R. 363, at 855.

<sup>68</sup> See *Ford v White&Co* [1964] 1 WLR 885 (CA).

<sup>69</sup> See *Winterton, D., op. cit.* at 26.

<sup>70</sup> *Farley v Skinner* [2002] 2 A.C. 732, per Lord Steyn, at 748.

‘sit outside on his terrace ... and enjoy the delightful gardens, the pool and the other amenities’<sup>71</sup> of his country house. It is for the plaintiff to propose a substitutive benefit and for the court to assess its adequacy compared to the non-pecuniary gratification that the breached contract would have provided.

In cases where the breach is continuing and is causing prospective non-pecuniary loss, the damages have to be assessed once and for all in one action.<sup>72</sup> In *Farley* the breach resulted in a continuous cause of action as the plaintiff’s suffering would not end at all.<sup>73</sup> He would always be exposed to the high levels of aircraft noise, but the nature and extent of the loss that he would suffer was identifiable at the time of the breach. This would allow for a quantification of the loss that the plaintiff would suffer in the future at the time of breach. It is possible to determine the missed non-pecuniary gratification that was pursued with the contract and to discover an equivalent non-pecuniary benefit that could off-set it. For example, in this case the court could identify a reasonable number of times when the plaintiff could spend two or three weeks per year in the Scottish Highlands. In assessing this, all factual circumstances of the particular case have to be taken into consideration – the plaintiff’s age, his subjective preferences of alternative non-pecuniary benefit, the adequacy between what was expected to be received from the performance and the non-pecuniary gratification that would be received from the substitutive vacation. Thus, it could have been concluded that the plaintiff would be entitled to fifteen holidays in the Scottish Highlands in a hotel or alternative accommodation offering a suitable level of comfort. In this case the financial assessment of the losses would be very similar to the one reached by the court,<sup>74</sup> but its justification would be more principled.

In *Watts* the plaintiffs were forced to stay in their country house as they wanted to supervise the refurbishment of the house they bought. The time that they lost in this could not be returned or recuperated in any tangible manner. Instead, they could have received an opportunity to become members of the Reform Club in St James’s for a certain period of time. They could entertain their guests there and spend pleasurable time on their own which could appease the inconvenience and discomfort they had suffered during the construction works. In this case the period of membership should be identical with the time that the refurbishment of the house took.

The identification of a new non-pecuniary benefit that would substitute the expected outcome of the contractual performance should be left to the promisee and confirmed by the court after taking into consideration all facts of the case. It will not be possible for the other party after his breach to impose an alternative non-pecuniary benefit which the promisee may not need or like at all. The identification of a substitutive benefit could be challenging, but it is not impossible. The promisee’s choice cannot be arbitrary and should be comparable and proportionate to the result that he expected to receive initially before the breach. The contractual outcome that would have been achieved had there been no non-performance, can be associated with a broader non-pecuniary benefit which the promisee aims to receive. A visit to an opera might relate to satisfaction of the promisee’s artistic interests. This outcome could be substituted with something which leads to this effect too. That might be a visit to a museum or a pop concert.

It might seem that there are cases where no substitute seems to be reasonably possible. The promisee may pay a large sum for front-row seats to Sir Paul McCartney’s very final performance. In this case the expected non-pecuniary gratification could be comparable to ten visits to other pop concerts, to a luxurious cruise in the Maldives or any other non-pecuniary benefit proposed by the promisee and perceived by the court as comparable in terms of its non-pecuniary gratification to the contractual outcome pursued with the breached contract. The value of the promisee’s counter-performance or the price of the stipulated subject matter will be entirely irrelevant<sup>75</sup> when this assessment is made. All

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<sup>71</sup> *Farley v Skinner* [2002] 2 A.C. 732, per Lord Steyn, at 743.

<sup>72</sup> See *Pegler v Ry Executive* [1948] A.C. 332.

<sup>73</sup> However, there are certain limitations to the recovery of the losses caused as a result of this suffering, including in terms of mitigation. For an alternative opinion about the applicability of the principle of mitigation to consequential losses only, see Winterton, D., *op. cit.*, at 165-166. For an objection against this opinion see Katy Barnett ‘A Critical Consideration of Substitutive Awards in Contract Law’ (2018) *MLR*, 81: 1064-1082 at 1075-1078.

<sup>74</sup> The plaintiff was awarded £10,000, see *Farley v Skinner* [2002] 2 A.C. 732, at 763, 765, and 772.

<sup>75</sup> However, it should be noted that in cases where the promisee recovers damages, his counter-performance must be either provided to the other party or its value must be subtracted from the compensation that he receives. Otherwise the promisee will be overcompensated as he will receive a substitution

the same, the substitutive non-pecuniary benefit does not need to be identical with the one which was not received as a result of the breach. The only principle that would matter is the identity of the level of the non-pecuniary gratification that was supposed to be received from the breached contract and the one that would be provided by the substitutive non-pecuniary benefit.

Although the identification of an appropriate substitution is closely related to the factual circumstances of each case and to the promisee's subjective preferences with regard to the nature of the substitutive benefit, there are some general rules that could be applied in all instances. The promisee's choice should be proportionate. His desire to replace a visit to an opera performance in Covent Garden for another one in Paris can hardly be justified whereas there are other opera theatres in London that offer concerts of similar general interest and artistic qualities. However, it might be possible that a performance of Mariinsky Ballet of Saint Petersburg in London, which could be missed due to the defendant's railway company not providing a transportation to the venue, can be substituted with the same performance in Paris. In all cases this change should be able to provide a new non-pecuniary benefit that is as close as possible to the one which was promised initially. A lifetime opportunity to watch Rudolf Nureyev in London cannot be substituted with an alternative opera performance in Manchester where a local dancer is engaged, if the promisee could see Rudolf Nureyev in Paris. And if this lifetime performance is missed irretrievably, then the promisee should be able to identify another substitutive non-pecuniary benefit of similar magnitude and importance to him. That could be a pleasant holiday in Saint Petersburg, but a long voyage around the world, including all places where Nureyev performed during his lifetime, could be hardly justifiable.

The choice of a substitutive non-pecuniary benefit should be reasonable.<sup>76</sup> This would require that the damages are proportionate to the outcome expected to be achieved with the performance initially. In the model proposed in the present section the damages are equal to the amount that is needed for provision of the substitutive benefit. The substitutive benefit should offer similar level of non-pecuniary gratification as the one which was promised initially. The value of the subject matter of the agreement would be entirely irrelevant for this assessment. What matters for the promisee is the aim that he can achieve as a result of the performance. Thus, in a contract for transportation from Birmingham to London the ticket price that the promisee pays, is not decisive. The damages will be reasonable if the missed opera performance which the defendant wanted to watch in Covent Garden is identical to the proposed alternative non-pecuniary benefit. As it has been explained above, in certain cases, this could be a substitutive opera performance even in Paris.<sup>77</sup>

### **(c) Assessment of the equivalent non-pecuniary benefit**

It could be thought that if an alternative non-pecuniary benefit commensurable to the unfulfilled contractual result is identified, the initial challenge remains – this new measure is still something which by its inherent nature cannot have financial value. The pleasure of visiting an opera concert or having an amusing holiday cannot have a specific price tag. However, if the contractual performance is no longer possible and thus the promised contractual outcome cannot be attained, the substitutive non-pecuniary benefit can still be provided. The route to this can be subject to a monetary quantification and the damages would be equal to the amount that is needed for obtaining of the alternative non-pecuniary benefit.

If the examples from the previous subsection are explored, in *Farley* the damages would be equal to the price of the vacations in the Scottish Highlands, in *Watts* – to the cost of a membership in the Reform Club and in the example where a train journey from Birmingham to London prevents the promisee from visiting an opera concert in Covent Garden – to

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for the promised contractual performance without providing his correlative counter-performance. For more details about this general question, see subsection C below.

<sup>76</sup> About principle of reasonableness, see also Rowan, S. (2017). Cost of cure damages and the relevance of the injured promisee's intention to cure. *The Cambridge Law Journal*, 76(3), 616-641.

<sup>77</sup> In all cases the principles for limitation of non-pecuniary losses should be applicable. For a general overview of the principles of limitation, see *Chitty on contracts, op. cit.*, para 26-066 et. seq.

all expenses that are needed for an attendance of a similar opera concert in Paris. In such cases the prevailing market prices should be used<sup>78</sup> and it could be expected that once the equivalent non-pecuniary benefit is determined, there will be no particular difficulties for quantification of the amount that is needed for its achievement. When the substitutive non-pecuniary benefit is identified, all general rules of assessment of damages should apply,<sup>79</sup> including the principles for their limitations.<sup>80</sup>

The calculation of the amount due for compensation should take into account the actual loss suffered by the promisee. In some cases, he would have received a partial performance and he will need to be compensated only for the non-fulfilled part of the non-pecuniary outcome of the agreement. This was the case in *Jarvis*. It was established that "[d]uring the first week [the plaintiff] got a holiday in Switzerland which was to some extent inferior ... and, as to the second week, he got a holiday which was very largely inferior"<sup>81</sup> to what he was promised. In this instance the substitutive non-pecuniary benefit should be comparable to the non-pecuniary gratification that was not received by the plaintiff.

In all cases, double recovery should not be possible. This principle was confirmed in *Baltic Shipping*.<sup>82</sup> The claimant was awarded damages for her disappointment and distress suffered by reason of the ship's foundering. The quantification of the damages took into consideration the fact that the claimant had received already a partial refund from the defendant, which had to be added to the overall amount of damages that were due to her. However, it should be noted that although the claimant received a partial refund of the price that she paid for the cruise, and this sum could be accounted for as a benefit arising through breach which offsets her non-pecuniary losses partially,<sup>83</sup> there is no relationship between her counter-performance – the price that she paid for the cruise – and the amount of losses that were caused to her as a result of the breach.<sup>84</sup>

#### (d) An alternative function of damages

The traditional view found in the legal literature<sup>85</sup> and by the courts<sup>86</sup> is that damages are compensation for a loss, or an injury suffered by the promisee as a result of the breach. The compensatory nature of damages expresses their restorative function. They are supposed to obliterate the adverse financial consequences following from the non-performance. It is thought that they can place the promisee in the same financial position in which he would have been had there been no breach.<sup>87</sup>

This could not be achievable in the cases explored in the present section of this article. The promisee's non-pecuniary contractual interest cannot be satisfied by a payment of a certain amount of money. In *Farley* the plaintiff cannot overcome his distress or inconvenience caused to him as a result of his exposure to high level of noise regardless of the award of damages that he can receive. In *Watts* the inconvenience and discomfort suffered by the plaintiffs as a result of the construction works undertaken in their house could not be undone by a payment of a certain amount of money. In *Jarvis*, the monetary compensation could not lead to a pleasurable winter vacation in the Swiss Alps. In all of these cases the promisees could not be placed in the same factual position<sup>88</sup> in which they would have been if their contracts had been performed.

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<sup>78</sup> *Dunkirk Colliery Co v Lever* (1878) 9 Ch. D. 20,

<sup>79</sup> *Treitel on The Law of Contract, op. cit.*, para 20-047.

<sup>80</sup> *McGregor, op. cit.*, para 8-001 et. seq.

<sup>81</sup> *Jarvis v Swans Tours Ltd.* [1973] Q.B. 233, at 237.

<sup>82</sup> *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 per Deane and Dawson JJ. at 354 et. seq.

<sup>83</sup> This would be under the third rule of mitigation of losses examined in *McGregor on Damages, op. cit.*, para 9-108 et. seq.

<sup>84</sup> For a detailed justification of this principle, see Zlatev, Z. M., *op. cit.* at 88. The opposite opinion per McHugh J in *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 406.

<sup>85</sup> *McGregor on damages, op. cit.*, para 1-004 et. seq.

<sup>86</sup> *Attorney General v Blake* [2001] 1 A.C. 268, at 280.

<sup>87</sup> See note 39 above.

<sup>88</sup> Despite the general understanding expressed in the common law that the losses aim to place the promisee in an identical financial position in which he would have been had the contract been performed, there are some newer understandings where the promisee's factual position seems to be relevant

Even so, damages that are awarded for non-pecuniary losses could be perceived as aiming to off-set the harms by offering something else instead. Other authors<sup>89</sup> have also noted the existence of this substitutive function of damages which could be opposed to their traditional restorative one. This view has attracted judicial support as well.<sup>90</sup> While in the type of contracts examined in the present section the promisee would not be able to enjoy the outcome of the performance that he contracted for, he could still receive something that might be an adequate substitution for it and that can provide an identical level of non-pecuniary gratification.

## 6. CONCLUSION

The quantification of damages for non-pecuniary losses is notoriously difficult. This difficulty is rooted into the nature of the losses – they do not affect the promisee’s patrimonial wealth. Therefore, the assessment of these damages cannot be based on the general principles applied to other cases.<sup>91</sup> However, it seems that the courts were not able to identify alternative ways in which a principled and fair quantification of damages for non-pecuniary losses could be possible.

A nuanced approach towards the quantification of damages for non-pecuniary losses should be adopted. If the promisee has an interest in delayed performance, his non-pecuniary losses should be equal to the value of the promised subject matter. If there is no source from where the stipulated subject matter can be provided, then his losses can be assessed with respect to an alternative benefit, which leads to the same result as the initial performance would have led had there been no delay. If the promisee has no interest in delayed performance, then he should be able to attain a different non-pecuniary benefit that can off-set his losses. In this case, damages do not aim to restore the promisee’s purported position which he would have occupied had there been no breach, but to provide a commensurable substitution for the non-pecuniary gratification that would have been achieved as a result of the promised performance.

These rules reveal a more insightful perspective on the genuine reasons for which a contract providing non-pecuniary benefits is concluded – not for enhancement of the promisee’s patrimonial wealth, but for satisfaction of his other non-pecuniary interests. There are cases where the non-pecuniary gratification that would result from the performance cannot be attained at all. The principles proposed in the present article acknowledge the impossibility of damages for non-pecuniary losses to obliterate the harms caused by the breach. In these instances, the damages aim to provide a fair and justified alternative which could substitute the outcome of the performance, pursued by the promisee, rather than trying to put a price on his non-pecuniary suffering.

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too. See *One Step (Support) Ltd v Morris-Garner and another* [2019] A.C. 649, per Lord Reed JSC, at 674.

<sup>89</sup> See Winterton, D., *op. cit.*, at 60 et. seq. and the literature referenced there.

<sup>90</sup> *Moore v Scenic Tours Pty Ltd* [2020] HCA 17, per Edelman J, para 62-75.

<sup>91</sup> *Treitel on The Law of Contract, op. cit.*, para 20-037 et. seq.