CONSUMER SURPLUS: A BETTER ALTERNATIVE TO DISAPPOINTMENT AWARDS

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Currently, when there is a breach of a holiday contract, the courts will consider giving the claimant an award to compensate them for their disappointment. This article argues that a preferable solution would be to award damages for the claimant's consumer surplus. This solution is more consistent with the aim of contractual damages. It could 'unlock' higher awards for claimants and also combat the injustice that claimants who endure a breach with stoicism generally receive lower damages.

In English law, the object of damages for breach of contract is to put the victim, so far as money can do it, in the same situation as if the contract had been performed. The courts have traditionally exercised a steadfast prohibition against recognising non-pecuniary losses when applying this approach. However, a trend in English law is emerging which represents the increasing acknowledgement for contractual interests that are not financial in nature. In relation to holiday contracts, this can be seen with awards for claimants' disappointment. This article will argue, however, that a better approach would be to assess this loss by considering the consumer surplus.

In 1979 Donald Harris, Anthony Ogus and Jennifer Phillips[1] borrowed the term consumer surplus from economic theorists to describe the subjective value consumers place on performance above the market value. In their words: '...if a purchaser can buy a plot of land for £1,000, when he would be prepared to pay up to £1,500 for it, the extra £500 represents his "consumer surplus"'.[2] The term is best understood, in a holiday context, by considering the following example. Imagine a wealthy couple, Mr and Mrs Wilcox, have paid £80,000 for their dream honeymoon, but it turns out to be a disaster, with all the typical shortcomings being present (e.g. a filthy room, the hotel being next to a noisy construction site etc). Due to these shortcomings the value of the holiday the Wilcoxs actually receive is only worth £20,000. If the Wilcoxs sue their travel provider for breach of contract, the court could give them an award for the difference in value (i.e. the financial equivalent between the holiday they received and the holiday they were promised). As the holiday promised cost £80,000 and the one they received cost £20,000, they would be entitled to £60,000 under this head of loss. However, this award alone might not adequately compensate their loss – factoring in the distress caused by having the honeymoon ruined. Accordingly, the courts have also considered, in these circumstances, an additional award to compensate the claimants for their disappointment. This was the Court of Appeal's approach in *Milner v Carnival PLC (trading as*

1. Donald Harris, Anthony Ogus and Jennifer Phillips, 'Contract Remedies and the Consumer Surplus' (1979) 95 LQR 581.

2. *Ibid* p.585.

Cunard) [2010] EWCA Civ 389, which concerned a ruined cruise where the claimants were awarded £8,500 for their 'inconvenience and distress'.

It is submitted that a better approach would be for a court faced with this situation to award the claimants their lost consumer surplus. In the Wilcox's case, this would be whatever they would have paid above the market value at the point the contract was formed. So, had they been willing to spend £100,000 on the holiday, but ended up only needing to spend £80,000, they should be awarded this £20,000 difference (i.e. their consumer surplus), in addition to the difference in value award. The reasoning behind this being that had they received the holiday they contracted for, they would have received a holiday they valued at £100,000.

This begs the following question: what is the difference between an award for a claimant's disappointment and an award for their lost consumer surplus? If one considers a claimant's pre-contractual level of well-being: damages for disappointment represent the degree to which a breach of contract *diminishes* this, whereas, damages for consumer surplus reflect a defendant's failure to *enhance* this to the level the claimant expected from performance. Accordingly, a claimant's consumer surplus is measured by reference to their expectation and what they would have paid over the market rate to secure it. The claimant's disappointment, on the other hand, is measured by scrutinising their disposition and how they endure the breach.

For those who like analogies, this difference can be better understood by considering a thermometer, where a claimant's pre-contractual mental state is taken as zero degrees centigrade. Imagine that the breach of contract diminishes the claimant's mental state, due to their upset and frustration, so that after the breach they are at –20 degrees centrigrade. An award for disappointment would compensate the claimant for this drop in temperature (i.e. the 20 degree difference). In this sense, the aim of this disappointment award would be to return the claimant to their pre-contractual position.

Let's compare this to the consumer surplus solution. Imagine that at the point the claimant enters the contract they expect the contract to improve their mental state, so much so that they expect their mental state to be at +30 degrees centrigrade once the contract has been performed. Consider again that the breach leads to them being worse off so that they are at –20 degrees centigrade after performance. The award for disappointment was only intended to reflect the reduction in temperature, whereas, the consumer surplus award represents the 50 degree difference between where the claimant is after the contract was performed and where they thought they would be.

Even after considering this analogy, one would be forgiven for finding this distinction between disappointment and consumer surplus awards complex. Undeniably it is. But it is a distinction worth grappling with, for four principal reasons.

First, the rationale underpinning the consumer surplus is more consistent with the aim of contractual damages. As discussed, the consumer surplus award is intended to reflect the claimant's anticipated mental state had the contract been performed. A disappointment award, by contrast, seems more consistent with the aim of tortious damages (i.e. to put the claimant into the position they would have been in had the tort not occurred).

Secondly, considering the thermometer example again, the disappointment award would only compensate the claimant for the 20 degree drop in temperature, whereas, the consumer surplus award would compensate the claimant for the 50 degree difference. If one converts this into money, the claimant would clearly receive higher damages for the consumer surplus award, as opposed to the disappointment award. This is not to suggest that the aim here is to find a route which secures more damages for the claimant. But rather, it is to find a route which compensates the claimant for their loss, whilst being ideologically consistent with other areas of law.

This leads onto the third point, that the consumer surplus avoids the risk of creating a disparity with how the courts approach damages relating to claimants' mental states. This article is ultimately about how best to compensate claimants for a loss that only exists in their mind (i.e. there is no market loss). Disappointment and consumer surplus are two different solutions to this. The problem with disappointment awards though is that they are capped, due to how the courts approach disappointment in other areas of law. Indeed, in *Farley v Skinner (No 2)* [2001] UKHL 49, where damages were awarded for the claimant's disappointment, Lord Steyn stated that £10,000 was at 'the very top end of what could possibly be regarded as appropriate damages' for this type of award.[3] Furthermore, where a parent loses a child as a result of some negligent act, the maximum bereavement award is currently £12,980.[4] Lord Steyn's guidance is sensible, therefore, as it would be irrational that a claimant could be awarded more damages for their diminished mental state resulting from a breach of an everyday consumer contract, compared to a parent having lost their child. However, considering the Wilcox's scenario again, a 'disappointment' award for £10,000 would not satisfy their loss. The solution to this dilemma is to recognise that the courts are compensating claimants for different heads of loss. Where a child dies due to a negligent act, the bereavement award is intended to compensate the child's parents for their diminished mental state. Where a holiday contract is breached, a consumer surplus award is intended to compensate the claimant for their lost expectation, measured by what they would have paid over the market value to secure performance. Recognising that these are two different heads of loss, as opposed to an over-arching 'disappointment' loss, is necessary to avoid any disparity with how the courts approach these two situations.

Finally, the fourth point for why the consumer surplus is a better solution to disappointment awards is that it avoids the injustice that claimants who endure a breach of contract with stoicism generally receive lower damages. At present, practitioners have to stress how badly affected their clients are by a breach in order to secure a disappointment award. For example, in *Milner*, it was considered how one of the claimants' chest problems and asthmatic episodes were accentuated by the complications with the holiday. However, some claimants might be reluctant to engage with these complaints, viewing this as 'whining'. This problem also arguably encourages a compensation culture, where those who complain the loudest get the greatest rewards. If the courts instead considered the consumer surplus, this would be avoided. Instead practitioners would have to argue about how the claimants valued the performance above the market value to secure damages: a more dignified solution one might think.

Even if one accepts these arguments there could still be some hesitation amongst those who fear any change to the status quo. The consumer surplus approach is seemingly untested. The

3. *Farley* [28]

4. Fatal Accidents Act 1976, s 1A(3).

term has only been cited approvingly by Lord Mustill in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (at 360). However, this sole reference to the term cannot be taken as authoritative blessing for this concept. Especially when one considers that Lord Lloyd attributed the damages in *Ruxley* to Mr Forsyth's 'disappointment'.[5] Moreover, in the subsequent decision by the House of Lords in *Farley*, Lord Steyn reflected on the decision in *Ruxley* and concluded that Mr Forsyth's award reflected his 'disappointment' and that, 'he did not set much store' in the label 'consumer surplus'.[6] Accordingly, the consumer surplus has not received explicit approval in English and Welsh law.

However, one of the principal points in Harris, Ogus and Phillips' thesis was that the courts have unknowingly acknowledged the consumer surplus already. They looked at holiday cases such as *Jarvis v Swans Tours Ltd* [1973] QB 233 and *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468 as early examples of the consumer surplus, based on the rationale behind the awards. For example, in *Jarvis*, where the claimant received a 'disappointment' award after a ruined holiday, Edmund Davis LJ measured the damages by contrasting 'the overall quality of the holiday so enticingly promised with that which the defendant in fact provided'.[7] This would seem to suggest that the claimant was actually compensated for his unsatisfied expectations, suggesting that *Jarvis* can more accurately be described as a consumer surplus case.

A more recent example of this can be seen in Ward LJ's leading judgment in *Milner*. Ward LJ assessed damages for a ruined holiday under two heads of loss: 'first the diminution in value and then the distress and disappointment'.[8] The former reflected the difference between the value of the holiday paid for and that actually provided, without considering the claimants' attitudes. Conversely, the 'disappointment' award relied on the claimants' attitudes, factoring in their 'expectations against the reality'.[9] Indeed, Mr Milner's diary entries depicted the holiday as a dreadful experience,[10] in contrast to his 'sky high' expectations, owing to the cruise being advertised as 'a legendary experience exceeding expectations'.[11] Accordingly, Ward LJ's references to 'expectation' and 'reality' highlight how the rationale underpinning the Milners' damages was more consistent with the consumer surplus.

Once one appreciates, therefore, that the consumer surplus has been accepted into law, just not explicitly, it immediately seems a less controversial proposal. Indeed, when Harris et al were proposing the recognition of the consumer surplus in 1979, they were not suggesting 'any radical modifications to the existing law of contractual remedies'.[12] Rather, they were acknowledging a concept that had already been tacitly accepted in their view.

The final point this article will broach relates to how the consumer surplus would operate in practice. Harris *et al* proposed that the loss should be evaluated objectively: 'How would the

5. *Ruxley* 374.
6. *Farley* [21].
7. *Jarvis* 239.
8. *Milner* [42]–[43].
9 *Ibid* [47].
10. *Ibid* [49]–[51].
11. *Ibid* [47].
12. Harris *et al.* p.608.

reasonable man, in the plaintiff's position, have valued the benefit of performance?'[13] They also asserted that the normal principles of remoteness of damage would provide a legal limitation to the recognition of the consumer surplus.[14] These principles ensure that any loss must have been within the reasonable expectation of the parties as not unlikely to arise on the breach, as judged at the time of contracting. Indeed, these principles are necessary to ensure that the recognition of the consumer surplus would not be unfair on defendants, who would otherwise be forced to compensate claimant's for a loss they would have had no chance of anticipating and subsequently did not consent to being responsible for.

In conclusion, the current approach with holiday contracts is for the courts to compensate claimants for their disappointment, inconvenience or distress – all based on the idea of compensating the claimant for their diminished wellbeing. But this does not acknowledge how the breach of contract has deprived the claimant of the enhancement to their wellbeing that they expected from performance. The consumer surplus provides a means to measure this lost expectation, by considering what the consumer would have paid over the market value to secure performance. Whilst this approach *prima facie* seems radical, in truth it is closer to what the courts have been doing for some time. The rationale behind the decisions in *Jackson*, *Jarvis* and *Milner* all demonstrate the courts attempting to compensate the claimants for their lost expectations, which is consistent with the ideology underpinning the consumer surplus. It would, therefore, be worthwhile for courts and practitioners to acknowledge this head of loss and explore its potential further.

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13. *Ibid* p.585.
14. *Ibid* p.599.