

## Mental distress in wrongful dismissals: towards a more rationalized approach

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DURING THE 1980's, Canadian employers have had to deal with an increasing incidence of wrongful dismissal litigation. One commentator has suggested that it has become "one of Canada's primary growth industries."<sup>1</sup> Not unexpectedly, the common law applied to wrongful dismissal cases has been undergoing dramatic change. Nowhere is this more apparent than in the area of compensation for the non-pecuniary or intangible losses flowing from a wrongful dismissal. Recovery of "punitive damages," to date, has largely been an Ontario phenomenon.<sup>2</sup> Recovery of "damages for loss of reputation" has been rare and generally limited to a very specific type of employee.<sup>3</sup> On the other hand, this decade has witnessed numerous Canadian decisions awarding "damages for emotional distress." While this mounting authority suggests that such damages are now recoverable, there is a paucity of guidance as to precisely when and on what basis mental distress damages are appropriate. Indeed, the decisions often appear confusing and contradictory. Some courts would restrict the award to "exceptional" or "unusual" circumstances,<sup>4</sup> or to cases where the employer's breach of

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1 Grosman has noted that the number of cases coming before the courts increased tenfold during the early 1980's (B. Grosman, *The Executive Firing Line* (Toronto: Carswell, 1982) ix); J. Hendy, "Unjust Dismissal in the Province of Quebec (Part I)" (1987) 4 *Bus & Law* 43.

2 *Brown v. Waterloo Regional Board of Commissioners of Police* (1982), 37 O.R. (2d) 277 (Ont.H.C.), rev'd in part (1983), 43 O.R. (2d) 113 (Ont.C.A.); *Pilato v. Hamilton Place Convention Centre* (1984), 45 O.R. (2d) 652 (Ont.H.C.). But the law in this area is evolving rapidly, and it appears that Manitoba courts are becoming more reluctant to dismiss a punitive damages claim prior to trial: *Perkins v. Brandon University* (1984), 33 Man. R. (2d) 152 (Man.Q.B.), aff'd [1985] 55 W.W.R. 740 (Man.C.A.).

3 This category is restricted to actors, theatrical performers, or persons with closely analogous employment contracts: *McMinn v. Town of Oakville* (1978), 19 O.R. (2d) 366 (Ont.H.C.); *Burmeister v. Regina Multicultural Council* (1985), 8 C.C.E.L. 144 (Sask.C.A.); *Desloges v. Radio-TV Representatives* (1987), 62 O.R. (2d) 633 (Ont.H.C.); cf. *Magee v. Channel Seventynine* (1976), 15 O.R. (2d) 185 (Ont.H.C.). Generally, see M. Norman Grosman, "Wrongful Dismissal: Damages for Loss of Reputation or Stature" (1983) 4 *A.Q.* 317.

4 *Bell v. Izaak Walton Killam Hospital* (1987), 14 C.C.E.L. 276 at 302 per Nunn J. (N.S.S.C.).

contract was "wanton or reckless."<sup>5</sup> Other courts have imposed no such requirements. Some courts have viewed the causation problems associated with the typical wrongful dismissal scenario as virtually insurmountable while others have arguably circumvented or ignored them. Some courts have denied damages by applying a rigid foreseeability test while other courts have been demonstrably less strict. Although rationalization on a case-by-case basis is impossible, a more rational approach is obviously needed.

The purpose of this article is to try to bring some order to the confusion that these seemingly contradictory results have created in the wrongful dismissal case law. After a brief historical introduction, I shall discuss and critically analyze the recent jurisprudence against the conventional causation and remoteness framework of contract law. In the process, I shall endeavour to formulate a more reliable and logical approach upon which to base future decisions regarding an employee's damage claim for emotional distress.

### I. MENTAL DISTRESS DAMAGES AND THE EROSION OF *ADDIS*

*ADDIS V. GRAMAPHONE CO.*,<sup>6</sup> a 1909 decision of the House of Lords, is the seminal case supporting the proposition that courts should not award damages for intangible losses in wrongful dismissal actions. *Addis* involved a claim for damages by a former employee 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."<sup>7</sup> In assessing the proper amount of damages, their Lordships held that a wrongfully dismissed employee could not recover compensation for the manner of his dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself made it more difficult for him to find new employment.<sup>8</sup>

For the better part of this century, *Addis* was perceived as laying down a general rule preventing damages from being awarded in con-

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5 *Brown v. Waterloo Regional Board of Commissioners of Police*, *supra*, note 2; *Pearl v. Pacific Evercon* (1985), 7 C.C.E.L. 252 (B.C.C.A.).

6 [1909] A.C. 488 (H.L.).

7 *Supra*, note 6 at 493 *per* Lord Atkinson.

8 *Addis* has been authoritatively supported in Canada. In *Peso Silver Mines v. Cropper*, [1966] S.C.R. 673, the Supreme Court of Canada upheld an appellate court's reduction in damages. Cartwright J., for the Court, stated, at 684, that "the claim being founded on breach of contract the damages cannot be increased by reason of the circumstances of dismissal whether in respect of the respondent's wounded feelings or the prejudicial effect upon his reputation and chances of finding other employment."

tract actions to compensate for intangible injuries.<sup>9</sup> Insofar as damages for mental distress were concerned, the supporting "remoteness" rationale was succinctly set out in *McGregor on Damages*; that is, "that contracts normally concern commercial matters and that mental suffering on breach is not in the contemplation of the parties as part of the business risk of the transaction."<sup>10</sup> In a prescient comment, the learned author continued:<sup>11</sup>

If, however, the contract is not primarily a commercial one, in the sense that it affects not the plaintiff's business interests, the door is not closed to awarding damages for mental suffering should the court think that in the particular circumstances the parties to the contract had such damage in their contemplation.

The "holiday cases" exemplify this latter principle and represent the most authoritative departure from *Addis*. The leading case is *Jarvis v. Swan Tours*,<sup>12</sup> a decision of the English Court of Appeal. In *Jarvis*, the plaintiff had purchased a holiday package that promised in very attractive detail an exceptional Swiss holiday. The holiday experience, however, was far removed from its promise. Lord Denning M.R., after considering several cases which precluded damages for mental distress in breach of contract actions, commented:<sup>13</sup>

I think that those limitations are out of date. In a proper case damages for mental distress can be recovered in contract, just as damages for shock can be recovered in tort. One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaks his contract, damages can be given for the disappointment, the distress, the upset and frustration caused by the breach.

The *Jarvis* case represents a simple application of the long-standing remoteness rule of *Hadley v. Baxendale*<sup>14</sup> to particular circumstances.

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9 This view is still occasionally expounded: *Perkins v. Brandon University*, [1985] 5 W.W.R. 740 at 745 (Man. C.A.) per Huband J.A., dissenting. However, as Professor Bridge has noted, a careful reading of *Addis* does not disclose any clear and general statement that the law of contract protects only tangible interests: Bridge, "Contractual Damages for Intangible Loss: A Comparative Analysis" (1984) 62 Can. Bar Rev. 323 at 344.

10 H. McGregor, *Damages*, 13th ed. (London: Sweet & Maxwell, 1972) at 46, para. 68.

11 *Ibid.*

12 [1973] Q.B. 233 (C.A.).

13 *Supra*, note 12 at 237-238 (Q.B.).

14 (1854), 9 Ex. 341. The case is celebrated authority for the proposition that before a head of damage is recoverable, it must be shown either that the damage is such as may fairly and reasonably be considered arising naturally from such a breach (the so-called "first branch" of the *Hadley v. Baxendale* rule) or such as may

The plaintiff's loss of pleasure was well within the contemplation of the holiday operators: the object of the contract was to provide pleasure, and the breach of contract necessarily resulted in the loss of that pleasure, thereby rendering the plaintiff's mental distress reasonably foreseeable within the first branch of the remoteness rule; that is, it arose naturally from the defendant's breach. The corollary is that damages for mental distress are also recoverable in the unusual case provided the defendant is seized with "special knowledge" at the time of the contract that mental distress would be the probable result of its breach.

Another "holiday case," *Newell v. Canadian Pacific Airlines*,<sup>15</sup> is illustrative. That case involved an elderly couple who purchased tickets to fly from Toronto to Mexico. So concerned were they for the welfare of their two pet dogs that they offered to purchase the entire first class section of the aircraft so that the pets could be with them in transit. They were told that their pets would have to travel in the cargo compartment but would nonetheless be well looked after and arrive in "first class condition." Sadly, one died and the other was in a comatose state upon arrival owing to the carrier's negligence. In his reasons for judgment, Borins J. made the following remarks with respect to the plaintiff's claim for damages for mental distress:<sup>16</sup>

... [I]t is clear that in England the rule in *Hadley v. Baxendale* permits a plaintiff to recover damages in a proper case where in the contemplation of the parties, vexation, frustration and distress are likely to result and do in fact result from a breach of contract. On the facts of the case before me it was, in my opinion, clear to the defendant from the obvious concern of the plaintiffs, with respect to the welfare of their pets that should anything happen to them, this would likely cause the plaintiffs vexation, frustration and distress. On the evidence it is very clear that the special circumstances of this case were brought home to the defendant at the time it entered into the contract with the plaintiffs. Thus, damages to the plaintiff's health, anguish, unhappiness, and inconvenience were a reasonably foreseeable consequence of the defendant's breach of contract.

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reasonably be supposed to have been in the contemplation of both parties when the contract was made as the probable result of its breach (the so-called "second branch" of the rule). The modern tendency is to restate the two branches as a consolidated rule of reasonable foreseeability: *Koufas v. C. Czarnikow (The Heron II)*, [1969] 1 A.C. 350 at 385 (H.L.).

15 (1976), 14 O.R. (2d) 752 (Ont. Co. Ct.).

16 *Supra*, note 15 at 767.

Judge Borins also clearly recognized the necessity of distinguishing between an ordinary commercial contract and one affecting the plaintiff's personal, social, and family interests:<sup>17</sup>

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. Prior to the decision in *Jarvis v. Swan Tours Ltd.* the cases exhibited a very narrow view with respect to the recovery of nonpecuniary damages.... In my respectful opinion when Lord Denning, M.R. stated in the *Jarvis* case that "in a proper case damages for mental distress can be recovered in contract" he was equating "proper case" with the *Hadley v. Baxendale* test – it was in the reasonable contemplation of the parties that if the defendant failed to provide what it had promised, the plaintiff might sustain disappointment, distress, upset and frustration.

With *Jarvis* and *Newell* showing the way, the erosion<sup>18</sup> of *Addis* soon extended to wrongful dismissal claims, albeit not without recognition of the very different and more difficult evidentiary, causation, and foreseeability issues raised in such claims.

## II. MENTAL DISTRESS IN WRONGFUL DISMISSALS

### A. Evidentiary problems

It could be argued that every breach of contract causes some degree of frustration and emotional distress to the innocent party.<sup>19</sup> But something more than ordinary distress and frustration is required to warrant compensation:<sup>20</sup>

An award for mental distress should not be lightly made. There should be something more than the anxiety and distress normally encountered. But, if as a consequence of the [breach] there is mental suffering of a serious nature that could reasonably be expected to occur, then it is compensable.

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17 *Supra*, note 15 at 769. Admittedly, the characterization of employment contracts is not so obvious; compare, for example, the comments enunciated in two recent Manitoba decisions: *Perkins, supra*, note 2 at 155 *per* Smith J. (Man. Q.B.); and, *Balchin v. Diecast Marwest* (1987), 46 Man. R. (2d) 201 *per* Darichuk J. (Man. Q.B.). See also *McMinn, supra*, note 3 at 373 (O.R.) *per* Dupont J. (Ont. H.C.); *cf. Wourinen v. Workers' Compensation Board* (1983), 1 C.C.E.L. 29 at 49 *per* Legg J. (B.C.S.C.).

18 The "erosion" has not been universally acknowledged: see the dissenting judgment of Huband J.A. in *Perkins, supra*, note 9 at 751 (Man. C.A.).

19 See, for example, the remarks of Scollin J. in *Griffin v. The Pas Health Complex*, [1984] 4 W.W.R. 744 at 751 (Man. Q.B.).

20 *Ewasasuk v. Estevan Area Home Care District 9* (1985), 9 C.C.E.L. 267 at 280 *per* Geatros J. (Sask. Q.B.). *Semble, Leblanc v. MacLaren Plansearch* (1984), 52 N.B.R. (2d) 275 at 281 *per* Dickson J. (N.B.Q.B.).

This, of course, presents a preliminary evidentiary consideration for the plaintiff who has the burden of proving that his anxiety and distress transcended the ordinary.

Results from the polar extremes of emotional upset are, of course, predictable. Where there is "no evidence" of any serious mental distress,<sup>21</sup> where the court is unable to discern any emotional distress "beyond the nature of the expected upset,"<sup>22</sup> or where the only evidence is the plaintiff's "bare statement that the [wrongful dismissal] stunned and shocked him,"<sup>23</sup> the minimum standard of gravity clearly has not been met. At the other end of the spectrum, mental distress necessitating multiple visits for medical psychiatric treatment exceeds the requisite standard.<sup>24</sup> Within these extremes, the judicial parameters of a threshold of gravity do not emerge with any degree of precision. Some courts appear to be taking the requirement more seriously than others. How else to explain why recovery was denied where the plaintiff's evidence of mental distress was "sparse"<sup>25</sup> or "not compelling,"<sup>26</sup> but allowed where there was "little evidence"<sup>27</sup> or where the evidence as "meagre"<sup>28</sup> or "not as great as that in other cases."<sup>29</sup> Clearly, medication or medical treatment is not a *sine qua non*. In *Wourinen v. Workers' Compensation Board*,<sup>30</sup> for example, the plaintiff was awarded \$2000 in damages for mental distress notwithstanding the absence of medical treatment or the use of any medication.

A review of the wrongful dismissal cases where plaintiffs have succeeded in obtaining damages for mental distress discloses that, in almost every case, notwithstanding the qualitative difference in manifestations, there was some actual evidence of injury caused by the mental distress. Even in *Gordon v. Saint John Shipbuilding & Dry Dock*,<sup>31</sup> where there was only minimal evidence of mental distress, the plaintiff's success can be rationalized on the basis that there was some

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21 *Supra*, note 19 at 751 (Man. Q.B.).

22 *Plummer v. W. Carsen* (1986), 10 C.C.E.L. 19 at 32 (Ont. D.C.).

23 *Cringle v. Northern Union Insurance* (1981), 124 D.L.R. (3d) 22 at 26 (B.C.S.C.).

24 *Pilato, supra*, note 2; *Carrick v. Cooper Canada* (1983), 2 C.C.E.L. 87 (Ont. H.C.).

25 *Wilcox v. Philips Electronics* (1984), 6 C.C.E.L. 43 at 54 (N.S.S.C.).

26 *Bell, supra*, note 4 (N.S.S.C.).

27 *Cormier v. Hostess Food Products* (1984), 52 N.B.R. (2d) 288 at 293 (N.B.Q.B.).

28 *Tippett v. Int'l Typographical Union Local 226* (1976), 71 D.L.R. (3d) 146 at 147 (B.C.S.C.).

29 *Lightburn v. Mid Island Consumer Services Co-operative* (1984), 4 C.C.E.L. 263 at 270 (B.C. Co. Ct.).

30 *Supra*, note 17. The most recent illustration is afforded by *Colasurdo v. C.T.G. Inc.* (1988), 18 C.C.E.L. 264 (Ont. H.C.).

31 (1983), 47 N.B.R. (2d) 150 (N.B.Q.B.).

"evidence of physical manifestation of that distress."<sup>32</sup> Perhaps, then, this best captures the requisite but illusive minimum threshold of mental distress emerging from the caselaw and, at the same time, highlights the necessity to draw a distinction between real and sustained mental distress provable by evidence, medical or otherwise, and the temporary and transient upset of mere injury to feelings.<sup>33</sup>

### B. Causation problems

A basic application of causation principles requires that, in order to maintain his claim, the plaintiff must establish on a balance of probabilities the damage of which he complains was in fact caused by the defendant's breach of contract. The typical wrongful dismissal case therefore is problematic. Employees, in general, do not have a proprietary interest in their jobs<sup>34</sup> and can be dismissed at pleasure providing the employer provides the employee with the notice to which he is entitled<sup>35</sup> or an appropriate severance payment in lieu of that notice. In the usual case the termination itself forms no part of the breach.<sup>36</sup> The latter consists solely in the employer's failure to provide either reasonable notice or the requisite compensation. Thus, where courts have determined that mental distress was not caused by the lack of reasonable notice but rather by a temporary layoff,<sup>37</sup> an unwise career choice,<sup>38</sup> the manner in which the employee was treated by his supervisor,<sup>39</sup> the fact

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32 This was the basis upon which the *Gordon* case was distinguished in *Buchanan v. Continental Bank of Canada* (1984), 58 N.B.R. (2d) 333 at 344 (N.B.Q.B.).

33 J. Dawson, "General Damages in Contract for Non-Pecuniary Loss" (1983), 10 N.Z.U.L. Rev. 232 at 258. In *Wourinen*, *supra*, note 17 at 45, the result can be rationalized on the basis that, notwithstanding the absence of medication and medical treatment, Legg J. did find that the plaintiff "suffered depression" and "sleeplessness and other forms of distress".

34 Unless otherwise agreed, an employment contract is for an indefinite duration: *Rivers v. Gulf Canada* (1986), 13 C.C.E.L. 131 (Ont. H.C.).

35 Federal and provincial legislation merely set out the minimum amount of notice that an employee must receive if dismissed in the absence of just cause: *Morby v. Tozer Plymouth Chrysler* (1986), 14 C.C.E.L. 221 (N.B.Q.B.). See also, *Bohemier v. Storval International* (1982), 142 D.L.R. (3d) 8 (Ont. H.C.). The notice required in any given case is a question of fact given all the circumstances. For a helpful discussion of reasonable notice criteria, see Shane and McPhillips, "Predicting Reasonable Notice in Canadian Wrongful Dismissal Cases" (1987) 41 Ind. & Lab. Law Rev. 108.

36 *Balchin*, *supra*, note 17 at 206 *per* Darichuk J. (Man. Q.B.); *Nicholls v. Richmond*, [1984] 3 W.W.R. 719 at 725-6 *per* McLachlin J. (B.C.S.C.).

37 *Misovic v. Acres Davy McKee* (1985), 7 C.C.E.L. 163 (Ont. C.A.).

38 *Leblanc*, *supra*, note 20 (N.B.Q.B.).

39 *Vorvois v. Insurance Corporation of British Columbia* (1984), 4 C.C.E.L. 237 (B.C.C.A.).

of dismissal itself,<sup>40</sup> or the difficulty of finding alternate employment<sup>41</sup>, damages for mental distress have properly been denied.

### 1. *Independent causes*

Given the difficulty in the typical wrongful dismissal scenario of proving that the distress was caused by the lack of notice rather than the fact of dismissal, the plaintiff's case for emotional distress damages is substantially strengthened if he can establish some breach of contract *independent* of the employer's failure to provide reasonable notice remuneration and show that his distress was caused by that breach. Two judicial techniques have emerged to assist plaintiffs in establishing such "independent" breaches of contract: the variation of contract approach and the implied term approach. Each approach is legitimate when applied within the established confines of contract law. When applied in patent disregard of these confines, however, the predictable result is confusion.

#### a. Variation of contract approach

The English case of *Cox v. Philips Industries*<sup>42</sup> illustrates a proper application of the variation of contract approach. The plaintiff was offered a position of greater responsibility and higher salary by his employer in order to dissuade him from accepting a job offer from a competitor. In breach of the employer's promise, the employee soon afterwards found himself "demoted" to a position of lesser responsibility and equal salary and, in consequence, suffered emotional distress requiring medical treatment. Lawson J., in these circumstances, had no difficulty with the issue of causation:<sup>43</sup>

I now come back to this question of the breach of the contractual term which I find took place when he was relegated to a position of lesser responsibility. I have already said his salary remained the same but there is not the slightest doubt in my mind that the result of this relegation in breach of contract, contrary to the promise that the defendants had made, did expose him to a good deal of depression, vexation and frustration and indeed led to ill health.

The *Cox* case has been applied with similar results in analogous circumstances in Canada.<sup>44</sup>

40 *Gray v. Electrolux Canada (No. 1)* (1986), 45 Man.R. 82 (Man.Q.B.); *Cringle, supra*, note 23.

41 *Sheehy v. Wolf* (1984), 6 C.C.E.L. 103 (Ont. Co. Ct.).

42 [1976] 1 W.L.R. 638 (Q.B.D.).

43 *Supra*, note 42 at 644.

44 In *Wourinen, supra*, note 17 (B.C.S.C.), the plaintiff, previously a unionized employee, accepted a promotion only because his employer promised him that he



The decision in *Lightburn v. Mid Island Consumer Services Co-Operative*<sup>45</sup> demonstrates the lengths to which some courts will go in finding a breach of contract independent of the failure to give proper notice or remuneration. In *Lightburn*, the plaintiff, who had been employed by the defendant for ten years, became seriously ill and was absent from his work for several months. During that time, he received two assurances from the defendant's general manager that he would have a position with the company when he was able to return to work. In reality, however, the employer had already decided to phase out the plaintiff's job due to an economic downturn and, upon his return to work, the employee was dismissed, purportedly on the false premise that he was physically unable to perform his job. He subsequently commenced an action for wrongful dismissal claiming, *inter alia*, damages for mental distress. In allowing that claim, Cashman Co. Ct. J. stated:<sup>46</sup>

[S]uch an award can be made where the employee is assured prior to his dismissal that certain things will be done. Here the assurance was that he would have a job with the defendant when he was able to return to work. He received that assurance on two occasions and I find that the assurance together with the lack of honesty on the part of the defendant's general manager, did cause him mental distress....

On a contractual analysis, the result in *Lightburn* is, with respect, unsupportable. If an employee's "independent" promise is supported by fresh consideration moving from the employee, such as rejection of employment offers from a competitor, as in *Cox*, or acceptance of a promotion, as in *Wourinen*, the employee will be able to meet the test of a binding variation of contract, and the resulting mental distress caused by the employer's breach of the modified term may properly be compensable. On the other hand, where, as in *Lightburn*, no consideration whatever supports the employer's independent promise; that promise remains gratuitous and unenforceable under elementary contract

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would be "treated no less favourably than those protected by the collective agreement." He was later dismissed in a summary fashion without cause as a result of a re-organization. The collective agreement would have required appropriate notice of redundancy and reasonable efforts to place the employee in a position of equal or better salary. It was held that the employer's failure to so provide was the breach of contract causing the employee's mental distress.

45 *Supra*, note 29.

46 *Ibid.*

principles.<sup>47</sup> This underscores the necessity to distinguish between contractual promises and non-contractual assurances.<sup>48</sup>

b. Implied term approach

The second judicial technique utilized to establish breaches of contract independent of the employer's failure to provide reasonable notice or remuneration, is the implied term approach. Traditionally, a contractual term can only be implied, based upon the presumed intention of the parties, where the contract clearly indicates that the parties neglected to express their obvious intention on a particular matter<sup>49</sup> or where it is a necessary implication in order to give business-like efficacy to the intention expressed.<sup>50</sup> A readily supportable application occurs, for example, where an express term in the employment contract of a managerial employee provides that he be treated no less favourably than employees in the collective bargaining unit. In these circumstances, the specific termination and redundancy provisions of the collective agreement impliedly set the minimum standards applicable to the redundancy of the managerial employee.<sup>51</sup>

A less obvious, but, in my view, equally supportable, application of the implied term approach is illustrated by the facts of *Pilato v. Hamilton Place Convention Centre*<sup>52</sup> Mr Pilato, one of the top marketing men in the hospitality industry, was hired as general manager of the defendant. It was an express term of his contract that if the employer elected to terminate his employment, he would be entitled to six months' notice or salary in lieu of notice. The plaintiff was subsequently dismissed based on unsubstantiated allegations of incompetency and dishonesty. The dismissal was announced in the press while Mr Pilato was on vacation. At no time was he provided with reasons for his dismissal or with the opportunity to be heard. Although the precise basis for the court's decision to award damages for mental distress is unclear, the result can be rationalized on the basis of the employer's breach of an

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47 The court's determination was further apparent in view of the fact that one of the two assurances was not even made to the plaintiff but, rather, to his wife.

48 *Luchuk v. Sport B.C.* (1982), 3 C.C.E.L. 117 (B.C.S.C.), where the fact that the plaintiff was told shortly before his dismissal that the defendant would still have a job for him, did not have the effect of constituting a new term in the employment contract.

49 *The Moorcock* (1889), 14 P. 64 (C.A.).

50 *Hart v. Bell Telephone* (1979), 26 O.R. (2d) 218 (Ont. C.A.). Cf. *Douglas Brothers and Jones v. MacQueen* (1959), 42 M.P.R. 256 (N.S.S.C.), which illustrates the resolution of some courts to restrict the circumstances in which an implied term will be found on grounds of business efficacy.

51 For example, *Wuorinen, supra*, note 17.

52 *Supra*, note 2.

implied term in the employment contract. Once a notice provision is expressly agreed upon, it follows that, in order to give a business-like efficacy to such an expressed intent, the courts may imply an additional term; namely, that, if the employer asserts just cause so as to support dismissal without the agreed notice, the employee will be provided with reasons for the dismissal and, especially where impropriety is alleged, the opportunity to be heard.<sup>53</sup> The same rationale, it is further suggested, is equally insupportable solely on the basis that there is no express notice provision in the contract.<sup>54</sup>

Some recent judicial commentary demonstrates a marked willingness to depart from traditional principles governing implied contractual terms. In *Carrick v. Cooper Canada*, Trainor J. of the Ontario High Court cited the employer's implied contractual duty "to treat [the employee] with concern and common decency."<sup>55</sup> In a similar and equally pervasive vein are the comments in the dissenting judgment of Anderson J.A. of the British Columbia Court of Appeal in *Vorvis v. Insurance Corporation of British Columbia*.<sup>56</sup> After denying the employee's claim for mental distress, His Lordship opined:<sup>57</sup>

If the pleading of the appellant had included a claim for breach of an implied term of the contract of employment, not to be subjected to harassment or oppression, the appellant might have succeeded in obtaining damages for mental distress.

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53 *Ewasiuk, supra*, note 20 at 276 *per Geatros J.* (Sask. Q.B.).

54 In such circumstances the law implies a contractual term that the period of notice shall be a reasonable one: *supra*, note 35. If the employer seeks to justify its failure to comply with the requirement, albeit implied, should it not likewise be impliedly required to provide the employee with reasons for dismissal and, where impropriety is alleged, an opportunity to be heard? This broad approach would be consistent with Professor Bridge's suggestion that implying terms into these contracts on business efficacy grounds is posited on the demands of employment contracts as a class, rather than employment contracts individually considered: Bridge, *supra*, note 9 at 350, n. 134. Regretably, the argument does not appear to have been pursued in otherwise appropriate cases: for example, *Dobson v. T. Eaton*, [1983] 1 W.W.R. 418 (Alta. Q.B.); *Rahemtulla v. Vanfed Credit Union* (1984), 4 C.C.E.L. 170, [1984] 3 W.W.R. 296 (B.C.S.C.).

55 *Supra*, note 24 at pp. 106-7. It could be argued that Trainor J. would restrict this implied contractual duty to higher-ranking managerial employees inasmuch as it is predicated on and corollary to "the employee's fiduciary duty to his employer to act only in its best interests". On the other hand, a similar duty, albeit non-fiduciary, would appear to be broadly applicable to all employees. Generally, see Atkinson & Spence, "Fiduciary Duties Owed by Departing Employees - The Emerging 'Unfairness' Principle" (1983-4) 8 Can. Bus. L.J. 501.

56 *Supra*, note 39.

57 *Supra*, note 39 at 255.

The most recent articulation is found in *Russello v. Jannock*.<sup>58</sup> In delivering the judgment of the Ontario Divisional Court, Saunders J. stated:<sup>59</sup>

It may be an implied term of some employment contracts that any dismissal will be carried out in a manner that will preserve the dignity of the employee. If that term is breached in a wanton or reckless manner, damages for mental distress may flow.

The foregoing judicial suggestions are not accompanied by any analysis or discussion of the basis upon which such terms should be implied into employment contracts. Given their radical nature, this is unfortunate. Considering that in contracts of indefinite duration an employee may be dismissed at the pleasure of his employer (with reasonable notice or remuneration), such implications surely cannot be based upon a presumed intention of *both* parties at the time of contract; namely, that the employer is assuming as part of its contractual undertaking the added burden of effecting a dismissal only with concern for the employee, without oppressing the employee and in a way which preserves the dignity of the employee. Rather, these implications appear to be based upon the court's view of what is reasonable and just. While such an approach is not entirely without precedent,<sup>60</sup> extending it so far as to create a new contractual cause of action based exclusively on the "manner" of dismissal can only be warranted if other established avenues of redress, such as those available under tort law, have proven ineffective. There are presently strong indications to the contrary.<sup>61</sup>

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58 (1987), 15 C.C.E.L. 209 (Ont. Div. Ct.).

59 *Supra*, note 58 at 213. A similar suggestion appears to be impliedly indicated in the comments of Dureault J. in *Johnson v. Canadian Association for the Mentally Retarded* (1985), 37 Man. R. (2d) 12 at 15 (Man. Q.B.).

60 Lord Denning, M.R., in dealing with the question of implied terms in *Federal Commerce and Navigation v. Tradax Export S.A. (The Maratha Envoy)*, [1977] 2 All E.R. 41 at 50 (C.A.), stated: "And, if [implied terms] are necessary to do justice, I think we should introduce them. It is a legitimate way of getting round the bad interpretation of the past." This approach, however, was severely criticized on appeal to the House of Lords: [1978] A.C. 1, particularly the comments of Lord Diplock at 7-8. See *Semble, Liverpool C.C. v. Irwin*, [1976] 2 All E.R. 39 at 50 *per* Lord Salmon (H.L.).

61 There is authority which suggests that a claim for mental distress may be founded in tort: see, for example, *Bohemier, supra*, note 35 at 18 *per* Saunders J.; *Fitzgibbons v. Westpre Publications* (1983), 3 D.L.R. (4th) 366 at 376-8 *per* Wallace J. (B.C.S.C.); *Rahemtulla, supra*, note 54 at 183-7 *per* McLachlin J. (B.C.S.C.); *Vorvis, supra*, note 39 at 246-7 *per* Hinkson J.A. and at 255 *per* Anderson J.A. (B.C.C.A.).

## 2. "Aggravated" damage

Recent wrongful dismissal caselaw reveals a number of cases where the courts have employed a notion of "aggravated" damages. It is used, however, in two distinct contexts: first, as an alternative to damages for mental distress and, secondly, as a factor to be considered in measuring the quantum of an otherwise compensable mental distress claim. Not surprisingly, the terminology has caused confusion.<sup>62</sup>

In the first context, an award of aggravated damages can only be justified in contract law on the compensatory principle of genuinely attempting to restore the plaintiff to his pre-contractual position.<sup>63</sup> Cherniak and Morse have stated that such an award "properly conveys the sense of additional compensation awarded the plaintiff for the hurt or injury actually experienced flowing from the nature of the conduct complained of."<sup>64</sup> So viewed, aggravated damages are but an alternative to mental distress damages. This was, indeed, the basis upon which Linden J. refused the award in *Brown v. Waterloo Regional Board of Commissioners of Police*:<sup>65</sup>

I have already indicated above that Chief Brown is to receive \$10,000 for his mental distress as a result of the breach of contract in this case. The reasons underlying this award include not only that he suffered such loss, but also a consideration of the quality of the conduct of the defendant in seeking to remove Chief Brown and thereafter. Consequently, the type of loss meant to be redressed by aggravated damages and the conduct it is based on have already been compensated for on another legal basis. There cannot be double recovery for the hurt feelings suffered here; that loss can only be compensated for once. (In the event that the mental suffering of Chief Brown had not been compensable under *Hadley v. Baxendale*, I would have been inclined to base such an award on the principles of aggravated damages. However, in this case it is unnecessary to do that, in view of the recent developments in the Canadian law of contract damages for mental suffering.)

As an alternative to damages for mental distress, identical causation problems emerge. The Ontario Court of Appeal, in *Brown*, made a special point of emphasizing that, whether styled as "damages for mental

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62 This is exacerbated by the historical non-contractual origins of the nomenclature. For a complete discussion, see Cherniak & Morse, "Aggravated, Punitive and Exemplary Damages in Canada," in *Torts in the 80's* (Law Society of Upper Canada Special Lectures, 1981) (Toronto: DeBoo, 1983) at 152.

63 As such, "aggravated" damages are entirely distinct and must be distinguished from "punitive" or "exemplary" damages whose purpose is to punish or penalize the wrongdoer: *Rookes v. Barnard*, [1964] 1 All E.R. 367 (H.L.).

64 *Supra*, note 62 at 154.

65 *Supra*, note 2 at 290.

distress" or "aggravated damages", the claim must still flow from an actionable breach of contract:<sup>66</sup>

... If a course of conduct by one party causes loss or injury to another, but is not actionable, that course of conduct may not be a separate head of damages in a claim in respect of an actionable wrong. Damages, to be recoverable, must flow from an actionable wrong. It is not sufficient that a course of conduct, not in itself actionable, be somehow related to an actionable course of conduct....

Thus, it is not sufficient to "tack on" a mental distress or aggravated damage claim to an actionable breach unless that kind of damage was, also, in fact caused by the breach as opposed to the "aggravating" circumstances surrounding it.<sup>67</sup>

There is no suggestion, however, referring now to the second context in which the notion of "aggravated" damages appears, that mental distress that is causally connected to the defendant's breach of contract cannot be "aggravated" by the surrounding conduct of the defendant, which, by itself, may not be actionable. This important but subtle distinction appears to have eluded Wallace J. of the British Columbia Supreme Court when he made the following comments in *Fitzgibbons v. Westpre Publications*:<sup>68</sup>

In my view, the practice of "tacking on" or "merging" of non-actionable claims with a recognized breach of contract might be more readily avoided if the court were to test each such claim by asking the question – would the employee have a claim for damages for mental distress based upon the employer's abusive conduct if the employer had given the appropriate notice, or paid the appropriate compensation in lieu of notice, at the time of dismissing his employee? If the employee would not, he cannot acquire such a cause of action by merging it with a proper action for wrongful dismissal.

This reasoning is, with respect, suspect. Unlike the circumstances in *Brown*,<sup>69</sup> where the employer has not provided the appropriate notice or remuneration, a breach of contract is in existence. The only question remaining should be whether the mental distress, as a head of damage claimed in respect of that breach, was caused by the breach. In such circumstances, the employee is not attempting to establish a new cause of

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66 *Supra*, note 5 at 121.

67 *Vorvis, supra*, note 39.

68 *Supra*, note 61 at 375.

69 In *Brown*, the Ontario Court of Appeal disallowed the mental distress damages on the basis that, because Chief Brown was the holder of a public office, the Board's abortive attempt to dismiss him did not constitute a breach of contract and was not actionable, because it was made by the Board in good faith and within its statutory authority.

action but, rather, to recover a head of damage in a cause of action he already has. Consequently, that attempt is clearly outside the concept of "tacking on" or "merging" eschewed by the Ontario Court of Appeal in *Brown*. This understanding is essential to a proper rationalization of the results in two Ontario High Court decisions, *Pilon v. Peugeot Canada*<sup>70</sup> and *Bohemier v. Storwal International*.<sup>71</sup> Both cases are representative of typical scenarios where the breach of contract consisted of the employer's failure to provide adequate notice or remuneration.

In *Pilon*, Galligan J. awarded damages "solely in compensation for the mental distress caused to the plaintiff by the defendant's breach of contract," but described, in the following terms, the way in which he considered the callous manner of the plaintiff's dismissal:<sup>72</sup>

I think that the conduct used by the defendant and the method used by it in callously, suddenly and arbitrarily firing a long-devoted, loyal servant, aggravated the mental distress which the defendant's breach of contract caused the plaintiff. Its method of firing increased the distress and in that sense, and only in that sense, do I consider the callous conduct of the defendant when I assess the plaintiff's damages for mental distress.

Similarly, in *Bohemier*, where a long-term employee's dismissal without cause and without notice was communicated to him by way of a "cold and perfunctory" letter delivered by taxi to his home, Saunders J. held that the plaintiff was "entitled to damages for mental suffering arising out of a failure to give adequate notice, aggravated by the manner in which the [inadequate] notice was communicated."<sup>73</sup> It is not without significance that the Ontario Court of Appeal did not find this reasoning in conflict with its decision in *Brown*. Rather, the Court confirmed the quantum of damage awarded for mental distress with the terse commentary that "Saunders J. correctly stated the principles applicable and... his judgment is unassailable."<sup>74</sup>

What *Pilon* and *Bohemier* suggest is that the circumstances surrounding the employer's breach of contract in failing to provide adequate notice or remuneration may "aggravate" the resulting mental distress flowing from the breach. Such circumstances will never obviate the need to establish a causal link between the lack of notice or re-

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70 (1980), 29 O.R. (2d) 711 (Ont. H.C.).

71 *Supra*, note 35.

72 *Supra*, note 70 at 716.

73 *Supra*, note 35 at 19-20. Semble, *Ewasiuk, supra*, note 20 at 279-80 *per* Geatros J.

74 *Bohemier, supra*, note 35 at 384.

muneration and the resulting mental distress, but will, on the other hand, assist in establishing that causal link.<sup>75</sup>

Other cases, although not utilizing the "aggravated" damages nomenclature, can be rationalized on the same basis. In *Speck v. Greater Niagara General Hospital*, the fact that the hospital purported to dismiss a senior nurse for cause when sufficient cause did not exist was viewed to be "of great significance to the plaintiff's claim for damages for mental suffering, even though it [did] not change the basic nature of the breach of contract."<sup>76</sup> Southey J. went on to decide the causation issue in the following terms:<sup>77</sup>

I have decided on the balance of probabilities that virtually all of the mental suffering experienced by the plaintiff was caused by the defendant's breach of contract, that is, by the way in which she was terminated: without notice because of cause, rather than by the termination itself.

A similar rationale can be used to support the causative link in *Pilato*, where, in very extreme circumstances, a senior employee was likewise purportedly dismissed for cause when sufficient cause did not exist. Although Fitzpatrick J. makes no explicit reference to "aggravated" damages, his causation analysis clearly indicates that he viewed the plaintiff's mental distress was caused by the failure of adequate notice and the severe and unfair manner in which it occurred.<sup>78</sup>

### 3. Multiple causes

The *Pilon*, *Bohemier*, and *Pilato* cases all suggest factual situations where the mental distress was not found to be caused by the fact or manner of termination as *opposed* to inadequate notice remuneration. Rather, it was the failure to provide adequate notice or remuneration in these cases that caused the respective employee's emotional distress. The distress itself, however, was held to be "aggravated" by the manner of effecting that failure on the employer's part. The importance of the distinction must be emphasized, because a number of courts that have denied damages for mental distress appear to have done so on the all-or-nothing basis that mental distress is exclusively caused either by the lack of adequate notice or remuneration or by the termination itself as

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75 For example, *Luchuk, supra*, note 48, where Spencer J. found that the plaintiff's mental distress was aggravated by his inability to find work during a period in which he should have been receiving salary in lieu of notice, thereby creating a causative link to the employer's breach of contract. Cf., *Rahemtulla, supra*, note 54.

76 (1983), 43 O.R. (2d) 611 at 616 (Ont. H.C.).

77 *Supra*, note 76 at 621 (O.R.).

78 *Pilato, supra*, note 2 at 663.



determined in the vacuous absence of any other considerations.<sup>79</sup> In *Antonaros v. SNC*, White J. queried how one could really ever know whether the plaintiff's mental distress flowed from one or the other.<sup>80</sup>

Damages, as indicated in these cases, must flow from the failure to give adequate notice and not from the act of dismissal.... What does it mean? How can one really know as a tribunal of fact whether depression and anxiety flow from one or the other? They seem in a practical way to be causally intermingled in their psychological effect as to be distinguishable only by a sophist.

His Lordship did go on, however, to suggest a practical way around the dilemma:<sup>81</sup>

... I find that part of the emotional distress of the plaintiff exhibited by anxiety and depression did flow from the inadequate notice. Had adequate notice been given, one less source of stress would have been playing on the plaintiff.... [T]he plaintiff's emotional distress...was caused by inadequate notice, at least in part.

This multiple-causes formulation is useful insofar as it recognizes that emotional distress is really an integrated psychological response to many concurrent variables, not all of which are causally related to the defendant's breach of contract. In *Antonaros*, White J. found that the plaintiff's emotional distress was caused by two factors; namely, his discharge without adequate notice and his wife's serious illness. Having attributed fifty per cent of the plaintiff's distress to his employer's breach of contract, His Lordship applied apportionment principles in awarding mental distress damages to the plaintiff.

Of course, one must not lose sight of the fact that causation precedes apportionment, and, in all cases, it is incumbent upon the plaintiff to establish that his emotional distress was caused, at least in part, by the employer's breach of contract. Medical evidence, of necessity, will comprise a crucial part of that proof.<sup>82</sup> Once the causal link is established, however, the difficulty of assessing relative degrees of contribution to

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79 The commentary of Galligan J. in *Rivers, supra*, note 34 at 140 (Ont. H.C.) is illustrative. See also, *Misovic, supra*, note 37 at 165; *Nicholls, supra*, note 36 at 735; *Russello v. Jannock* (1987), 15 C.C.E.L. 209 at 213 (Ont. Div. Ct.); *Fitzgibbons, supra*, note 61 at 373 (B.C.S.C.); *Plummer, supra*, note 22 at 21.

80 (1985), 6 C.C.E.L. 264 at 286 (Ont. H.C.).

81 *Supra*, note 80 at 286-7.

82 For example, *Dobson, supra*, note 54, where the plaintiff's doctor elicited four problems (including breach of contract) that could have caused the plaintiff's emotional distress. Because the doctor was unable to differentiate between them "as to whether one of them caused all the stress symptoms or two of them or three of them or four of them", damages were denied.

the plaintiff's emotional distress should not deter a court from the task.<sup>83</sup>

### C. Remoteness problems

Even if the plaintiff can successfully establish a causal link between the employer's breach of contract and the resulting mental distress, a more formidable prerequisite to recovering emotional distress damages remains: the satisfaction of remoteness requirements. A strict application of *Hadley v. Baxendale* limits the recovery of damages to ordinary consequences flowing in the usual course of events from the breach of contract and extraordinary consequences that can reasonably be supposed to have been in the contemplation of the parties at the time they made their contract as liable to result from the breach. As Professor Fridman has noted, the two formulations reveal two different foreseeability tests:<sup>84</sup>

The first test is *objective*, ie., what the reasonable man would or ought to have foreseen as being the likely or probable consequence of his breach. This will be, and was intended to be the normal, most usual test. However, exceptionally, it is recognized that, in some instances, the recoverable damages may go beyond what the ordinary, reasonable man would foresee as being likely, and might extend to consequences not ordinarily foreseeable, as long as the particular circumstances were foreseeable in light of *their* particular contract and its special circumstances. In such instances the test is *subjective*.

In the typical wrongful dismissal scenario, where the breach of contract consists of the employer's failure to provide adequate notice or remuneration, it is unlikely that resulting mental distress could ever satisfy an objective remoteness test, because it cannot be said that inadequate notice or remuneration in the usual course of events would cause any real and sustained mental distress beyond the anxiety and distress normally encountered in any breach of contract.<sup>85</sup> It is possible, on the other hand, to satisfy a subjective remoteness test providing that the circumstances existing at the time of contract reveal that the prospect of such mental distress was or should have been in the reasonable contemplation of the parties. This clear operational standard has however not been consistently or predictably applied. Although the proper time horizon for measuring remoteness was expressly articu-

83 Apportionment in the context of contributory negligence legislation provides ample judicial experience to draw upon: for example, *The Tortfeasors and Contributory Negligence Act*, R.S.M., c. 266, s. 4. For a recent application, see *Beatty v. Pengelly* (1984), 32 Man. R. (2d) 119 (Man. Q.B.).

84 G.H.L. Fridman, *The Law of Contract*, 2d ed. (Toronto: Carswell, 1986) 656.

85 For example, *Leblanc*, *supra*, note 20 at 281 *per* Dickson J.; *Plummer*, *supra*, note 22 *per* Haley D.C.J.

lated in *Hadley v. Baxendale*, and has not been seriously questioned since, three different time frames can be identified in the wrongful dismissal caselaw: first, the time of contract; secondly, the time of hiring; and, thirdly, the time of breach.

### 1. *Proper time for the determination of foreseeability*

The "time of hiring" and "time of contract" tests are themselves not free from ambiguity. Many courts appear to use the tests interchangeably. The "time of hiring" test is justifiably synonymous with the "time of contract" test in all cases where there are no subsequent alterations to the original contract. Clearly, in such cases, *Hadley v. Baxendale* requires that a court turn the clock back, so to speak, to the original time of contract in order to determine what was, or should have been, in the reasonable contemplation of the parties at that point in time. This is how the test was used in *Plummer v. W. Carsen*,<sup>86</sup> where an employee of nine years at the bookkeeper level was terminated on one month's severance pay in lieu of notice. Damages for mental distress were denied on the basis that such damages were not reasonably foreseeable "at the time the plaintiff was hired."<sup>87</sup> Treating the tests as synonymous is most appropriate where the time frame between the date of hiring and date of dismissal is relatively short<sup>88</sup> or where, as in *Plummer*, no changes of major significance in the terms and conditions of employment have intervened between the time of hiring and the time of dismissal.<sup>89</sup>

The "time of hiring", however, is not necessarily synonymous with the "time of contract" in cases where there have been subsequent alterations to the employment contract. In *Wourinen v. Workers' Compensation Board*, Legg J. suggested that, if an employment contract is altered, the relevant time for determining foreseeability is the date of the alteration.<sup>90</sup>

I have noted Mr. Justice Linden's reference in *Brown v. Waterloo* to the well-known principle that the damages recoverable must be within the contemplation of the parties "at the time they enter into the contract". However, in my opinion that principle carries the qualification that if a term of a contract of employment is altered after the commencement of the employment by the employee, the time for considering whether such damage is within the contemplation of the parties is as of the date of such alteration.

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86 *Supra*, note 22.

87 *Ibid.*

88 *Cringle, supra*, note 23; *Antonaros, supra*, note 80.

89 *Dobson, supra*, note 54; *Luchuk, supra*, note 48; *Nicholls, supra*, note 36.

90 *Supra*, note 17.

This test recognizes that the time of contract is not immutably fixed as at the time of hiring. Many judges, on the other hand, seem to be routinely and mechanically reverting to the "time of hiring," however styled.<sup>91</sup>

The "time of breach" test represents the most dramatic departure from established principles of contract law. With one exception,<sup>92</sup> courts applying this test have done so surreptitiously, by neglecting to specifically enunciate the relevant time of contemplation; alternately and more commonly, they have paid "lip service" to the "time of hiring" or "time of contract" test, but then, in apparent disregard, looked at subsequent circumstances to determine what should have been in the contemplation of the parties at that time.

In *Speck*, for example, Southey J. directed his mind to what "the hospital *should have known* when it hired the plaintiff as an administrative nursing assistant in 1969," and concluded that it should have known that mental distress would result if, "after 12 years of diligent service in that position or other management positions," the plaintiff was wrongfully dismissed without notice.<sup>93</sup> With respect, it would be indeterminate at the time of hiring whether Ms Speck would be rendering twelve years of service, diligent or otherwise, in any management position.<sup>94</sup> Nor does it appear that Southey J.'s regard to the time of breach was other than advertent when one considers that he also referred to the defendant's actual or constructive knowledge of the plaintiff's reactive depression during her employment.<sup>95</sup> Similarly, in *Wourinen*, in addressing whether it was reasonably within the contemplation of the parties that the plaintiff would suffer mental distress were he to be dismissed summarily, Legg J. stated:<sup>96</sup>

On the evidence I find that his depression and mental stress was reasonably foreseeable by the Board. Mr. Riegert admitted on discovery that he would have anticipated that upon termination an employee would become anxious about whether he would be able to gain other employment and Mr. Riegert admitted he would have been caused anxiety by such termination under the prevailing economic conditions.

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91 For example, *Brown, supra*, note 5 (Ont. C.A.); *Jackson v. SNC* (1985), 8 C.C.E.L. 274 (Ont. H.C.); *Luchuk, supra*, note 48; *Misovic, supra*, note 37; *Nicholls, supra*, note 36; *Plummer, supra*, note 22; *Rivers, supra*, note 34; *Wilcox, supra*, note 25.

92 *Taggart v. Kwikasair Express* (1980), 26 B.C.L.R. 352 at 353 (B.C.C.A.).

93 *Supra*, note 76 at pp. 618-9 (O.R.) [emphasis added].

94 Indeed, at the time of her hiring it appears Ms Speck was engaged in a non-managerial position. See also *Pilon, supra*, note 70 at 715, where it was held that the employer should reasonably have contemplated that "[l]ong-term employees in positions of responsibility, such as Mr. Pilon" would suffer mental distress from a sudden dismissal without notice.

95 *Speck, supra*, note 76 at 618.

96 *Supra*, note 17 at 45.

Mr. Calhoun admitted on cross-examination that he knew the plaintiff would be upset by the termination because it was "an emotional time for all of us."

It is clear that Legg J., at this particular stage, was having regard to what should have been reasonably foreseeable at the time of breach rather than at the time of contract.

Other decisions likewise demonstrate judicial tolerance towards expanding the horizon of contemplation to the time of breach. In *Carrick v. Cooper Canada*, Trainor J., although purportedly applying a "time of hiring" test, emphasized the fact that "at the time of [his] termination, the plaintiff was... vulnerable" owing to intervening personal and medical problems.<sup>97</sup> Similarly, in *Lightburn v. Mid Island Consumer Services Co-Operative*,<sup>98</sup> although the time of contemplation *per se* was not articulated, the fact that Judge Cashman connected the reasonable foreseeability of the plaintiff's mental distress with the pre-breach assurances and dishonesty of the defendant's general manager, leads to the irresistible conclusion that he, too, was looking to the employer's knowledge of its employee at the date of breach.

To the degree that any of the foregoing cases suggest a remoteness test to determine foreseeability at a point in time other than the time of contract, they should not be supported. Any suggestion that the horizon of contemplation is fixed as at the time of hiring or can be permissively extended to the time of breach fundamentally violates long-standing principles of contract law. It is regrettable that much of the confusion could have been avoided and, in many cases, the same results could have been achieved if the courts uniformly applied the "time of contract" test, properly understood.

## 2. "Updating" proper time: Major contractual modifications

The proposition asserted in *Wourinen* that, if an employment contract is altered, the relevant time for determining foreseeability is the date of the alteration, is important to a proper understanding of the "time of contract" test. It may be that this proposition is too broadly stated, because contract law has long distinguished between "major" and "minor" alterations with regard to their effect upon extant contracts.<sup>99</sup> It is only in the former case that a "new contract" is said to result.<sup>100</sup> In these circumstances, there is, indeed, a compelling argument that the

97 *Supra*, note 24 at 106.

98 *Supra*, note 29.

99 The distinction between a "major" alteration by way of rescission followed by the making of a new contract and a "minor" alteration appears to be one of degree and the question is often not an easy one to determine: see, for example, the test suggested by Lord Dunedin in *Morris v. Baron* [1918] A.C. 1 at 26 (H.L.). Generally, see G.H. Treitel, *The Law of Contract*, 7th ed. (London: Stevens, 1987) 80-2.

100 *Patterson v. Scott* (1922), 69 D.L.R. 81 at 89-91 *per Galt J.* (Man. Q.B.).

relevant time for determining foreseeability should be updated accordingly. In the case of a "minor" alteration, however, the argument is less persuasive insofar as the legal effect of the alteration is merely to modify the existing contractual arrangements; that is, in all other respects the original contract remains intact.<sup>101</sup> If so, it can be argued that the time for determining foreseeability should be inviolate.

Be that as it may, it is important to recognize that, all other things being equal, emotional distress of a real and sustained nature is more likely to be a foreseeable consequence of summary dismissal in the case of a long- versus short-term employee,<sup>102</sup> an employee with greater versus lesser responsibility,<sup>103</sup> a "company man" versus a less-conscientious employee,<sup>104</sup> and so on. Yet, such matters are often indeterminate at the time of hiring, emerging or evolving instead over time. Where the employment is long-term, it may often be possible to identify one or more contractual variations. In my view, where the variation is major, the horizon of contemplation should be *updated* to include a consideration of the intervening variables. Support for this proposition was recently afforded by Twaddle J.A. in delivering the judgment of the Manitoba Court of Appeal, in *Yosyk v. Westfair Foods*<sup>105</sup> His Lordship noted a "refinement" of the "time of hiring" or "time of contract" test for determining the intention of the parties in the context of the appropriate length of notice required from an employer.<sup>106</sup>

The relationship between an employer and an employee is not a static one. During it, the contract is often amended by agreement on such fundamental terms as remuneration and the responsibilities of the employee. In a similar manner, the intention of the parties as to the length of notice required to end their relationship may change. The relevant intent is that which the parties had when the contract was last changed prior to the events leading to its termination.

It was earlier noted that the caselaw prior and subsequent to *Wourinen* reveals that most courts seem to be treating the time of hiring or contract to be an immutable foreseeability reference point. This is often so notwithstanding the presence of factors that suggest the appropri-

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101 *Emerald Resources v. Sterling Oil Properties Management* (1969), 3 D.L.R. (3d) 630 (Alta. C.A.); *Lohnes v. Daw* (1968), 68 D.L.R. (2d) 730 (N.S.S.C.).

102 See the comments of Scollin J. in *Griffin, supra*, note 19. See also *Bohemier, supra*, note 35. Cf. *Balchin, supra*, note 17, where the distinction was accorded little significance.

103 For example, *Ewasiuk, supra*, note 20; *Pilato, supra*, note 2. Cf. *Plummer, supra*, note 22.

104 For example, *Pilon, supra*, note 70.

105 [1988] 3 W.W.R. 155 (Man. C.A.).

106 *Supra*, note 105 at 159. Cf. *Morby, supra*, note 35 at 227-8 *per* Creaghan J.

ateness of updating. In a number of cases, this has resulted in denying the mental distress claim as being too remote when, if the court considered what should have been in the contemplation of the parties as at the date of contractual modification, such damage may have been found to have been reasonably foreseeable.<sup>107</sup> *Jackson v. SNC*<sup>108</sup> serves as a cogent illustration. The plaintiff, a 44-year-old civil engineer, who had worked for six years for the defendant corporation, was informed that he was to be discharged due to a construction slowdown. In April 1982, he struck an agreement with his employer delaying the possible layoff. The agreement provided that the plaintiff would use his vacation hours and a two-month leave of absence to extend his employment until September 1982. At that time, the defendant was unable to reinstate the plaintiff and dismissed him without further notice. Although the plaintiff suffered substantial mental distress owing to the insufficient notice, Holland J. denied the claim upon the ground that such damage was unforeseeable at the time of hiring. His supporting reasons leave little doubt that, if remoteness been measured at the time of contractual modification, the damage would have been recoverable.<sup>109</sup>

There is no evidence, in my opinion, that at the time of the hiring it was in the contemplation of both parties that mental distress would be the probable result of a failure to give proper notice. It is true that Mr Jackson from time to time, and particularly about January of 1982, told his supervisor that if he was to be discharged he required adequate notice. But as I indicated before, there is no evidence that anything like this was said at the time of hiring or that, to the knowledge of his employer at the time of hiring, Mr Jackson was in such a mental or physical condition that a failure to give adequate notice would probably result in mental distress.

In certain cases, although plaintiffs have been successful in obtaining damages for mental distress, the time of contemplation test employed by the court is indeterminate. Some of these results can be rationalized by "updating" the relevant time for measuring foreseeability

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107 For example, *Bell, supra*, note 4: a pharmacist, initially hired to dispense drugs, whose responsibilities changed radically over twenty-six years of employment; *Rivers, supra*, note 34: twenty-eight-year employee who had risen through a series of promotions to hold a position of senior administrator; *Wilcox, supra*, note 25: fifteen-year employee with defendant company prior to his major promotion.

108 *Supra*, note 91.

109 *Supra*, note 91 at 280. It is important to note that, although Holland J. found that the letter of 15 April 1982 did not amount to an agreement to settle the plaintiff's claims in respect of the applicable notice period, he does not in any way suggest that it was not a binding contractual modification with respect to other matters therein contained: see 278 of the decision.

through the major contractual modification device.<sup>110</sup> The *Bohemier* case is illustrative. Mr Bohemier was an employee with thirty-five years of service at the time of his wrongful dismissal. He had been employed as a spot welder, brake pressman, inspector, desk packer and, for the last five years, as a quality control inspector. Accepting this latter position meant resigning his membership in the plant union and becoming part of management. This, in my view, constituted a major variation of contract, thereby permitting an updating of the horizon of contemplation to encompass the fact that Mr Bohemier was a long-term, "loyal and satisfactory" employee who was "proud of his work and his long association with the business."<sup>111</sup> Viewed in this context, the foreseeability of mental distress resulting from his dismissal without cause and without notice can be justified without departing from traditional principles.

The major contractual modification device can also be used to rationalize results in a number of cases where the courts have improperly had regard to an employer's knowledge of its employee at the time of breach. In *Speck*,<sup>112</sup> the plaintiff was initially hired as a nursing supervisor in 1969 and head nurse in the obstetrics department in 1980. She was wrongfully dismissed one year later. While Southey J.'s conclusions as to what should have been in the employer's contemplation at the "time of hiring" cannot be supported, they are supportable as at the time of her major promotion in 1980.<sup>113</sup> In *Wourinen*,<sup>114</sup> it was unnecessary for the court to canvass economic conditions at the time of breach. At the point when Mr Wourinen accepted his promotion, assuming that the time of contract had been "updated", the likelihood of mental distress would probably have been reasonably foreseeable, because he was assured by his employer at that time, as a term in the (new) contract, that he would be treated no less favourably in regards to notice than he would have been had he remained in the collective bargaining unit. Likewise, in *Carrick*,<sup>115</sup> one-and-one-half months prior to the plaintiff's dismissal, his employment responsibilities significantly changed. If, as is suggested, these were major alterations, the employer's contemplation at that point in time would, or should, have included the employee's "vulnerability", thus rendering the re-

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110 For example, *Pilon*, *supra*, note 70; *Young v. Huntsville District Memorial Hospital* (1984), 5 C.C.E.L. 113 (Ont. H.C.).

111 *Bohemier*, *supra*, note 35 at 9.

112 *Supra*, note 76.

113 The same analysis can be used to support the result in *Pilon* (*supra*, note 70 at 715).

114 *Supra*, note 17.

115 *Supra*, note 24.



sulting mental distress reasonably foreseeable without the necessity for judicial regard to the time of breach.<sup>116</sup>

### 3. *Special circumstances*

The plaintiff's ability to satisfy remoteness requirements may be assisted by the presence of "special circumstances" known to the parties at the time of hiring that render it likely that he, in particular, will suffer real and sustained emotional distress in the event of the employer's breach.<sup>117</sup> A number of illustrations appear in the wrongful dismissal caselaw and, for the most part, display the recurring presence of one or more of the following factors: an "older" or "more mature" employee,<sup>118</sup> known medical problems rendering the employee more prone to react with serious physical symptoms to emotional distress,<sup>119</sup> a highly-qualified employee,<sup>120</sup> a depressed job market at the time of hiring,<sup>121</sup> actions or communications by the employer reflecting assurances of continued employment,<sup>122</sup> the public nature of the employment and/or incumbent,<sup>123</sup> and a small-town milieu.<sup>124</sup> These factors are not discrete. It is usually the presence of several and the interrelationship between them that produces a cumulative effect and renders the circumstances or the relationship between the parties at the time of contract "special", thus increasing the likelihood that mental distress flowing from a wrongful dismissal would be reasonably foreseeable. In *Jackson v. SNC*, for example, the fact that the plaintiff was forty-eight years of age at the time of hiring, held high engineering qualifications, and was induced to leave steady and secure employment in what was

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116 Alternatively, Trainor J. could have supported his decision solely with reference to the time of hiring and the constructive knowledge of the employer exclusively as at that point in time: *supra*, note 24 at 107.

117 Even those few courts continuing to express strict adherence to *Addis* appear to recognize a "special circumstances" exception to its general prohibition: for example, *Wilcox, supra*, note 25 at 54.

118 *Antonaros, supra*, note 80; *Brown, supra*, note 2; *Carrick, supra*, note 24.

119 *Antonaros, supra*, note 80; *Speck, supra*, note 76; cf. *Nicholls, supra*, note 36, where the employee's prior health and the existence of depressed economic conditions were not known at the time of contract.

120 *Pilato, supra*, note 2.

121 *Antonaros, supra*, note 80. This would only be relevant if the dismissal occurred soon afterwards or if there had been no change in the prevailing economic conditions.

122 *Antonaros, supra*, note 80; *Colasurdo, supra*, note 30: an employee induced by employer to leave secure employment; *Cox, supra*, note 42: employee possessed of competitor's job offer induced by employer to stay.

123 *Brown, supra*, note 2; *Pilato, supra*, note 2; *Young, supra*, note 110.

124 *Johnson, supra*, note 59: "small rural community where everyone is known"; *Gordon, supra*, note 31: "small village"; *Young, supra*, note 110: "small town"; *Ewasiuk, supra*, note 20: "closely-knit city."

otherwise a poor market for engineering skills on the strength of the defendant's knowingly false assurance of three to five years' employment, persuaded White J. that the employer should have reasonably foreseen that a termination without reasonable notice would cause the plaintiff to suffer serious emotional distress and anxiety.<sup>125</sup>

Many variables which, in concert, contribute to the establishment of "special circumstances" would, of course, be known to the parties at the time of hiring. If not, express disclosure by the employee may be warranted and, from a practical perspective, imperative. Such disclosure before or at the time of contract may be the only way for the employee to establish that his employer was seized with actual or constructive knowledge of his propensity to suffer real and sustained mental distress in the event of the employer's breach. An example is provided by *Cringle v. Northern Union Insurance*,<sup>126</sup> where the employee's major concern at the time of hiring was to maintain the security that he had attained with his previous employer, especially in light of the fact that his working wife would be terminating her employment at the end of the year owing to pregnancy and, also, that he had acquired a new home with a heavy mortgage. Although he was summarily discharged without notice and without cause only ten weeks later, Mr Cringle's mental distress claim did not succeed because of his failure to expressly disclose these special circumstances that were in existence at the time of his hiring.<sup>127</sup>

Major contractual modifications during the employment would improve the chances in some cases that special circumstances would be present at the time of contract due to an "updating" of both the existence of, and the interrelationship between, key variables. The nature of the employer-employee relationship and the years and quality of service rendered by the employee, for example, may evolve considerably from the situation pertaining at the time of hiring. So too, in many cases, would the personal circumstances of the employee himself that, if known to the employer at the updated time of contract, may give rise to special knowledge sufficient to render mental distress arising from the employer's breach reasonably foreseeable.

#### D. Nature of the breach:

##### A requirement of wantonness or Recklessness?

There is evidence of renewed hostility to the award of mental distress damages in wrongful dismissals emanating from the appellate courts

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125 *Supra*, note 80. See also *Pilon, supra*, note 70 at 715 *per* Galligan J. Most recently, the same result ensued in *Colasurdo, supra*, note 30.

126 *Supra*, note 23.

127 *Supra*, note 23 at 23-4.

in Ontario and British Columbia. In *Brown v. Waterloo Regional Board of Commissioners of Police*, Weatherston J.A., in delivering the judgment of the Ontario Court of Appeal, opined that the reasonable expectations of the parties to "the ordinary commercial transaction" would only rarely include compensable mental distress damages.<sup>128</sup> In His Lordship's view, this was "not so much an exception to the rule in *Hadley v. Baxendale* as a practical application of it."<sup>129</sup> He then curiously approved a passage from an American authority that seemingly superimposes an added requirement to the reasonable foreseeability mandated under *Hadley v. Baxendale*.<sup>130</sup>

The cases that I have referred to show that there may be circumstances where a breach of contract will give rise to a claim for damages for mental distress. In my opinion, the correct rule is stated in Corbin, vol. 6, 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 a performance of such a character that the promisor had reason to know when the contract was made that a breach would cause suffering, for reasons other than pecuniary loss.

According to this test, in order for mental distress damages to be recoverable, they must be reasonably foreseeable *and* flow from a wanton or reckless breach of contract.

There appears to be no compelling theoretical rationale for the introduction of this additional requirement. In my view, it unnecessarily interjects tort considerations into contract law. While Corbin's rule, paraphrasing paragraph 341 of the American *Restatement*, may be appropriate in its American context, it is not readily transferable. It should be noted, for example, that, unlike the situation existing in the Canadian common law provinces, in most American jurisdictions it is unnecessary for the plaintiff to specify in his pleadings whether his case lies in contract or tort, and it is common for decisions to be rendered without classifying the wrong for which damages are awarded.<sup>131</sup> Even more noteworthy is the fact that the wantonness or recklessness requirement is now absent from the *Restatement (2d) Contracts*.<sup>132</sup> Against

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128 *Supra*, note 5 at 118.

129 *Ibid.*

130 *Supra*, note 5 at 120.

131 See commentary accompanying para. 341, *Restatement of the Law of Contracts* (St. Paul: American Law Institute Publishers, 1932). With respect to Canadian common law, the issue is poignantly illustrated in *Vorvis, supra*, note 39 at 246-7 per Hinkson J.A.

132 *Restatement of the Law: Contracts 2d* (St. Paul: American Law Institute Publishers, 1982). Para. 353 is based on the former para. 341 and provides as follows:

this background, Weatherston J.'s comments in *Brown* warrant closer scrutiny.

It is important to keep in mind that damages for mental distress were disallowed by the Ontario Court of Appeal in *Brown* on the narrow ground that there was no breach of contract occasioning the plaintiff's mental distress.<sup>133</sup> The subsequent adoption of the Corbin-*Restatement* test was, therefore, I suggest, obiter. This may explain why the wantonness or recklessness requirement was entirely ignored by the Ontario Court of Appeal in *Bohemier*,<sup>134</sup> its appellate decision rendered just three months after the Court's decision in *Brown*. Perhaps even more telling was the Court's approach in a later post-*Brown* appeal. In *Misovic v. Acres Davy McKee*,<sup>135</sup> the Ontario Court of Appeal cited its decision in *Brown* as setting out two prerequisites for an award of mental distress damages in wrongful dismissal actions. A superimposed wantonness or recklessness requirement is notably absent:<sup>136</sup>

It is clear from the evidence that the test laid down by this Court in *Brown v. Waterloo Reg. Bd. of Commrs. of Police* for the award of damages for mental distress in this type of case has not been met. The evidence does not support an inference that it was in the contemplation of the parties at the time of the hiring that mental distress would be a probable result of a failure to give proper notice. Nor does the evidence support an inference that such distress was suffered in any one of these cases from the absence of reasonable notice, rather than from the temporary lay-off of each of the respondents, or their dismissal.

Most lower court decisions in Ontario exhibit a conspiracy of silence insofar as the wantonness or recklessness requirement is concerned.<sup>137</sup> Even the few decisions citing *Brown* as authority for the adoption of the Corbin-*Restatement* test, appear to eschew a strict application of the requirement. Thus, in *Speck* for example, the employer's conduct in purporting to dismiss an employee without notice for cause, when

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Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.

133 *Supra*, note 5. The case was atypical in that Chief Brown was the holder of a public office. Because the Board's abortive attempt to dismiss him was made in good faith and within statutory authority, it was held not to constitute an actionable breach of contract.

134 *Supra*, note 35.

135 *Supra*, note 37.

136 *Supra*, note 37 at 164-5.

137 For example, *Pilato*, *supra*, note 2; *Jackson*, *supra*, note 91; *Rivers*, *supra*, note 34; *Plummer*, *supra*, note 22; *Colasurdo*, *supra*, note 30.

sufficient cause did not exist, was held to be a "reckless" breach within the rule.<sup>138</sup>

The post-*Brown* Ontario approach markedly differs from that prevailing in British Columbia. On three separate occasions, the British Columbia Court of Appeal has purportedly followed the Ontario Court of Appeal's decision in *Brown* and unequivocally endorsed a strict application of the *Corbin-Restatement* rule.<sup>139</sup> In *Lockhart v. Chrysler Canada*<sup>140</sup> and *Pearl v. Pacific Evercon*,<sup>141</sup> appeals with respect to awards of mental distress damages were allowed precisely because the appellate court was of the view that the conduct of the respective employers did not meet the wantonness or recklessness standard. In light of Ontario's post-*Brown* judicial experience, the British Columbia Court of Appeal may wish to reconsider its imposition of the added requirement. In the interim, however, it appears that only in British Columbia is the absence of wantonness or recklessness fatal to the plaintiff's claim.

### III. CONCLUSION

THE INCREASING INCIDENCE OF CONTRACTUAL DAMAGE awards for emotional distress in wrongful dismissal actions has failed to provide definitive guidance with respect to the difficult evidentiary, causation, and remoteness problems inherent in such claims. Rather, the cases have spawned a parallel increase in uncertainty owing to the diversity of judicial approaches to these problems. The foregoing analysis of recent jurisprudence was concerned with detailing the theoretical and practical difficulties associated with some of these approaches with a view towards rationalization on a broader basis.

The intangible nature of emotional distress necessarily invites evidentiary problems. Canadian courts have ostensibly experienced considerable difficulty in fashioning with precision the parameters of the necessary distinction between real and sustained mental distress on the one hand and mere injury to feelings on the other. What has clearly emerged, notwithstanding the paucity of judicial direction, however, is a general evidentiary prerequisite to compensability; that is, that the plaintiff must be able to establish by evidence some physical manifestation of his mental distress. Admittedly, the application of this

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138 *Supra*, note 76 at 616. A similar conclusion was reached in *Young, supra*, note 110 at 127-8, where the employee was effectively given no notice nor any opportunity to be heard. *Semble, Ewasiuk, supra*, note 20.

139 *Vorvis, supra*, note 39 at 246 *per* Hinkson J.A. and at 256 *per* Anderson J.A.; *Lockhart v. Chrysler Canada* (1984), 16 D.L.R. (4th) 392 (B.C.C.A.); *Pearl, supra*, note 5.

140 *Ibid.*

141 *Supra*, note 139.

minimal evidentiary prerequisite does little to further predictability in the individual case. But this is largely because questions of degree and the weight to be attached to evidence, medical or otherwise, are necessarily the subject of individual adjudication. On the other hand, it does serve to explain why most awards of damages to employees for breach of contract will not include mental distress damages, notwithstanding that almost every breach of contract by an employer causes the employee some degree of worry and stress.

Yet, even where the evidence of emotional distress is strong and convincing, the plaintiff's potential for success is hard to predict owing to the confusing and, oftentimes, contradictory approaches to causation and remoteness issues. The stark reality is that many courts have exhibited a patent disregard of basic principles of contract law in order to facilitate an award of mental distress damages. The most unfortunate aspect of this judicial phenomenon, aside from the obvious uncertainty it engenders, is that, by and large, it is unnecessary. Most often, the same results can be achieved within the bounds of the well-established causation and remoteness rules. In some wrongful dismissals, the facts may, indeed, suggest a breach of contract independent of the employer's failure to provide reasonable notice or the requisite compensation to its employee. The proper scope to be accorded judicial techniques utilized to assist plaintiffs in establishing such independent breaches has been delimited. In most cases, however, the breach complained of will consist solely in the employer's notice or remuneration failure. Any departure from established causation principles in this typical wrongful dismissal scenario is unwarranted, because, while it is true that the employee's mental distress must flow from the employer's failure, it is not essential that the existence and quantum of the mental distress be exclusively predicated upon that failure. Emotional distress in any given case may be attributable to more than one cause, and the circumstances surrounding the employer's breach of contract in failing to provide adequate notice or remuneration may "aggravate" emotional distress flowing from the breach. Increased judicial recognition of this will obviate any need to ignore or exceed established causation principles in order to achieve a just result.

With respect to the remoteness issue, Canadian courts have too often gravitated towards the extremities of an unduly restrictive or excessively permissive application of the long-established *Hadley v. Baxendale* foreseeability rule. Universally restricting the horizon of contemplation to the time of hiring fails to recognize the evolving nature of employment contracts, while arbitrarily expanding the horizon of contemplation to the time of breach violates established precedent. The "time of contract" test, on the other hand, has long been recognized as the exclusive reference point for determining the reasonable foreseeability of contractual damages. This test, properly understood

and applied, permits an "updating" of the relevant time for determining remoteness if a major contractual modification has occurred. In the employment context, it also increases the possibility that, in some cases, special circumstances arising subsequent to the hiring will render mental distress arising from a wrongful dismissal reasonably foreseeable. This does no more than reflect the reality that the expectations of employers and employees most often evolve over the course of the ongoing employment relationship.

A rationalized approach to the award of emotional distress damages in contractual wrongful dismissal actions will only be achieved through an increased judicial recognition of the "relational" versus "transactional" nature of employment contracts coupled with the judicial resolve to accommodate that recognition within the established confines of contract law.