PART ONE

MONETARY RELIEF

CHAPTER ONE

GENERAL PRINCIPLES OF DAMAGES

I. INTRODUCTION: THE COMPENSATION PRINCIPLE

The purpose of an award of damages, it has often been said, is to put the party complaining in the position that they would have occupied if the wrong had not been done. The most widely quoted statement is that of Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880), 5 App Cas 25 at 39 (HL (Sc)):

> I do not think that there is any difference of opinion as to its being the general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

But this principle, like all general principles that concern the law, is not self-applying. It has always been found that some restrictions must necessarily be placed on the search for perfect compensation—whether for practical or principled reasons. As a practical matter, quantifying compensation may prove difficult given uncertainty about what position the plaintiff would have occupied if the wrong had not been done and what will instead be their trajectory (the former a hypothetical inquiry and the latter not always amenable to accurate prediction at the time of trial or settlement). There are also principled reasons for sometimes departing

from a pure compensation approach, which include prioritizing consistent, fair, and reasonably inexpensive application. Consider the following statement of Dr Lushington, in a ship collision case, *The "Columbus"* (1849), 3 W Rob 158 at 162, 166 ER 922 at 923 (HC Admir).

> [N]ot only in this Court [the High Court of Admiralty] but in all other Courts, I apprehend the general rule of law is, that where an injury is committed by one individual to another … the party receiving the injury is entitled to an indemnity for the same. But although this is the general principle of law, all Courts have found it necessary to adopt certain rules for the application of it; and it is utterly impossible, in all the various cases that may arise, that the remedy which the law may give should always be the precise amount of the loss or injury sustained. In many cases it will, of necessity, exceed, in others fall short of the precise amount.

The chief limiting principles are causation, remoteness, and mitigation. The plaintiff must establish, on the balance of probabilities, that they have suffered a loss and that the loss has been caused by the defendant's wrong. But if all such losses were to be compensated, defendants would be liable for very unexpected consequences. Willes J in *British Columbia and Vancouver's Island Spar Lumber & Saw-Mill Co Ltd v Nettleship* (1868), LR 3 CP 499 at 508 gave the example of

> a case said to have been decided about two centuries and a half ago, where a man going to be married to an heiress, his horse having cast a shoe on the journey, employed a blacksmith to replace it, who did the work so unskillfully that the horse was lamed, and, the rider not arriving in time, the lady married another; and the blacksmith was held liable for the loss of the marriage.

Willes J called the imposition of liability an "absurdity," and, since the 19th century, it has been recognized that a limit is necessary, but it has not been found easy to formulate a principle to explain and predict which kinds of losses will be classified as legally too remote and which will not.

The issues of remoteness and causation are also relevant with respect to the equitable remedy of compensation, and further material can be found in Chapter 11, Financial Relief in Equity, where that remedy is addressed specifically. There, consideration is given to the proposition that equitable compensation is not subject in quite the same way to the limitations on recovery resulting from principles of remoteness and causation that apply in the domains of contract and tort damages.

Another limitation relates to mitigation. Losses the plaintiff could have avoided by acting reasonably will not be charged to the defendant. While the principle is simply stated, difficulties may arise regarding what counts as acting reasonably, or when the plaintiff should have acted to limit their losses.

II. CERTAINTY AND CAUSATION

It may seem obvious that for a defendant to have to compensate a plaintiff for an injury, the defendant's wrongdoing must have caused that injury. However, what is meant by causation is notoriously tricky. Must the wrong be a necessary cause or contribute in some other way to the outcome? What if an injury has multiple causes? If the causal connection is uncertain or, indeed, the very existence of a future injury is uncertain, what will the law require in order to conclude that that injury has been caused (in law) by the defendant's wrong?

As the excerpt from *Clements v Clements* indicates, the test of causation in negligence, as in virtually every area of private law, is the "but for" test—the wrong must be a necessary condition for the injury to occur. *Clements* then goes on to address an exception to that rule where it would be unfair to require the plaintiff to prove causation on a balance of probabilities.

Clements v Clements

2012 SCC 32

I. Introduction

[1] The parties to this appeal, Mr. and Mrs. Clements, were motorbike enthusiasts. August 7th, 2004, found them en route from their home in Prince George, British Columbia, to visit their daughter in Kananaskis, Alberta. The weather was wet. Mr. Clements was driving the bike and Mrs. Clements was riding behind on the passenger seat. The bike was about 100 pounds overloaded. Unbeknownst to Mr. Clements, a nail had punctured the bike's rear tire. Though Mr. Clements was travelling in a 100 km/h zone, he accelerated to at least 120 km/h in order to pass a car. As he crossed the centre line to commence the passing manoeuvre, the nail fell out, the rear tire deflated, and the bike began to wobble. Mr. Clements was unable to bring the bike under control and it crashed, throwing Mrs. Clements off. Mrs. Clements suffered a severe traumatic brain injury. She now sues Mr. Clements, claiming that her injury was caused by his negligence in the operation of the bike.

[2] Mr. Clements' negligence in driving an overloaded bike too fast is not disputed. The only issue is whether his negligence *caused* Mrs. Clements' injury. Mr. Clements called an expert witness, Mr. MacInnis, who testified that the probable cause of the accident was the tire puncture and deflation, and that the accident would have happened even without the negligent acts of Mr. Clements.

[3] The trial judge rejected this conclusion, and found that Mr. Clements' negligence in fact *contributed to* Mrs. Clements' injury. However, he held that the plaintiff "through no fault of her own is unable to prove that 'but for' the defendant's breaches, she would not have been injured," due to the limitations of the scientific reconstruction evidence (2009 BCSC 112 (CanLII), at para. 66). The trial judge went on to hold that in view of this impossibility of precise proof of the amount each factor contributed to the injury, "but for" causation should be dispensed with and a "material contribution" test applied. He found Mr. Clements liable on this basis.

[4] The British Columbia Court of Appeal, *per* Frankel J.A., set aside the judgment against Mr. Clements on the basis that "but for" causation had not been proved and the material contribution test did not apply (2010 BCCA 581, 12 B.C.L.R. (5th) 310).

[5] The legal issue is whether the usual "but for" test for causation in a negligence action applies, as the Court of Appeal held, or whether a material contribution approach suffices, as the trial judge held. For the reasons that follow, I conclude that a material contribution test was not applicable in this case. I would return the matter to the trial judge to be dealt with on the correct basis of "but for" causation.

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III. Discussion

A. Causation in the Law of Negligence: The Basic Rule of "But For" Causation

[6] On its own, proof by an injured plaintiff that a defendant was negligent does not make that defendant liable for the loss. The plaintiff must also establish that the defendant's negligence (breach of the standard of care) *caused* the injury. That link is causation.

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[8] The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was *necessary* to bring about the injury—in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

[9] The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury. ...

[10] A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss. ...

[11] Where "but for" causation is established by inference only, it is open to the defendant to argue or call evidence that the accident would have happened without the defendant's negligence, i.e. that the negligence was not a necessary cause of the injury, which was, in any event, inevitable. As Sopinka J. put it in *Snell* [*v Farrell*, 1990 CanLII 70 (SCC)], at p. 330:

> The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. If some evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept [that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted" (*Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969, at p. 970)]. This is, I believe, what Lord Bridge had in mind in *Wilsher* when he referred to a "robust and pragmatic approach to the ... facts" (p. 569). [Emphasis added.]

[12] In some cases, an injury—the loss for which the plaintiff claims compensation—may flow from a number of different negligent acts committed by different actors, each of which is a necessary or "but for" cause of the injury. In such cases, the defendants are said to be jointly and severally liable. The judge or jury then apportions liability according to the degree of fault of each defendant pursuant to contributory negligence legislation.

[13] To recap, the basic rule of recovery for negligence is that the plaintiff must establish on a balance of probabilities that the defendant caused the plaintiff's injury on the "but for" test. This is a factual determination. Exceptionally, however, courts have accepted that a plaintiff may be able to recover on the basis of "material contribution to risk of injury," without showing factual "but for" causation. As will be discussed in more detail below, this can occur in cases where it is impossible to determine which of a number of negligent acts by multiple actors in fact caused the injury, but it is established that one or more of them did in fact cause it. In these cases, the goals of tort law and the underlying theory of corrective justice require that the defendant not be permitted to escape liability by pointing the finger at another wrongdoer. Courts have therefore held the defendant liable on the basis that he materially contributed to the risk of the injury.

[14] "But for" causation and liability on the basis of material contribution to risk are two different beasts. "But for" causation is a factual inquiry into what likely

happened. The material contribution to risk test removes the requirement of "but for" causation and substitutes proof of material contribution to risk. As set out by Smith J.A. in *MacDonald v. Goertz*, 2009 BCCA 358, 275 B.C.A.C. 68, at para. 17:

> ... "material contribution" does not signify a test of causation at all; rather it is a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation. In such cases, plaintiffs are permitted to "jump the evidentiary gap": see "Lords a'leaping evidentiary gaps" (2002), Torts Law Journal 276, and "Cause-in-Fact and the Scope of Liability for Consequences" (2003), 119 L.Q.R. 388, both by Professor Jane Stapleton. That is because to deny liability "would offend basic notions of fairness and justice": *Hanke v. Resurfice Corp.* [2007 SCC 7], para. 25.

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[16] Elimination of proof of causation as an element of negligence is a "radical step that goes against the fundamental principle stated by Diplock, L.J., in *Browning v. War Office*, [1962] 3 All E.R. 1089 (CA), at 1094-95: ' ... A defendant in an action in negligence is not a wrongdoer at large: he is a wrongdoer only in respect of the damage which he actually causes to the plaintiff'": *Mooney v. British Columbia (Attorney General)*, 2004 BCCA 402, 202 B.C.A.C. 74, at para. 157, *per* Smith J.A., concurring in the result. For that reason, recourse to a material contribution to risk approach is necessarily rare, and justified only where it is required by fairness and conforms to the principles that ground recovery in tort.

B. The Material Contribution to Risk Approach

1. The Canadian Cases

[17] The possibility of material contribution as an exceptional substitute for "but for" causation has arisen in a variety of contexts involving multiple tortfeasors.

[18] One of the earliest cases on the issue is *Cook v. Lewis*, 1951 CanLII 26 (SCC), [1951] S.C.R. 830. Three men were out hunting. Two of them fired shots, virtually simultaneously. One of the shots struck a fourth hunter, Mr. Lewis, who was injured and sued both defendants in negligence. On the evidence, it could not be established which defendant's gun had fired the shot that injured Mr. Lewis. Clearly, one of the men had caused Mr. Lewis' injury, and one had not. But which one? The evidence shed no light on this. The defendants contended that the plaintiff's action must be dismissed because he had not proved "but for" causation against either defendant, relying on the classic "point the finger at someone else" defence. Both defendants were found jointly and severally liable. The majority reasons in this Court spoke of reversing the onus in these circumstances, rather than material contribution to risk.

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3. When Is a Material Contribution to Risk Approach Available?

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[46] The foregoing discussion leads me to the following conclusions as to the present state of the law in Canada:

(1) As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required.

(2) Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.

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[47] The trial judge made two errors.

[48] The first error was to insist on scientific reconstruction evidence as a necessary condition of finding "but for" causation. ...

[49] As discussed above, the cases consistently hold that scientific precision is not necessary to a conclusion that "but for" causation is established on a balance of probabilities. It follows that the trial judge erred in insisting on scientific precision in the evidence as a condition of finding "but for" causation.

[50] The trial judge's second error was to apply a material contribution to risk test. The special conditions that permit resort to a material contribution approach were not present in this case. This is not a case where we know that the loss would not have occurred "but for" the negligence of two or more possible tortfeasors, but the plaintiff cannot establish on a balance of probabilities which negligent actor or actors caused the injury. This is a simple single-defendant case: the only issue was whether "but for" the defendant's negligent conduct, the injury would have been sustained.

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[53] We cannot be certain what the trial judge would have concluded had he not made the errors I earlier described. All that can be said is that the parties did not receive a trial based on correct legal principles. In my view, the appropriate remedy in these circumstances is an order for a new trial.

Sunrise Co v Lake Winnipeg (The)

1991 CanLII 107 (SCC)

L'HEUREUX-DUBÉ J

On June 7, 1980, the *Kalliopi L*, while downbound on the St. Lawrence River, met but did not collide with, the upbound *Lake Winnipeg*. Immediately after the meeting, the *Kalliopi L* went aground. The trial judge found that the *Lake Winnipeg* and her owners were entirely responsible for this grounding. In proceeding to an anchorage area, the *Kalliopi L* again, though through no fault of the *Lake Winnipeg*, went aground and suffered further damage. The second incident was unrelated to the first. Each grounding alone would have required the *Kalliopi L* to proceed immediately to dry dock for repairs once her cargo had been discharged. The time in dry dock necessitated by damage repairs occasioned by both incidents was 27 days. The detention in dry dock for repairs from the first incident alone would have required the full 27 days. If, however, repairs relating to the second incident were carried out separately, only 13 days in dry dock would have been necessary.

Liability for the cost of repairs is not an issue in the principal appeal as each party assumed responsibility for these costs. The loss in dispute is that resulting from the

detention of the ship. Accordingly, the sole issue raised by the principal appeal is who is responsible for the loss of profit resulting from the detention for 27 days of the *Kalliopi L*.

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[Discussion of *The Haversham Grange*, [1905] P 307 and of *Carslogie Steamship Co v Royal Norwegian Government*, [1952] AC 292 (HL (Eng)) followed.]

... I will briefly comment on the comparison of loss of profit cases in the shipping area with personal injury cases. While, as my colleague McLachlin J. points out ... , the general principles may be the same, their application is of necessity different. Inherent differences in the nature of the injuries sustained militate against any meaningful comparisons between the two areas. The problems that may arise upon such an attempt can be seen in the difficulties experienced by the court in the personal injuries case referred to by McLachlin J., *Baker v. Willoughby*, [1969] 1 Q.B. 38.

Another example in the case law of an attempted comparison can be found in *Stene and Lakeman Construction v. Evans and Thibault* (1958), 1958 CanLII 232 (AB CA), 24 W.W.R. 592 (Alta. S.C.A.D.). At trial, *The Carslogie* was held to be inapplicable. On appeal, McBride J.A. implicitly warned against such comparisons. At page 596 he spoke of his inability to find any meaningful similarities in the shipping cases:

> I find it difficult to see any similarity or parallel between a seaworthy motor vessel damaged but still requiring further repairs because of original collision damage, then later and further severely damaged in mid-Atlantic, and the plaintiff Stene's position after the doctors had done all they could for him with respect to the first accident and he had made his maximum recovery and had started to learn accountancy.

It seems to me that a more meaningful use of the principles in the shipping cases occurs in *Performance Cars Ltd. v. Abraham*, [1962] 1 Q.B. 33, in that, as in the shipping cases, the issue revolved around property damage. In this case, a car was involved in two collisions. The damage done was slight although the first collision necessitated the respraying of the whole lower part of the car. As the plaintiff was unable to recover the amount needed for respraying from the first tortfeasor, he reasoned that, as the damage caused by the second tortfeasor would have independently required respraying, he would look to the second tortfeasor for recovery of this cost. Lord Evershed M.R. in coming to a conclusion, relied partly on the reasoning in *The Carslogie* and *The Haversham Grange*. At page 40, he concluded:

> In my judgment in the present case the defendant should be taken to have injured a motor-car that was already in certain respects (that is, in respect of the need for respraying) injured; with the result that to the extent of that need or injury the damage claimed did not flow from the defendant's wrongdoing. [Emphasis added].

While in the case before us liability for the cost of repairs is not in issue, I have referred to this case to illustrate what is, in my opinion, a more appropriate context for meaningful use to be made of those principles laid down in the shipping cases. The conclusion reached by Lord Evershed M.R. is also helpful in the search for a principled conclusion in the case presently before us.

... It is not sufficient in this case merely to determine that the damage caused by the second incident was a cause of the detention. Notwithstanding an affirmative answer to this question, one must, on the principles set out above, answer the further and more important question of liability for loss of profit. While the second

incident caused time in dry dock it did not have as a consequence any loss of profit. This conclusion is necessitated both on principle and on the clear reasons on this point offered by the House of Lords. The profit-making enterprise was brought to a halt by the meeting with the *Lake Winnipeg*. Repairs due to the second incident were completed within the 27 days detention required by the first incident. The second incident did not, therefore, have as a consequence a diminution in profit-earning. Thus, this further question in the determination of liability must be answered in the negative.

As was made clear above, the nature of the second casualty, be it tortious or otherwise, is irrelevant in this determination. It does not seem useful then, in focusing on the nature of the second incident, to characterize this case as a *Carslogie*-type case as does my colleague McLachlin J. ... :

> *The Carslogie* ... unlike *The Haversham Grange* but like the case at bar, was a case where the intervening event was not the act of another tortfeasor.

Such a characterization has little place in what is, in my respectful opinion, the proper analytical framework. At page 31 of his factum the appellant states:

> ... if the first casualty directly prevented the vessel from continuing her profit-making venture and the length of the period of repairs arising from the first casualty exceeded that of any repairs resulting from any other cause, such as a second accident, then the detention and dry docking expenses fall upon the party responsible for the first accident, whether the second accident was caused by the fault of the ship owner, the fault of a third party or the fault of no one, such as heavy weather.

In my opinion, the appellant has, on the facts of this case, asserted a correct proposition of law, one that commends itself to me both on the cases and on principle. On my interpretation of the case law in reaching a result in this case, there is no need to "conjure up explanations aimed at reconciling the disparate results in *The Haversham Grange* and *The Carslogie*." When one adopts the view I take of the cases, in my opinion, the result is clear.

In summary, there is no causal link between the second incident and the loss of profit suffered by the owners of the *Kalliopi L,* such damage being merely coincidental. The *Lake Winnipeg* must, as a consequence, bear the responsibility for the full 27 days detention in dry dock.

For the foregoing reasons, I would dismiss the cross-appeal with costs, set aside the judgment of the Court of Appeal as regards the principal appeal and restore the findings of the trial judge, the whole with costs both in the Court of Appeal and in this court.

[McLachlin and Gonthier JJ dissented, favouring apportionment of responsibility for the 14 days in issue.]

Clements and *Lake Winnipeg* involved the relevance of causal factors other than the legal wrong at issue. *Schrump v Koot* and *Janiak v Ippolito*, excerpted below, raise a different issue, namely how to treat a future injury that may or may not materialize due to the defendant's wrongdoing. Must it be proven likely to occur (that is, on a balance of probabilities) for the plaintiff to recover at all? As these cases demonstrate, courts treat uncertain future injuries differently than past injuries whose causal connection to wrongdoing is uncertain.

Schrump v Koot

1977 CanLII 1332 (ONCA)

LACOURCIÈRE JA: The interesting and important issue in this case, raised directly for the first time in this Court, is whether "possibilities," as contrasted with "probabilities," of future loss or damage resulting from a present injury are to be taken into account in the assessment of a plaintiff's damages.

The defendants appeal from a judgment of Morden J., based on a jury's answer to a question submitted to them respecting the general damages suffered by the female plaintiff, the respondent Mary Schrump. The appellants had admitted liability for a motor vehicle collision which occurred on January 3, 1974. The respondent, a 61-year-old housewife at the time of trial with a life expectancy of 20.5 years, suffered, in addition to less serious injuries, a severe compression fracture of the 5th lumbar vertebra (L 5) compressed to about one-half the normal height.

The course of hospitalization and treatment and the prolonged disability of the respondent are not in dispute at this stage of the litigation. While the experts who gave evidence at trial were in agreement that the respondent suffers from a permanent, persistent backache, they expressed differing prognoses on her future expectations. At the trial the respondent's expert expressed it this way:

> Q. When you saw Mrs. Schrump in January of 1975, at that time what is your prognosis for her future? A. I felt then there was a ninety to ninety-five percent probability that she would have persisting and long-term back problems, and she may, particularly with pain upon excessive activity and damp weather intolerance.
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> What I am saying, arthritic-type significant back pain.
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> Q. Yes? A. I also felt that there was a *twenty-five to fifty per cent probability* that she would have significant worsening future problems that may require a discectomy [*sic*] and/or back fusion.
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> (Emphasis added.)

In contrast, the distinguished orthopaedic surgeon called at trial on behalf of the defendants was of the view that the possibility of future surgery was very remote. In his view there were no objective signs of disc rupture and therefore no likelihood that she could require disc surgery. He also stated that the pain was not sufficient for a spinal fusion and, in any event, he did not consider her a suitable candidate for that operation because she would complain of pain even if a solid fusion were obtained.

In his charge, the learned trial Judge properly instructed the jury on how to deal with the evidence of expert witnesses and with the principles relating to the assessment of damages. He carefully reviewed all the evidence in an extremely fair, accurate and complete manner, and focused on the medical evidence of the two doctors, repeatedly quoting accurately significant parts of their testimony as summarized above, and the cross-examinations thereon.

The appellants' only criticism of the charge is that the learned trial Judge erred in failing to direct the jury to ignore and disregard the possibility of future surgery. Mr. Raphael contends that, since the medical evidence most favourable to the respondent indicated only a possibility and not a probability of surgery in the future, the jury should have been told to exclude it from their consideration. He contended that "damages in a personal injury case are to be assessed upon the basis of the injury suffered as it manifests itself at the date of the trial making due allowance for the probable future developments but excluding such matters as remain in the sphere of possibility," relying on Corrie v. Gilbert, 1965 CanLII 99 (SCC),

[1965] S.C.R. 457, 52 D.L.R. (2d) 1 and Turenne v. Chung et al. (1962), 1962 CanLII 400 (MB CA), 36 D.L.R. (2d) 197, 40 W.W.R. 508.

In Corrie v. Gilbert the Court had to consider an assessment of damages in a case where a mild permanent disability, pre-existing before the accident became, as a result of the defendant's conduct, a serious permanent disability due to phlebitis. Speaking for the majority in favour of varying the amount of damages, Ritchie J. said at p. 461 S.C.R., p. 4 D.L.R.:

> In my opinion the trial judge, having correctly instructed the jury that their verdict was to be based upon "probability," sufficiently illustrated the difference between "probabilities" and "possibilities" in relation to the present case and there was no misdirection in this regard. I do not, however, think that there was any evidence in the record to warrant the instruction to the jury that they might consider the serious "possibilities" as a factor contributing to the plaintiff's nervous tension. To so direct the jury was, in my view, having regard to the evidence, to invite speculation.
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> It is my opinion that the damages in the present case are to be assessed upon the basis of the injury suffered by Mrs. Corrie as it manifested itself at the date of the trial, making due allowance for the probable future developments but excluding such matters as remain in the sphere of possibility, and that upon this basis the verdict of the jury was inordinately high.

The Court reduced the amount of general damages on the basis that no jury acting judicially could have reached the verdict if they had confined themselves to the existing injury and its probable future development.

In Turenne v. Chung et al. the Manitoba Court of Appeal held that the trial Judge had erred in principle in considering the mere possibility, rather than the probability, of prospective damage—specifically, the likelihood or otherwise of future degenerative changes due to arthritis consequent upon the injuries sustained in the accident. Miller C.J.M., at pp. 198-9, stated that:

> Damages should not be awarded on the basis of conjecture or speculation. Loss reasonably to be anticipated is a proper basis upon which to award damages. Is a mere possibility of loss, as distinct from a probability, sufficient? In our view it is not.

The Turenne case supports the appellants' proposition, but of course is not binding on this Court. This cannot be said of the Corrie v. Gilbert decision, which has been followed in several Canadian cases: see Davidson v. Melendy (1965), 1965 CanLII 553 (BC CA), 54 D.L.R. (2d) 416.

In my respectful view, the passage which I have quoted from Corrie v. Gilbert does not stand for the broad proposition advanced by the appellants. The words quoted, "probable future developments," are used in the context of a discussion as to what possibilities should be considered by a jury as a factor contributing to the increase in the plaintiff's nervous tension. The medical evidence referred to in the report is very scant, and this may support the view that the Court was dealing with remote possibilities. To direct the jury that remote possibilities of amputation or death from a pulmonary embolism could be considered as a factor in the plaintiff's continuing nervous tension was an invitation to speculate.

In this area of the law relating to the assessment of damages for physical injury, one must appreciate that though it may be necessary for a plaintiff to prove, on the balance of probabilities, that the tortious act or omission was the effective cause of the harm suffered, it is not necessary for him to prove, on the balance of probabilities, that future loss or damage *will* occur, but only that there is a reasonable chance of such loss or damage occurring. The distinction is made clear in the following passages in 12 Hals., 4th ed., pp. 437, 483-4:

1137. *Possibilities, probabilities and chances*. Whilst issues of fact relating to liability must be decided on the balance of probability, the law of damages is concerned with evaluating, in terms of money, future possibilities and chances. In assessing damages which depend on the court's view as to what will happen in the future, or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will happen or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

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1199. *Proof of damage*. ... The plaintiff must prove his damage on a balance of probabilities. In many cases, however, the court is called upon to evaluate chances, such as the chance of a plaintiff suffering further loss or damage in the future; in these cases the plaintiff need only establish that he has a reasonable, as distinct from a speculative, chance of suffering such loss or damage, and the court must then assess the value of that chance.
(Emphasis added.)

The principle concisely stated in the passage quoted is directly applicable in this case. Speculative and fanciful possibilities unsupported by expert or other cogent evidence can be removed from the consideration of the trier of fact and should be ignored, whereas substantial possibilities based on such expert or cogent evidence must be considered in the assessment of damages for personal injuries in civil litigation. This principle applies regardless of the percentage of possibility, as long as it is a substantial one, and regardless of whether the possibility is favourable or unfavourable. Thus, future contingencies which are less than probable are regarded as factors to be considered, provided they are shown to be substantial and not speculative: they may tend to increase or reduce the award in a proper case.

The proper test to be applied is discussed in Davies v. Taylor, [1972] 3 W.L.R. 801 (H.L.). This case involved an assessment of damages under fatal accident legislation. It was held that the plaintiff, who had deserted her husband some time before his death, had to prove that there was a significant prospect, as opposed to a mere speculative possibility, of a reconciliation with her husband if he had lived. Lord Reid observed at pp. 804-5:

> When the question is whether a certain thing is or is not true—whether a certain event did or did not happen—then the court must decide one way or the other. There is no question of chance or probability. Either it did or it did not happen. But the standard of civil proof is a balance of probabilities. If the evidence shows a balance in favour of it having happened then it is proved that it did in fact happen.
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> But here we are not and could not be seeking a decision either that the wife would or that she would not have returned to her husband. You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All that you can do is to evaluate the chance. Sometimes it is virtually 100 per cent.: sometimes virtually nil. But often it is somewhere in between. And if it is somewhere in between I do not see much difference between a probability of 51 per cent. and a probability of 49 per cent.
>
> "Injury" in the *Fatal Accidents Act* does not and could not possibly mean loss of a certainty. It must and can only mean loss of a chance. The chance may be a probability of over 99 per cent. but it is still only a chance. So I can see no merit in adopting here the test used for proving whether a fact did or did not happen. There it must be all or nothing.
>
> If the balance of probability were the proper test what is to happen in the two cases which I have supposed of a 60 per cent. and a 40 per cent. probability. The 40 per cent.

> case will get nothing but what about the 60 per cent. case. Is it to get a full award on the basis that it has been proved that the wife would have returned to her husband? That would be the logical result. I can see no ground at all for saying that the 40 per cent. case fails altogether but the 60 per cent. case gets 100 per cent. But it would be almost absurd to say that the 40 per cent. case gets nothing while the 60 per cent. case award is scaled down to that proportion of what the award would have been if the spouses had been living together. That would be applying two different rules to the two cases. So I reject the balance of probability test in this case.

The same approach is found in the judgment of the British Columbia Court of Appeal (Davey, C.J.B.C., Bull and Robertson JJ.A.) in Kovats et al. v. Ogilvie et al. (1970), 1970 CanLII 760 (BC CA), 17 D.L.R. (3d) 343, [1971] 1 W.W.R. 561. On this point, the judgment of the Court given by Robertson J.A. is accurately summarized in the headnote [W.W.R.]:

> In assessing damages for personal injuries the award may cover not only all injuries actually suffered and disabilities proved as of the date of trial, but also the "risk" or "likelihood" of future developments attributable to such injuries. It is not the law that a plaintiff must prove on a balance of probabilities the probability of future damage; he may be compensated if he proves in accordance with the degree of proof required in civil matters that there is a possibility or a danger of some adverse future development.

The Court held that the trial Judge was in error in awarding nothing for the future disability of the plaintiff where the medical evidence had placed the possibility of disabling arthritis at somewhere between 33 and 50%. Robertson J.A. said at p. 346 D.L.R., p. 564 W.W.R.:

> In my respectful opinion, the learned Judge misdirected himself. It is a fundamental rule that in civil cases questions of fact are to be decided on a balance of probabilities; this is a matter of proof. But it is not equally true that damages in respect of things which have not yet developed may only be awarded if it is probable that they will develop and may not be awarded if it is only possible that they will develop. One can decide on a balance of probabilities that something in the future is a possibility, and in appropriate circumstances that possibility can be taken into account in assessing damages; in such a case it is not essential, before damages can be assessed for the thing, to decide on a balance of probabilities that the thing in future is a probability. When the word "probability" is used in such a context there is an inclination to contrast it with the word "possibility." That can be avoided by using instead the word "risk," or perhaps "danger" or "likelihood." Then one can say, without the danger of being misunderstood, that one can decide on a balance of probabilities that there is a risk of something happening in the future. In an appropriate case such a risk can be taken into account in assessing damages for the wrongful act or default that caused it. As put by Cartwright J., on behalf of himself and Rand, Kellock and Fauteux JJ., in Archibald et al. v. Nesting et al. and Dalton, 1953 CanLII 57 (SCC), [1954] 1 D.L.R. 347 at p. 361, [1953] 2 S.C.R. 423:
>
> > ... the innocent person who has been gravely injured by the fault of another should not be called upon to bear all the risk of the uncertainties of the future.
>
> The degree of risk, danger or likelihood in each case will, of course, be taken into account in assessing damages as a matter aggravating the injury. When "probability" and "possibility" are used, which term fits the circumstances cannot be decided by any mathematical proposition.

The learned Judge did not interpret the words of Ritchie J., in Corrie et al. v. Gilbert, 1965 CanLII 99 (SCC), [1965] S.C.R. 457, 52 D.L.R. (2d) 1, as deciding anything different from the passage immediately quoted. I entirely agree with this view.

Adverting to the medical evidence in the present case, the plaintiff's expert felt that "there was a 25 to 50% probability" of future surgery. Since the risk is no greater than 50%, the expert's opinion might better be regarded as prognosticating the possibility only of future surgery. But, as in the Kovats case, supra, the semantic distinction between the words "probability" and "possibility" is not decisive. Rather, it is the "risk, danger or likelihood" of future surgery as established by the evidence which is crucial to the decision. The Court in Kovats, supra, was free to draw its inferences from the medical evidence, as the case had been tried by a Judge without a jury. Here, in a situation involving a jury award which is attacked as being inordinately high, this Court must assume that the jury drew from the medical evidence inferences favourable to the respondent. In particular, the jury must have concluded that, at the time of trial, there was a real and substantial possibility or risk that the respondent would require a discotomy or fusion.

• • •

We do not find error in the learned trial Judge's charge in his decision not to recall the jury. In the general part of his charge, he had explained to the jury that they could draw logical inferences from the evidence, but that this did not mean that they could make findings of fact on mere speculation or conjecture. The possibility of future surgery upon the respondent's back was left fairly and quite properly to the jury. We must assume that the jury considered the possibility as a serious factor aggravating the respondent's permanent disability.

In charging the jury, the presiding Judge will, in a proper case, warn them to exclude from their consideration remote, fanciful or speculative possibilities. He will leave for their consideration any real and substantial risk, with the higher degree or the greater chance or risk of a future development attracting a higher award. In the present case, the risk of future surgery was substantial and supported by medical evidence. It follows that the award of $20,000 was not an inordinately high one, and therefore did not represent a wholly erroneous assessment of the respondent's general damages. I would dismiss the appeal.

In his statement and argument, respondents' counsel failed to refer to any case law or to develop any argument based on general principle, and the Court was left without any help in meeting the strong argument put forward on behalf of the appellants. In the exercise of my discretion, I would not allow the respondents any costs of the appeal.

Janiak v Ippolito

1985 CanLII 62 (SCC)

[1] WILSON J: The central issue in this case is how damages for personal injury are to be assessed where the victim of the accident unreasonably refuses to undergo the recommended surgery.

1. The Facts

[2] On March 31, 1976 the respondent sustained serious back injuries when his automobile was struck from behind by a vehicle driven by the appellant. Prior to that date the respondent had been employed for eleven years as a crane operator. Since the accident he has been disabled to such an extent that it has been

impossible for him to return to work. Liability for negligent driving was admitted by the appellant and the trial was confined to the issue of damages.

[3] The respondent's main injury, according to the medical evidence presented at trial, consisted of a disc protrusion of the cervical spine. Several medical experts testified to the effect that the recommended course of treatment for such an injury would be the surgical excision of the disc together with a spinal fusion. The trial judge accepted the evidence that this type of operation entails an approximately 70 per cent chance of success and that, if successful, could result in an almost 100 per cent recovery for the respondent who could thereafter return to work as a crane operator. The respondent, however, appears to have suffered from a great fear of surgery of any kind and insisted on assurance of a 100 per cent chance of success before consenting to undergo the recommended procedure. As neither his family physician nor his orthopaedic surgeon was able to provide such an absolute guarantee for this or any other type of surgery, the respondent refused to heed the medical advice. Accordingly, his back injuries have not improved and he continues to be disabled and out of work.

• • •

3. Unreasonable Refusal of Treatment

[7] The single most noteworthy fact with which this appeal is concerned is that the trial judge found the respondent to have been unreasonable in his refusal to accept the recommended medical treatment. As noted by each of the members of the House of Lords in *Steele v. Robert George and Co.*, [1942] A.C. 497, this question is most appropriately left to the trier of fact to decide. There is no reason to conclude that Callaghan J. committed an error of law in determining this issue in the case at bar. Both the majority and the dissent in the Ontario Court of Appeal were of the view that there was sufficient evidence to support the trial judge's finding and, in the absence of any suggestion that he misdirected himself or applied the wrong test to the facts presented to him, there is no basis on which this court can interfere with his finding. He alone had the opportunity to assess the evidence and determine the issue of the respondent's reasonableness at first hand.

• • •

[39] What then counts as an unavoidable loss in a case like this where there has been found to be an unreasonable refusal of surgery? The answer given by MacKinnon A.C.J.O. is that one looks to what would have happened on a balance of probabilities had the operation in fact taken place. The majority approach, on the other hand, is to determine what damages are avoidable by assuming that the plaintiff has agreed to an operation which has not yet been performed. If the majority is correct, then the courts would normally take account of any "substantial possibility" of failure and the amount by which full compensation would be discounted—in this case 70 per cent—would represent his avoidable loss.

[40] There is a paucity of direct authority on this issue. The following passage from the judgment of Jenkins L.J. in *McAuley* [*v. London Transport Executive*, [1957] 2 Lloyd's Rep. 500 (CA)], at p. 505, may be viewed as support for the approach taken by the majority:

> If he receives medical advice to the effect that an operation will have a 90 per cent chance of success, and is strongly recommended to undergo the operation and does not do so, then the result must be, I think, that he has acted unreasonably, and that the damages ought to be assessed as they would properly have been assessable if he had, in fact, undergone the operation and secured the degree of recovery to be expected from it. [Emphasis added.]

It seems to me not only to be implicit in the English authorities but also to be common ground between the majority and the dissent in the Court of Appeal in this case that, even after an unreasonable refusal of surgery, the plaintiff is still entitled to claim unavoidable losses assuming, of course, that they are otherwise recoverable. MacKinnon A.C.J.O. would, it is true, deny all subsequent recovery in this case where on the balance of probabilities (70 per cent) surgery would lead to a full recovery, but if there was a 50-100 per cent chance of no more than an 80 per cent recovery at the outside, it seems to me that his approach would necessarily permit a plaintiff to recover the remaining 20 per cent of his damages as unavoidable loss.

[41] As Blair J.A. points out, support is also to be found for the majority approach in a number of Australian cases, notably *Newell v. Lucas*, [1964-65] N.S.W.R. 1597. In *Plenty v. Argus*, [[1975] WAR 155], Burt J. seems to have adopted it in the following *obiter* statement at p. 159:

> And if a finding is made that a plaintiff in the face of an uncertain prognosis acted unreasonably in not submitting himself to surgery or treatment, then it would seem that his damages would be assessed having regard to his condition as it is, discounted by the evaluation of the lost chance, or as one would if the assessment were made in advance of the carrying out of the advised treatment.

[42] In my view the majority approach is consistent with first principles as expressed by Lord Diplock in *Mallet v. McMonagle*, [1970] A.C. 166 at p. 176:

> The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

See also Lord Reid in *Davies v. Taylor*, [1972] 3 All E.R. 836 (H.L.) at p. 838. This position is essentially the one adopted by Lacourcière J.A. in *Schrump v. Koot* (1978), 1977 CanLII 1332 (ON CA), 18 O.R. (2d) 337, which Blair J.A. cites in support of his position. MacKinnon A.C.J.O. attempts to distinguish this latter case on the ground that it applies only to assessing the risk of likelihood of future developments but, as the passage from Lord Diplock makes clear, the balance of probabilities test is confined to determining what did *in fact* happen in the past. In assessing damages the court determines not only what will happen but what *would have* happened by estimating the chance of the relevant event occurring, which chance is then to be directly reflected in the amount of damages. The general rule stated by Lord Diplock would therefore seem to be applicable to this case, suggesting that the majority approach is at least *prima facie* correct. The issue then becomes, it seems to me, a question of whether there are any reasons to take this particular type of case outside the general rule.

[43] MacKinnon A.C.J.O. suggests that the majority approach bypasses the trial judge's initial finding of unreasonableness. With respect, I think he must be in error in this since the respondent is precluded by that finding from claiming full compensation for the losses he has already suffered. The same response can be made to the appellant's submission that the uncertainty in the evidence results from the

plaintiff's unreasonable conduct and that he ought not to be able to "profit" from it. The finding that his refusal to undergo surgery was unreasonable precludes the plaintiff from recovering his actual loss. To hold that his remaining compensation should be determined on the basis of principles higher than those normally applied in assessing tort damages would, it seems to me, be to punish him for not undergoing surgery. This would be contrary to the general judicial policy that "it is not the prerogative of the court to require that any person undergo surgery to any degree" (*McCarthy v. MacPherson's Estate* (1977), 1977 CanLII 2788 (PE SCAD),14 Nfld. & P.E.I.R. 294 (P.E.I.C.A.) at p. 297.

[44] Nor am I swayed by the appellant's submission that a respondent may, because he is free to change his mind about the surgery, effectively be overcompensated. As long as he is *bona fide* in his present claim that he does not intend to have the operation and is not deliberately taking a calculated risk that he will come out ahead by recovering 30 per cent of his damages now and then later have the surgery with a 70 per cent chance of complete success (an intention which would amount to fraud on the court in any event), there does not seem to me to be any problem arising from the fact that he might change his mind in the future and be overcompensated in the result. The potential for over or under compensation is, it seems to me, a pervasive difficulty with the present "once and for all" method of awarding tort damages. The situation presented by this case is only one example of that more comprehensive problem; it does not, in and of itself, call for a special solution of any sort. It should also be kept in mind that, while it is true that if the respondent does decide to have the operation at some future time there is a 70 per cent chance that he will be somewhat overcompensated, it is also true that there exists a 30 per cent possibility that he will be very substantially undercompensated.

[45] I would respectfully adopt the approach of the majority of the Court of Appeal to this issue.

III. LOSS OF CHANCE

As seen in *Schrump* and *Janiak*, where an injury is prospective, and may never materialize at all, the courts depart from the usual approach of requiring proof on a balance of probabilities, entitling the plaintiff to 100 percent of the value of the injury. The cases below address whether a similar departure is warranted where wrongdoing denies the plaintiff the chance to avoid a loss or to gain a benefit. Plaintiffs have sometimes argued that the loss of a chance to gain, or to avoid loss, is itself a loss that should be compensated. *Laferrière v Lawson*, excerpted below, rejects that approach in medical negligence cases. However, the approach in contracts cases, and some forms of professional negligence other than medical malpractice, is different.

Laferrière v Lawson

1991 CanLII 87 (SCC)

GONTHIER J: This case deals with the legal consequences of a doctor's failure to inform his patient of a cancerous condition and, subsequently, to follow up on the patient's health in the appropriate manner. The Court is asked to consider whether an action can succeed even where it is not proven that the patient's fate would have been different absent the doctor's fault. In particular, the Court must examine the theory of "*perte de chance*," or loss of chance, and determine whether it should be introduced into the civil law of Quebec in matters of medical responsibility.

I Facts and Proceedings

The respondent, Me Nicole Laferrière, acts in her capacity as testamentary executor of the late Mrs. Mireille Fortier-Dupuis. Mrs. Dupuis began proceedings against the appellant, Dr. Ray Lawson, in November 1975, claiming the sum of $150,000 as damages arising out of the alleged non-fulfilment by Dr. Lawson of his obligations as a medical professional. Mrs. Dupuis died in 1978, before these proceedings had been completed. She was, however, able to testify before her death and did so, at the request of the appellant, on June 21, 1976. Following a judgment of Guérin J. on September 23, 1981, Me Laferrière was authorized to continue the suit on behalf of Mrs. Dupuis. A re-amended declaration, dated November 23, 1983, claimed a total of $250,000.

In 1970, Mrs. Dupuis, at that time 48 years of age, became increasingly concerned about the presence of an abnormal nodule or lump in her right breast. She consulted her gynecologist who recommended a mammogram, the results of which proved negative. Apparently, these results did not allay Mrs. Dupuis' anxiety. In March 1971, she read an article about Dr. Ray Lawson in the weekend magazine of a Montréal newspaper. She noted that he was an international authority on the treatment of breast cancer, that he used the most up-to-date equipment for the detection of breast cancer and that his progressive approach to treatment of such cancer avoided any unnecessary removal of breast tissue. Mrs. Dupuis contacted Dr. Lawson at his Westmount Breast Centre and made an appointment for March 10, 1971.

At the Centre, Mrs. Dupuis underwent a number of diagnostic procedures, including mammogram and thermogram. As a result of these tests, Dr. Lawson recommended an excisional biopsy, or surgical removal of the abnormal mass for more accurate diagnosis. Mrs. Dupuis accepted this proposal.

On April 12, 1971, Mrs. Dupuis was admitted to the Royal Victoria Hospital. Two days later, Dr. Lawson performed the surgery, described in the hospital records as "breast biopsy and excision of lump of right breast." The pathology report, dated April 20, 1971, indicated "intraductal carcinoma with infiltrative growth," that is, cancer of the breast.

Mrs. Dupuis was discharged from the hospital on April 15, 1971. She later saw Dr. Lawson at an out-patient clinic and discussed routine matters such as the healing of the scar left after surgery. According to the trial judge's findings, she was not informed that the lump in her breast was cancerous, and she was not advised as to the appropriate post-operative treatments. No long-term follow-up was arranged for her by Dr. Lawson.

From 1971 to 1974, Mrs. Dupuis underwent regular gynecological check-ups and had no cause during that time to worry about her health. In the fall of 1974, her health began to deteriorate and by March 1975, an eyelid disorder (known as the Claude Bernard-Horner syndrome) developed which caused her doctors to suspect that a cancerous condition had taken hold. One of her doctors looked more closely into his patient's history and by obtaining records from the Royal Victoria Hospital discovered the 1971 diagnosis of cancer of the breast. This information was made known to Mrs. Dupuis in April 1975.

Subsequently, Mrs. Dupuis underwent surgery to remove nodules which had newly appeared on the right breast. This intervention revealed systemic metastases or generalized cancer requiring removal of the ovaries. Following surgery, Mrs. Dupuis received various treatments, including chemotherapy. She died on January 27, 1978.

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[The action was dismissed at trial on the ground that the plaintiff had suffered no loss in consequence of the defendant's failure to inform the patient. The Quebec Court of Appeal awarded damages for loss of the chance of obtaining proper treatment and for the distress suffered by the patient on learning the truth. Gonthier J considered the law in several civil law jurisdictions and concluded:]

By way of summary, I would make the following brief, general observations:

- The rules of civil responsibility require proof of fault, causation and damage.
- Both acts and omissions may amount to fault and both may be analyzed similarly with regard to causation.
- Causation in law is not identical to scientific causation.
- Causation in law must be established on the balance of probabilities, taking into account all the evidence: factual, statistical and that which the judge is entitled to presume.
- In some cases, where a fault presents a clear danger and where such a danger materializes, it may be reasonable to presume a causal link, unless there is a demonstration or indication to the contrary.
- Statistical evidence may be helpful as indicative but is not determinative. In particular, where statistical evidence does not indicate causation on the balance of probabilities, causation in law may nonetheless exist where evidence in the case supports such a finding.
- Even where statistical and factual evidence do not support a finding of causation on the balance of probabilities with respect to particular damage (*e.g.*, death or sickness), such evidence may still justify a finding of causation with respect to lesser damage (e.g., slightly shorter life, greater pain).
- The evidence must be carefully analyzed to determine the exact nature of the fault or breach of duty and its consequences as well as the particular character of the damage which has been suffered, as experienced by the victim.
- If after consideration of these factors a judge is not satisfied that the fault has, on his or her assessment of the balance of probabilities, caused any real damage, then recovery should be denied.

2. Application to the Facts in This Case

I have reviewed the detailed evidence submitted by the parties and have considered the findings of the trial judge. I agree with the majority of the Court of Appeal that the trial judge focused primarily on the surgical technique employed by the appellant in 1971 rather than on those procedures and treatments which should have been available to the patient had she been appropriately informed and followed up on by her doctor. I cannot, however, endorse the conclusions of the Court of Appeal as to the extent of the damages.

Jacques J.A. bases his award of $50,000 in damages on the small hope of survival which medical science held out to Mrs. Dupuis had she been informed, followed more closely and consequently treated in a timely and proper fashion. For reasons which I have set out earlier, I do not feel that it is appropriate to focus on the degree of probability of success and to compensate accordingly; it is at least necessary that such a probability, or here, at most, a small possibility, translate into a concrete benefit for the patient which she can be said to have lost as a result of the doctor's fault.

In my view, the evidence amply supports the trial judge's finding that the appellant's fault could not be said to have caused Mrs. Dupuis' death seven years after the first diagnosis of cancer of the breast. Unfortunately, I must agree with the trial judge that all the evidence clearly confirms the stubborn and virulent nature of this disease.

I am less convinced, however, by the judge's implicit findings regarding the pain, anguish and suffering which the appellant's fault allegedly caused to Mrs. Dupuis. I have decided as a matter of law that proper causal analysis requires the judge to examine closely all elements of the damage, and with the greatest respect for the trial judge who was faced with a complex and difficult case, I find it necessary to reconsider his findings in this more narrow respect.

First, I am convinced that Mrs. Dupuis experienced a type of psychological suffering which was directly related to the appellant's failure to inform his patient of her condition. From 1975 until her death, she experienced the horrible rhythms of her disease and the regular and seemingly ineffectual treatments and medications in the knowledge that things might have been different had she known earlier and been treated earlier. Her chances may not have been sufficient for the law, but they were very real to her, no doubt. I think that it was also probable that the pain which she experienced as a result of the advancing disease was all the more distressing given that knowledge. While she was a person who was concerned with her health and prepared to seek the best medical evidence and abide by it, she was denied the opportunity and choice of doing so by reason of the appellant's failure to inform her. This led, for instance, to her continued use of contraception pills which she would have been advised against had her condition been known. I would therefore agree with Vallerand J.A.'s specific recognition of psychological damages, and, given the exceptional nature of this case, I would increase the amount in question to $10,000.

Furthermore, I am of the view that while the death caused by cancer was not caused by the appellant's failure to follow up on his patient, it is probable that Mrs. Dupuis was denied the benefit of earlier treatment which would have translated into some real improvement in her admittedly terminal condition. I note, for example, that expert witnesses for both parties stated that proper and timely treatment would probably have provided for the patient a better quality of life even in the face of such a malignant condition.

Dr. Jacques Cantin, expert witness for the respondent, stated the following in the course of his testimony:

> [TRANSLATION] There is a second aspect to patient follow-up, namely the notion of quality of life.
>
> Certainly, patients have been followed very regularly and die all the same, but if they are properly followed, and recurrences are detected early, the patient may have a better quality of life. I will explain.
>
> If, for example, you have a patient whose first recurrence of the disease is one or two pulmonary metastases, if the problem is taken at the start, when there are two or three small images on the lung, it is an easier problem for us to handle, the situation is not as serious for the patient as if, for example, the patient comes to us with water in her lungs: her quality of life will not be the same. We will prevent her having a lot of problems.
>
> If, for example, this patient—I suggest it is possible that if we catch it when she only has these small local recurrences, well, the problems that she has are fewer than theoretically if we wait until she has an invasion of the cervical plexus with a Claude Bernard Horner, and the other dimension that I would like to pass on to the judge, it is not true that this will necessarily cure more people, but in any case often the quality of patients' lives at the time they suffer recurrences can be better.

Dr. Roger Poisson, one of the appellant's expert witnesses, was even more confident on this score:

> [TRANSLATION]... [patients] live for several years in a more comfortable way than in the past, without the rate of survival being necessarily improved that much. I think it is mainly ... the quality of life which is improved. ...
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> • • •
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> ... Now, to answer the judge ... it has to be admitted that survival rates in breast cancer ... have unfortunately not improved very much ... and, you know, it is ironic because despite the advance in surgery, radiotherapy and so on ... survival rates unfortunately remain too stable. On the other hand, quality of life has I think improved a great deal.

The improvement in the quality of life may not have been great, but I believe that deprivation of such a real and probable improvement should be recognized and compensated. I believe that $7,500 would be appropriate for the damage represented by the diminished quality of life which Mrs. Dupuis experienced as a result of the appellant's fault.

V Disposition

I would allow the appeal in part and order the appellant to pay respondent $17,500 with interest and the additional indemnity pursuant to art. 1078.1 *C.C.L.C.* beginning April 1, 1983, and with costs throughout.

[La Forest J dissented, adopting the view of the Quebec Court of Appeal.]

NOTE

In *Cottrelle v Gerrard*, 2003 CanLII 50091 (ONCA), the Ontario Court of Appeal reached a similar conclusion in respect of Ontario law. In *Gregg v Scott*, [2005] UKHL 2, a medical negligence case where the adverse effect had not materialized at the time of the judgment, the House of Lords, by a 3–2 majority, denied recovery for loss of chance.

Folland v Reardon

2005 CanLII 1403 (ONCA)

DOHERTY JA: —

I

Overview

[1] The appellant Gordon Folland ("Folland") was convicted of sexual assault and sentenced to five years in the penitentiary. He served almost three years before he was released on bail pending appeal. This court admitted "fresh" evidence on the appeal, quashed the conviction and directed a new trial. The Crown decided not to retry Folland.

[2] The respondent Dennis Reardon ("Reardon") acted for Folland at his criminal trial but not on the appeal. After the criminal proceedings had been completed, Folland sued Reardon alleging that Reardon's negligent conduct of the defence in the criminal proceedings resulted in Folland's wrongful conviction and lengthy incarceration.

[3] Reardon moved for summary judgment alleging that there were no genuine issues for trial. He contended that none of the alleged deficiencies in his defence of Folland rose to the level of negligence and that in any event, nothing he did or failed to do caused the conviction of Folland. Counsel for Reardon also submitted, by way

of alternative argument, that Folland's claims should be struck as an abuse of process. ...

[4] The motion judge rejected Reardon's abuse of process argument, but accepted the submission that there were no genuine issues for trial. He dismissed Folland's action ... .

• • •

[7] I would allow Folland's appeal. There were genuine issues for trial, both as to whether Reardon's defence of Folland fell below the required standard of care, and if so, whether those failings caused Folland's conviction.

• • •

(iii) Causation

[57] Folland pleaded that as a result of Reardon's negligence in the conduct of his defence, Folland was wrongfully convicted, imprisoned and consequently suffered mental distress, loss of income and other damages. In holding that Folland's action could not succeed, even if Reardon was negligent in his defence of Folland, the motion judge said [at para. 36]:

> There is no evidence that any act or omission by the Applicant [Reardon] caused the conviction of Mr. Folland. In fact the evidence suggests that Mr. Folland's conduct on the stand that [sic] has a stronger causal link to the conviction than the decisions made by the Applicant [Reardon] in conducting the trial. Because the trial was a jury trial, it can never be known with any degree of certainty how either the conduct of trial counsel or the conduct of the accused on the stand impacted the conviction. There is nothing on the face of the record, however, that suggests that had Mr. Reardon conducted the trial in a different manner, a more favourable result would have been achieved for Mr. Folland. This inability to prove causation provides the strongest support for the Applicant's [Reardon] motion for summary judgment.
> (Emphasis added).

[58] Earlier in his reasons, the motion judge observed [at para. 29]:

> The authorities make it clear that the plaintiff must establish that, had the lawyer acted with reasonable care, the results would have been more favourable to the plaintiff whether in a civil or criminal case.
> (Emphasis added).

[59] At Folland's criminal trial, there were two possible verdicts, guilty or not guilty. It must follow that the motion judge's reference to "a more favourable result" was a reference to an acquittal. The language used by the motion judge and his reliance on Roncato v. Caverly (1991), 1991 CanLII 7093 (ON CA), 5 O.R. (3d) 714, [1991] O.J. No. 1534 (CA), at p. 718 O.R., indicates that he used a "but for" analysis in considering whether Reardon's negligence caused Folland's conviction. On this approach, Folland was obliged to establish on the balance of probabilities that he would have been acquitted had Reardon not been negligent in his defence of Folland. This causation inquiry requires a trial within the negligence trial where the merits of the criminal case will effectively be reassessed on the assumption that Folland was properly defended.

[60] The "but for" analysis is the generally accepted, although not exclusive approach to factual causation in tort law ... . On this analysis, the court looks for a causal connection between the wrongdoing of the defendant and the harm actually suffered by the plaintiff for which compensation is claimed. The link is established if the plaintiff demonstrates on the balance of probabilities that the harm would not have occurred but for the fault of the defendant, even if there are other factual

causes that also meet the "but for" standard: Athey v. Leonati, [1996 CanLII 183 (SCC)]. Absent the causal link, the defendant is not liable even though he may have been negligent.

[61] "But for" factual causation has been employed in solicitor's negligence cases, particularly those where the plaintiff contends that he received negligent advice and would have acted differently had he received appropriate advice. In those cases, the plaintiff must show on the balance of probabilities that if properly advised, he would have proceeded in a manner that avoided the damages suffered or obtained the benefit lost as a result of the negligent advice ... . It would appear that in Quebec, a "but for" analysis is also used where a plaintiff alleges that he has lost an opportunity to commence a lawsuit because of a lawyer's negligence. The plaintiff must establish on the balance of probabilities that he or she would have been successful in the lawsuit but for the lawyer's negligence: see authorities discussed in Laferrière v. Lawson, [1991 CanLII 87 (SCC)], at pp. 587-89 S.C.R.

[62] Assuming that the "but for" approach to factual causation is appropriate to this case, and assuming that Reardon was negligent in the manner described by Mr. Gold, I think that the question of whether Folland could establish on the balance of probabilities that he would have been acquitted had he received proper representation does raise a genuine issue for trial.

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[69] Counsel for Folland made an alternative submission on the causation issue. He contends that Folland could succeed at trial if he could demonstrate on the balance of probabilities that as a result of Reardon's negligence, he lost a real chance of being acquitted. On this approach, counsel submits that Folland could succeed even if that chance, while significant, was less than 50 per cent. Folland's damages for this loss of a chance to be acquitted would equal the chance of the acquittal stated as a percentage, multiplied by the total loss suffered as a result of the conviction: K. Cooper-Stevenson, [*Personal Injury Damages in Canada*, 2nd ed (Scarborough, ON: Carswell, 1996)] at pp. 767-68; J. Fleming, "Probabilistic Causation in Tort Law" (1989) 68 Can Bar Rev. 661, at p. 673.

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[71] ... To my knowledge, there is no Canadian case law directly on point. This issue could take on considerable practical importance at the trial. If Folland were to establish a real chance of an acquittal absent Reardon's negligence, but were to fail to establish that it was likely that he would have been acquitted but for Reardon's negligence, Folland would not recover anything on a "but for" analysis but would recover part of the total loss suffered by him as a result of his incarceration if a "lost chance" analysis is open to him ... .

[72] The imposition of liability grounded in the loss of a chance of avoiding a harm or gaining a benefit is controversial in tort law, particularly where the harm alleged is not purely economic ... .

[73] Whatever the scope of the lost chance analysis in fixing liability for tort claims based on personal injuries, lost chance is well recognized as a basis for assessing damages in contract. In contract, proof of damage is not part of the liability inquiry. If a defendant breaches his contract with the plaintiff and as a result a plaintiff loses the opportunity to gain a benefit or avoid harm, that lost opportunity may be compensable. As I read the contract cases, a plaintiff can recover damages for a lost chance if four criteria are met. First, the plaintiff must establish on the balance of probabilities that but for the defendant's wrongful conduct, the plaintiff had a chance to obtain a benefit or avoid a loss. Second, the plaintiff must show that the chance lost was sufficiently real and significant to rise above mere speculation. Third, the plaintiff must demonstrate that the outcome, that is, whether the plaintiff

would have avoided the loss or made the gain, depended on someone or something other than the plaintiff himself or herself. Fourth, the plaintiff must show that the lost chance had some practical value ... .

[74] The first criterion is simply an application of the traditional burden of proof. The plaintiff has the burden of demonstrating the "but for" connection between the lost opportunity and the defendant's misconduct. The second criterion is admittedly somewhat nebulous. There is no bright line between a real chance and a speculative chance. An empirical review of the case law suggests that chances assessed at less than 15 per cent are seldom viewed as real chances. The third requirement recognizes that where a plaintiff is faced with the difficulty of establishing what would have happened, a past hypothetical fact, had the defendant not engaged in the wrongful conduct, it is too much to expect the plaintiff to establish that hypothetical fact on the balance of probabilities where what would have happened turns on the actions of a third party. The fourth requirement reflects the inherent nature of a damages award. If the chance lost has no real value, neither the compensatory nor restitutionary rationale for damages would justify an award of more than nominal damages.

[75] Recovery for lost chances based on lawyers' negligence either in advising clients, or in conducting litigation, is well established in the common law: ... .

[76] The solicitor's negligence cases set out above address liability in terms of the negligence of the solicitor's conduct, but assess damages using contractual principles. In most solicitor's negligence cases, liability rests in both contract and tort. Where, as in this case, the contractual and tort liability is concurrent, I see no reason to assess damages for what is essentially the same wrong in a different manner when considering contractual liability and liability in negligence ... .

[77] Cases in which lawyers have negligently missed limitation periods thereby denying their clients an opportunity to pursue a lawsuit provide the clearest example of recovery based on the valuation of a lost chance. Most lawsuits are neither clear winners, nor clear losers. A plaintiff who loses an opportunity to pursue a lawsuit that has some realistic chance of success has lost something of value even if the chance of success is less than 50 per cent. The same can be said of a defendant who loses an opportunity to defend a claim, even though the chance of successful defence was less than 50 per cent. Lawsuits are settled every day based on counsel's assessment of the possibilities of success or failure and the valuation of those possibilities.

[78] The rationale underlying the lost chance analysis is described in the seminal case, Kitchen v. Royal Air Forces Association, ... [[1958] 2 All ER 241, [1958] 1 WLR 563 (CA)]. Lord Evershed, M.R. rejected the contention that the plaintiff had to prove that her action against the third party would have succeeded before she was entitled to any damages as against her negligent lawyer. He said, at p. 251 All E.R.:

> In my judgment, assuming that the plaintiff has established negligence, what the court has to do in such a case as the present is to determine what the plaintiff has lost by that negligence. The question is: Has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can. (Emphasis added).

[79] Lord Parker, in a concurring judgment, observed, at p. 252 All E.R.:

> If the plaintiff can satisfy the court that she would have had some prospect of success, then it would be for the court to evaluate those prospects, taking into consideration the difficulties that remained to be surmounted. In other words, unless the court is

satisfied that her claim was bound to fail, something more than nominal damages fall to be awarded.
(Emphasis added).

[80] In Prior v. McNab, [1976 CanLII 604 (ONSC)], Reid J. applied Kitchen v. Royal Air Forces Association, supra, and clearly explained, at pp. 383-84 O.R. why the plaintiffs should be compensated for a loss of a chance to proceed with a lawsuit even if it could not be said that the lawsuit probably would succeed:

I therefore conclude that even if the Priors cannot establish that they would probably have succeeded against the police, and even if I were unable to conduct a substitute trial of such an action by reason of absence of witnesses or lapse of time or some other reason, the Priors would not necessarily be out of Court.

Rather, the question I must ask and answer is simply: did Robert or Elsie Prior have a right of value, a chose in action of reality and substance, arising out of Robert Prior's injury at the hands of the policeman? ...

[81] The loss of chance analysis has been applied in England in a wide variety of solicitors negligence cases, where the answer to the hypothetical question—what would have happened had the solicitor not been negligent?—depends on the actions of a third party. On these authorities, if the plaintiff can establish a real chance that the third party would have acted in a manner that would have avoided the loss suffered by the plaintiff or bestowed a benefit on the plaintiff, the plaintiff has established the solicitor's liability. The degree of the chance lost is a matter for the quantification of the plaintiff's damages: Allied Maples Group v. Simmons & Simmons, [1995] 1 W.L.R. 1602, [1995] 4 All E.R. 907 (CA); Jackson and Powell on Professional Negligence, 5th ed. (London: Sweet & Maxwell, 2002), at pp. 680-83.

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[83] Acton v. Graham Pearce and Co., [1997] 3 All E.R. 909 (Ch. Div.) applies the principles set out in Allied Maples to a case where the alleged negligence occurred in the defence of a criminal trial. The facts in Acton bear some similarity to this case. In Acton, the plaintiff, himself a solicitor, alleged that the defendant was negligent in the preparation of his defence in a criminal proceeding. The plaintiff contended that the defendant, a firm of solicitors, had failed to make certain inquiries and to obtain important evidence for the defence prior to trial. That evidence was eventually presented on appeal and the plaintiff's convictions were quashed.

[84] The trial court held that the defendant was negligent in the preparation of the plaintiff's criminal defence. Applying Allied Maples, the trial judge first determined whether on the balance of probabilities the plaintiff would have acted differently had he been given proper advice by the defendant. The trial judge concluded that the plaintiff would have taken the proper advice had it been given by his solicitors. The trial judge then considered whether there was a real or substantial chance that had the lawyers not been negligent, the prosecution would have discontinued the case or the plaintiff would have been acquitted. The trial judge found that there was a substantial chance that the prosecution would have been discontinued or the plaintiff acquitted had the solicitor not been negligent. He said, at p. 935 All E.R.:

The quantification of the value of a chance lost cannot be an exact science. The task is made more difficult when, as in the present case, the value of the chance lost depends on the evaluation of a sequence of chances; each of which contributes to the loss of a favourable outcome overall. I do not think that the task is assisted by over-refinement. The court must make the best estimate that it can.

> In my judgment the chance that, had the defendants done what reasonably competent and experienced solicitors would have done in the circumstances of this case, Mr. Acton [the plaintiff] would not have been convicted of the offences for which he was charged can fairly be put at 50%.
> (Emphasis added).

[85] The trial judge in Acton referred to obiter in earlier English authorities suggesting that a plaintiff in Folland's position could recover in a negligence action only if he could show the balance of probabilities that he would have been acquitted had his lawyer not been negligent: see e.g., Saif Ali v. Sydney Mitchell & Co., [1978] 3 ALL E.R. 1033, [1978] 3 W.L.R. 849 (H.L.), at pp. 1044-45 All E.R. In preferring the lost chance analysis described in Allied Maples, the trial judge said, at p. 931:

> To treat the plaintiff's claim, in an action of this nature, as a claim for damages for the loss of a chance—that is to say, for the loss of the chance that he would not have been prosecuted; or for the loss of the chance that, if prosecuted, he would have been acquitted on different evidence or if the trial had been conducted differently—enables the civil court to avoid a rehearing of the criminal trial. In order to decide whether the plaintiff has lost a substantial chance of an acquittal as a result of the negligence of his lawyers and, if so, to evaluate that chance, the civil court does not have to embark on the exercise, described by the Court of Appeal ... as virtually impossible, of attempting to decide on the balance of probabilities whether a jury in the earlier criminal trial, properly directed on different evidence, would have been satisfied beyond reasonable doubt as to the guilt of the accused.
> (Emphasis added).

[86] With respect, I cannot agree that the lost chance analysis is so qualitatively different than an assessment which would require a determination of whether the plaintiff would have been acquitted at the criminal trial. In either case, the criminal allegation must be retried, at least to some extent, in the context of the negligence action. Nor is it necessarily less difficult to fix the percentage chance of an acquittal than it is to determine whether on the balance of probabilities the plaintiff would have been acquitted at the criminal trial had he received appropriate representation. Finally, I see no intrinsic value in avoiding a rehearing of the criminal allegation where, as here, the verdict in the criminal trial has been set aside and the Crown has decided that it will not proceed with a new trial. With respect, I do not find the reasons provided in Acton for adopting a lost chance analysis persuasive.

[87] There are three reasons for not adopting a lost chance analysis in this case. First, Folland's damages all flow from his alleged wrongful conviction and subsequent incarceration. Unlike some cases, he does not allege losses that are not the consequence of the conviction: e.g., Boudreau v. Benaiah (2000), 2000 CanLII 29048 (ON CA), 46 O.R. (3d) 737, [2000] O.J. No. 278 (C.A). Folland could only avoid the damages he says flowed from Reardon's negligence if he could avoid conviction. Unlike the civil litigant, a mere chance of acquittal had no settlement value for Folland. Nor do I see any correlation between the sentence ultimately imposed on Folland if convicted and his chances of acquittal. For example, it cannot be said that he would have received a lesser sentence and, therefore, suffered lower damages if he had a 30 per cent chance of an acquittal as opposed to a ten per cent chance of an acquittal. A mere chance of an acquittal had no real value to Folland in that it would not have avoided conviction, imprisonment and the damages flowing from those events. If Reardon's negligence only decreased Folland's chance of an acquittal but was not a "but for" cause of his conviction, Reardon's negligence resulted only in nominal damages to Folland.

[88] My second reason for rejecting a lost chance analysis in this case arises out of the specific nature of the hypothetical fact in issue. In some cases, as for example where the plaintiff loses a lottery ticket because of the defendant's misconduct, the plaintiff has not lost anything more than a chance and it would be unfair to the plaintiff's case to require the plaintiff to show on the balance of probabilities that he would have won the lottery but for the defendant's misconduct: see Chaplin v. Hicks, supra. In other cases, perhaps because of the complexity of the variables involved or the unavailability of crucial evidence, it will be impossible to realistically assess what would have happened but for the defendant's misconduct. In those cases, the plaintiff may successfully advance a lost chance claim, if that claim meets the criteria discussed above. In doing so, the plaintiff effectively acknowledges that it cannot be determined what would have happened but for the defendant's misconduct but claims that it can demonstrate the loss of a chance having value as a result of that misconduct.

[89] In the present case, the hypothetical fact in issue—whether Folland would likely have been acquitted had he been properly represented—cannot be compared to the results of a lottery or a beauty contest where the outcome turns largely, if not entirely, on chance. As Gonthier J. said, at p. 605 S.C.R. in Laferrière, supra, in the course of rejecting lost chance as a basis for recovery in medical malpractice actions:

> Even though our understanding of medical matters is often limited, I am not prepared to conclude that particular medical conditions should be treated for purposes of causation as the equivalent of diffuse elements of pure chance, analogous to the non-specific factors of fate or fortune which influence the outcome of a lottery.

[90] Virtually all causal inquiries where harm is alleged as a result of the defendant's misconduct are "what if" inquiries and involve an element of conjecture. The degree of conjecture, however, varies greatly. While no one can know how an individual trier of fact will decide a particular criminal case, I do not think that decision can be attributed to "the non-specific factors of fate or fortune". Criminal trials are supposed to be decided on the basis of the proper application of known legal principles to the facts as found in the evidence. The outcome of a criminal trial is knowable in the sense that an informed, objective, reasonable assessment can be made of what that outcome would be if the relevant evidence is known. Courts sitting on criminal appeals routinely make "what if" objective assessments of the likelihood of acquittals or convictions in deciding the appropriate order when the appellant has shown an error at trial. I see no reason why the same kind of inquiry cannot be made in a negligence trial.

[91] As Folland's pleadings demonstrate, he does not contend that he can do no more than show that he lost a chance of an acquittal. He claims that he was wrongfully convicted because of Reardon's negligence. The answer to the "what if" question in this case is relatively straightforward. For example, if the trier of fact decides that Reardon was negligent in not obtaining Harris's DNA, the trier will decide whether it is more likely than not that Folland would have been acquitted had that DNA evidence been obtained and presented. A trier of fact can come to an informed decision on this question. It is reasonable and realistic to call upon Folland to demonstrate on the balance of probabilities that he would have been acquitted but for the alleged negligence.

[92] My third reason for rejecting loss of chance as a basis for recovery in this case flows from my conclusion that it is reasonably open to Folland to demonstrate on the balance of probabilities that he would have been acquitted but for Reardon's

alleged negligence. If Folland were to set out to demonstrate that he would likely have been acquitted but were to only establish a less than 50 per cent chance of an acquittal, by implication the trier of fact would have found that it was more likely than not that Folland had been properly convicted of sexual assault. Public policy would not countenance a damage award to Folland when, on the findings of the trial court, Folland probably committed the crime with which he was charged. As Lord Diplock said in Saif Ali, supra, at pp. 1044-45 All E.R.:

> The client cannot be heard to complain that the barrister's lack of skill or care prevented him from obtaining a wrong decision in his favour from a court of justice.

[93] Folland's claim stands or falls on whether he was wrongfully convicted because of the negligence of Reardon. I think he is entitled to more than nominal damages only if he can show on the balance of probabilities that he would have been acquitted had he received reasonably competent legal advice and representation ... .

(iv) Conclusion

[94] For the reasons set out above, the motion judge erred in dismissing Folland's action.

IV. REMOTENESS

A. FORESEEABILITY

Not all injuries caused by wrongdoing will be compensated by damages. An important limiting principle is remoteness, which precludes recovery for unforeseeable losses. Difficulties arise regarding just how foreseeable a loss must be, and whether remoteness operates in the same way in tort as in contract. While both use the language of foreseeability, the application of that concept to facts differs between contract and tort given that remoteness serves different functions in these causes of action.

H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd

[1978] QB 791 (CA)

[The defendant sold a hopper for storing pig food to the plaintiff for the plaintiff's pigs. In installing the hopper, the defendant failed to open a ventilator, with the result that the pignuts became mouldy, and the pigs were affected by the intestinal infection known as E. coli.]

SCARMAN LJ (at 810-13): ... The outbreak of E. coli, which did the damage, was, as found by the judge and now conceded by the defendants, caused by the mouldy condition of the nuts fed from the hopper. It is also conceded, as the judge also found, that the lack of top ventilation in the hopper caused this condition. But it is the defendants' case that at the time of the contract the parties could not have reasonably contemplated that nuts, rendered mouldy by lack of hopper ventilation, would cause serious illness, such as E. coli, in the pigs that fed on them.

A formidable volume of expert evidence upon this point was deployed for the consideration of the judge. His findings as to the contemplatability of E. coli [were] as follows:

> I would not consider that I would be justified in finding that in the spring of 1971 at the time of the contract either a farmer in the position of the plaintiffs or a hopper manufacturer in the position of the defendants would reasonably have contemplated that there was either a very substantial degree of possibility or a real danger or serious possibility that the feeding of mouldy pignuts in the condition described by Mr. Parsons would cause illness in the pigs that ate them, even on an intensive farm such as that of the plaintiffs.

The plaintiffs, by their respondent's notice, challenge this finding. I have done my best to study the evidence as it appears from the detailed and lucid judgment under appeal. I confess that I think I might well have reached a different conclusion, but bearing in mind the inevitable limitations upon an appellate court's consideration of such a question and the great advantages available to the judge, and most assuredly used to the full by him, I think it would be wrong to disturb his finding.

But it is necessary to note the essence—and the limits—of the finding. It is a finding that the parties could not reasonably be supposed to have had in contemplation that there was a serious possibility of mouldy nuts causing illness in the plaintiffs' pigs. It is not a finding that they could not reasonably have had in contemplation that a hopper unfit for its purpose of storing food in a condition suitable for feeding to the pigs might well lead to illness.

The judge's other findings of fact may be summarized as follows. He found that there was a warranty—its existence is not disputed by the defendants—to the effect that the hopper should be reasonably fit for the purpose of storing pignuts in a condition suitable for feeding to the plaintiffs' pigs. He found that the hopper, being unventilated, was not so fit; and this defect was a breach of the warranty, and that the pignuts were unfit by reason of the breach. He found that the plaintiffs' loss was caused by the breach of warranty. Upon the basis of these findings, the judge held that since the first question is whether "the damage" claimed arises in the ordinary course of things from the breach, "there is no need to have recourse to the question of the presumed contemplation." He then considered the meaning of the implied term "pleaded and admitted" that the hopper should be reasonably fit for the purpose of storing pignuts to be fed to the plaintiffs' pigs and reached the conclusion, which I respectfully think was inevitable, that it meant that, in so far as proper storage could achieve it, the hopper would keep the pignuts in a condition such as not to make the plaintiffs' pigs ill. He stressed the importance to be attached to the particular nature of this herd of pigs—a very different set of animals from the ordinary farmyard pig—and to the intensive nature of the plaintiffs' farming operation, all of which matters were made known to the defendants before contract. He stated his conclusion in these words:

> On this interpretation the inevitable conclusion from the findings I have already made would be that this hopper was not reasonably fit for that purpose and that this caused the nuts to become toxic and that the illness of the pigs was a direct and natural consequence of such breach and toxicity, and that the plaintiffs do not have to prove that the toxicity or its results were foreseeable to either party. To put it another way, once the question of foreseeability of the breach is eliminated, as it is by the absolute warranty, the consequences of the breach flow naturally from it.

Mr. Drake criticises strongly this part of the judgment. He says it is based on a misunderstanding of *Hadley v. Baxendale*, 9 Exch. 341 and he referred us to the well-known passage in Lord Reid's speech in *C. Czarnikow Ltd. v. Koufos*, [1969] 1 A.C. 350 where he said that it is not enough that in fact the plaintiff's loss was directly caused by the defendant's breach of contract. Lord Reid said, at p. 385:

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

Notwithstanding his choice of language, I think the judge was making the approach which, according to Lord Reid, is the correct one. He was saying, in effect, that the parties to this contract must have appreciated that, if, as happened in the event, the hopper, unventilated, proved not to be suitable for the storage of pignuts to be fed to the plaintiffs' pigs, it was not unlikely, there was a serious possibility, that the pigs would become ill. The judge put it this way:

> The *natural* result of feeding toxic food to animals is damage to their health and may be death, which is what occurred, albeit from a hitherto unknown disease and to particularly susceptible animals. There was therefore no need to invoke the question of *reasonable* contemplation in order to make the defendant liable (my emphasis).

The judge in this critical passage is contrasting a natural result, i.e. one which people placed as these parties were would consider as a serious possibility, with a special, specific result, i.e. E. coli disease, which, as he later found, the parties could not at the time of contract reasonably have contemplated as a consequence. He distinguished between "presumed contemplation" based on a special knowledge from ordinary understanding based upon general knowledge and concludes that the case falls within the latter category. He does so because he has held that the assumption, or hypothesis, to be made is that the parties had in mind at the time of contract not a breach of warranty limited to the delivery of mouldy nuts but a warranty as to the fitness of the hopper for its purpose. The assumption is of the parties asking themselves not what is likely to happen if the nuts are mouldy but what is likely to happen to the pigs if the hopper is unfit for storing nuts suitable to be fed to them. While, on his finding, nobody at the time of contract could have expected E. coli to ensue from eating mouldy nuts, he is clearly—and, as a matter of common sense, rightly—saying that people would contemplate, upon the second assumption, the serious possibility of injury and even death among the pigs.

And so the question becomes: was he right to make the assumption he did? In my judgment, he was: see *Grant v. Australian Knitting Mills Ltd.*, [1936] A.C. 85, and particularly the well-known passage in the speech of Lord Wright at pp. 97-100.

I would agree with *McGregor on Damages*, 13th ed. (1972), pp. 131-132 that

> ... in contract as in tort, it should suffice that, if physical injury or damage is within the contemplation of the parties, recovery is not to be limited because the degree of physical injury or damage could not have been anticipated.

This is so, in my judgment, not because there is, or ought to be, a specific rule of law governing cases of physical injury but because it would be absurd to regulate damages in such cases upon the necessity of supposing the parties had a prophetic foresight as to the exact nature of the injury that does in fact arise. It is enough if upon the hypothesis predicated physical injury must have been a serious possibility. Though in loss of market or loss of profit cases the factual analysis will be very different from cases of physical injury, the same principles, in my judgment, apply. Given the situation of the parties at the time of contract, was the loss of profit, or market, a serious possibility, something that would have been in their minds had they contemplated breach?

It does not matter, in my judgment, if they thought that the chance of physical injury, loss of profit, loss of market, or other loss as the case may be, was slight, or that the odds were against it, provided they contemplated as a serious possibility the type of consequence, not necessarily the specific consequence, that ensued upon breach. Making the assumption as to breach that the judge did, no more than common sense was needed for them to appreciate that food affected by bad storage conditions might well cause illness in the pigs fed upon it.

As I read the judgment under appeal, this was how the judge, whose handling of the issues at trial was such that none save one survives for our consideration, reached this decision. In my judgment, he was right, upon the facts as found, to apply the first rule in *Hadley v. Baxendale* or, if the case be one of breach of warranty, as I think it is, the rule in section 53(2) of the *Sale of Goods Act 1893* without inquiring as to whether, upon a juridical analysis, the rule is based upon a presumed contemplation. At the end of a long and complex dispute the judge allowed common sense to prevail. I would dismiss the appeal.

LORD DENNING MR (at 801-03):

The Law as to Remoteness

Remoteness of damage is beyond doubt a question of law. In *C. Czarnikow Ltd. v. Koufos*, [1969] A.C. 350 the House of Lords said that, in remoteness of damage, there is a difference between contract and tort. In the case of a *breach of contract*, the court has to consider whether the consequences were of such a kind that a reasonable man, at the time of making the contract, would *contemplate* them as being of a very substantial degree of probability. (In the House of Lords various expressions were used to describe this degree of probability, such as, not merely "on the cards" because that may be too low: but as being "not unlikely to occur" (see pp. 383 and 388); or "likely to result or at least not unlikely to result" (see p. 406); or "liable to result" (see p. 410); or that there was a "real danger" or "serious possibility" of them occurring (see p. 415).)

In the case of a *tort*, the court has to consider whether the consequences were of such a kind that a reasonable man, at the time of the tort committed, would *foresee* them as being of a much lower degree of probability. (In the House of Lords various expressions were used to describe this, such as, it is sufficient if the consequences are "liable to happen in the most unusual case" (see p. 385) or in a "very improbable" case (see p. 389); or that "they may happen as a result of the breach, however unlikely it may be, unless it can be brushed aside as far-fetched" (see p. 422).)

I find it difficult to apply those principles universally to all cases of contract or to all cases of tort: and to draw a distinction between what a man "contemplates" and what he "foresees." I soon begin to get out of my depth. I cannot swim in this sea of semantic exercises—to say nothing of the different degrees of probability—especially when the cause of action can be laid either in contract or in tort. I am swept under by the conflicting currents. I go back with relief to the distinction drawn in legal theory by Professors Hart and Honore in their book *Causation in the Law* (Oxford: Clarendon Press, 1959), at pp. 281-287. They distinguish between those cases in contract in which a man has suffered no damage to person or property, but only *economic loss*, such as loss of profit or loss of opportunities for gain in some future transaction: and those in which he claims damages for an *injury actually done* to his person or *damage actually done* to his property (including his livestock) or for ensuing expense (*damnum emergens*) to which he has actually been put. In the law of *tort*, there is emerging a distinction between economic loss and physical damage: see *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.*, [1973] QB 27 at pp. 36-37. It

underlies the words of Lord Wilberforce in *Anns v. Merton London Borough Council*, [1978] AC 728 at 759 recently, where he classified the recoverable damage as "material, physical damage." It has been much considered by the Supreme Court of Canada in *Rivtow Marine Ltd. v. Washington Iron Works and Walkem Machinery & Equipment Ltd.*, [1973] 6 W.W.R. 692 and by the High Court of Australia in *Caltex Oil (Australia) Pty. Ltd. v. Dredge Willemstad* (1976) 51 A.L.G.R. 270.

Loss of Profit Cases

I would suggest as a solution that in the former class of case—loss of profit cases—the defaulting party is only liable for the consequences if they are such as, at the time of the contract, he ought reasonably to have *contemplated* as a *serious* possibility or real danger. You must assume that, at the time of the contract, he had the very kind of breach in mind—such a breach as afterwards happened, as for instance, delay in transit—and then you must ask: ought he reasonably to have *contemplated* that there was a *serious* possibility that such a breach would involve the plaintiff in loss of profit? If yes, the contractor is liable for the loss unless he has taken care to exempt himself from it by a condition in the contract—as, of course, he is able to do if it was the sort of thing which he could reasonably contemplate. The law on this class of case is now covered by the three leading cases of *Hadley v. Baxendale*; *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] 2 KB 528; and *C. Czarnikow Ltd. v. Koufos*. These were all "loss of profit" cases: and the test of "reasonable contemplation" and "serious possibility" should, I suggest, be kept to that type of loss or, at any rate, to economic loss.

Physical Damage Case

In the second class of case—the physical injury or expense case—the defaulting party is liable for any loss or expense which he ought reasonably to have *foreseen* at the time of the breach as a possible consequence, even if it was only a *slight* possibility. You must assume that he was aware of his breach, and then you must ask: ought he reasonably to have foreseen, at the time of the breach, that something of this kind might happen in consequence of it? This is the test which has been applied in cases of tort ever since *The Wagon Mound* cases, [1961] AC 388, and [1967] 1 AC 617. But there is a long line of cases which support a like test in cases of contract.

[Orr LJ agreed with Scarman LJ.]

The appeal was dismissed.

Kienzle v Stringer

1981 CanLII 1851 (ONCA)

ZUBER JA: This is an appeal by the plaintiff from a judgment of Mr. Justice Cromarty [14 R.P.R. 29] awarding the plaintiff the sum of $17,459.48 plus costs on a solicitor-and-client basis.

The sole issue at trial and on this appeal is the quantum of the plaintiff's damages. The defendant Stringer is a solicitor and the plaintiff was his client; from this relationship there flowed the problems that now confront this Court. Even though liability is not an issue, some reference to the facts is necessary to understand the problems raised on this appeal.

The plaintiff's parents Otis and Catherine Kienzle were the owners of a farm in the Town of Norwich in the County of Oxford (the "Oxford farm"). Catherine Kienzle died in 1943, leaving her husband and three children: the plaintiff and his two sisters Annie Ashbaugh and Velma Allin. No steps were taken in the estate of Catherine Kienzle until 1973 when letters of administration were issued to her husband. However, before any further steps were taken, Otis Kienzle died a widower on June 22, 1974. In 1977, letters of administration in the father's estate and letters of administration de bonis non in the mother's estate were issued to Annie Ashbaugh.

Shortly before the death of Otis Kienzle, the plaintiff, at his father's request, began working with him on the Oxford farm. He continued to work the farm up until his father's death and thereafter until the time of trial. In 1974 he rented an additional 78 acres of nearby land to work with the Oxford farm to render the operation economical.

In 1977, the plaintiff elected to buy the Oxford farm and offered the sum of $55,000 which was accepted by Mrs. Ashbaugh as administratrix of both estates. The defendant who had acted as the solicitor for both estates also acted as solicitor for the plaintiff. The defendant prepared a deed dated July 12, 1977 conveying the Oxford farm from Annie Ashbaugh as administratrix of both estates to the plaintiff. Mrs. Ashbaugh did not join in the conveyance in her personal capacity. Mrs. Allin did not join in the conveyance at all. In due course, each sister was paid one-third of the $55,000 and the plaintiff also received his one-third share. The defendant certified in the traditional language that the plaintiff had "a good and marketable title."

The title to the Oxford farm was neither good nor marketable. Since three years had expired since the date of Otis Kienzle's death and no appropriate steps had been taken, title to the farm had vested in the three next of kin, the plaintiff and his two sisters. The deed of the administratrix without the concurrence of the two sisters in their personal capacities was of little or no value.

The plaintiff, however (at least for the time being), was unaware of his title problems but encountered others. He found that it was increasingly difficult to operate the Oxford farm on a profitable basis and as a result planned to buy a larger farm. In the spring of 1978 he found such a farm in the Kincardine area (the "Kincardine farm") which he agreed to buy at a price of $119,800. This agreement was conditional upon his being able to sell the Oxford farm. Shortly thereafter he received and accepted an offer to sell the Oxford farm at a price of $76,000. In anticipation of these two sales, the lease for the 78 acres near the Oxford farm was not renewed.

The plaintiff was, of course, unable to convey good title to the Oxford farm. Mrs. Ashbaugh, having received her one-third of the $55,000 was prepared to convey her one-third to the plaintiff. However, Mrs. Allin was not prepared to do so. As a result, the sale of the Oxford farm collapsed. The plaintiff then lacked the funds to complete the purchase of the Kincardine farm and that purchase was lost.

The learned trial judge awarded the plaintiff the amount of money necessary to buy out the Allin interest ($15,509.48), the return of the legal fees paid to the defendant ($1,200) and legal fees paid to another solicitor who attempted to unravel the title problems ($750). The plaintiff claims, however, that he is entitled to much more, namely damages for loss of income when the plaintiff was obliged to remain on the Oxford farm while it was no longer a viable operation without the additional leasehold property and damages for the lost purchase of the Kincardine farm the value of which had risen to $164,000 at the time of trial.

The learned trial judge was of the view that he was bound by the case of *Messineo v. Beale* (1978), 1978 CanLII 1570 (ON CA), 20 O.R. (2d) 49, 86 D.L.R. (3d) 713, 5 C.C.L.T. 235, and that his award of damages was therefore limited to the difference between the contract price and the market value of what was received. I take it to be clear as

well that the market value spoken of is the market value at the time of the transaction, otherwise rising values would wipe out the plaintiff's damages but leave him with his problems unresolved. On this premise the trial judge calculated the plaintiff's damages to be $15,509.48. In addition, he awarded a certain amount for legal costs already described.

In my respectful view, *Messineo v. Beale* is not authority for such a broad proposition. In *Messineo v. Beale*, the plaintiff agreed to buy several parcels of property, among them a particular piece called Murch's Point. The defendant's solicitor searched the title, closed the transaction and presented to the plaintiff a deed which included Murch's Point. A month later it was discovered that the purchaser had not received title to Murch's Point because the vendor had never owned it. However, the value of the land received exceeded the purchase price. The plaintiff was therefore awarded only nominal damages.

In my respectful opinion, *Messineo v. Beale* decides only that the defendant did not *cause* the plaintiff any damage. Since the vendor did not own Murch's Point, the defendant's solicitor did not cause its loss. The solicitor caused the plaintiff to complete a transaction that he would otherwise have avoided but no loss resulted from this. The plaintiff could have resold as soon as he discovered that he had not obtained Murch's Point and would have suffered no loss at all. It would have been far different if the vendor had owned Murch's Point and the solicitor had omitted the property from the deed or in some other way had caused the plaintiff to lose the property. In that case, the plaintiff's damage would have been the value of the missing property despite the fact that the value of what he had received was greater than the purchase price.

It appears that in many of the cases, as a matter of fact, the damages amount to no more than the difference between the purchase price and the market value of what is received, but I find no case binding on this Court compelling the acceptance of such a measure as a rule of law.

In my view the law should not support a rule which gives exceptional protection to solicitors from the general principles of damages which flow from either contractual or tortious responsibilities.

One problem that intrudes but briefly in this case is whether the liability of the solicitor is based in contract alone or in tort as well. (See again, *Messineo v. Beale*.) However, in this case, the question is of little consequence. Liability is admitted, no limitation period intervenes; the sole question is the question of damages. The extent of recovery for damages from breach of contract is described in the classic words of Baron Alderson in *Hadley v. Baxendale* (1854), 9 Exch. 341 at p. 355, 156 E.R. 145 at p. 151:

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

In tort, the measure is reasonable foreseeability. It is, I think, apparent that neither of these tests is a measure of precision and I number myself among those who are unable to see any real difference between them. (See *H. Parsons (Livestock) Ltd. v. Uttley Ingham & Co. Ltd.*, [1978] Q.B. 791, [1978] 1 All E.R. 525.)

For the purpose of simplicity, I shall use the term "reasonable foreseeability" as embracing the test in both tort and contract. Using this measure, we come to the

case at hand. There is no denial that the plaintiff is entitled to the sum of money needed to put the title to the Oxford farm in good order. It was disclosed on this appeal that it actually required $750 more (for her costs) to settle with Mrs. Allin than the sum of $15,509.48 estimated by the trial judge. This item of damages must, therefore, be increased. The plaintiff is, of course, entitled to the other items allowed by the trial judge.

The first substantial item of consequential loss asserted by the appellant flows from the fact that the appellant, relying on the marketability of the Oxford farm, shut down the effective operation of that farm by letting go the surrounding leasehold property. When the sale fell through, the plaintiff was obliged to keep the Oxford farm without being able to do much with it. Even his credit position had been adversely affected by the discovery of the faulty title. His profit from the Oxford farm dropped drastically. The plaintiff, however, was obliged to mitigate his damages and could not simply stay in this position forever. In my view, a reasonable period for him to untangle himself from the web in which he found himself would be a period of one year and for that period his loss of profits should be assessed at $10,000. This loss is directly and immediately connected to the defective title and consequent lack of marketability of the Oxford farm, and would have occurred if the plaintiff had chosen only to sell the Oxford farm without any plan to purchase another farm. I conclude, therefore, that this loss is within the ambit of reasonable foreseeability.

The far more difficult problem that arises is the lost profit on the purchase of the Kincardine farm. Mr. Cherniak asked that the appellant's award be increased to reflect this loss. The contract price of the Kincardine farm was $119,800; by the time of trial it had advanced to $164,000, a difference of $44,200. During this same period, the value of the Oxford farm rose from $76,000 to $100,000. Mr. Cherniak claims on behalf of his client the loss on the Kincardine sale, diminished by the gain on the retention of the Oxford farm, i.e., $20,200.

The question that then arises is whether or not this loss is "reasonably foreseeable" and it becomes apparent that this measure is far from precise.

It may be helpful to recognize that in using the terms "reasonably foreseeable" or "within the reasonable contemplation of the parties" courts are not often concerned with what the parties in fact foresaw or contemplated. (I leave aside those cases where the disclosure of special facts may lead to the conclusion that a party has assumed an extraordinary risk.) The governing term is reasonable and what is reasonably foreseen or reasonably contemplated is a matter to be determined by a court. These terms necessarily include more policy than fact as courts attempt to find some fair measure of compensation to be paid to those who suffer damages by those who cause them. (See [Barry J] Reiter & [John] Swan, *Studies in Contract Law* (1980), p. 61, study 3, Katherine Swinton, "Foreseeability: Where Should the Award of Contract Damages Cease?")

In the ordinary course, a client relies on his solicitor to guarantee the title that he certifies. The fee charged is calculated upon the sale price of the title certified and arguably the size of the risk assumed. It is not unreasonable to add to that risk consequential damages immediately concerned with the failure of marketability.

This reliance, however, does not or should not extend to the loss of profits from secondary transactions which may be fuelled by funds expected from the marketing of the subject real property. This range of secondary transactions is unpredictable and limitless and so are the losses that may flow therefrom. If the ambit of reasonable foreseeability takes us into this area of secondary transactions it is difficult, if not impossible, to know where a boundary may be found. In my view, the damages that flow from the loss of profits from a secondary bargain lie on the far

side of a Rubicon that should not be crossed; reasonable foreseeability takes us only to the shore. I except again those cases in which particular disclosure may lead to the assumption of additional risks. In this case, of course, there was no such disclosure that the Oxford farm was to be the basis of future purchases.

I conclude that the plaintiff should not recover his loss resulting from his inability to purchase the Kincardine farm.

In declining to extend the ambit of the plaintiff's recovery to the Kincardine transaction I have chosen not to rely upon the weakest reason for so doing, *i.e.*, the plaintiff's impecuniosity. That classic argument would say that the plaintiff should have completed the purchase of the Kincardine farm by drawing upon his theoretically limitless funds; the fact that he had no such funds is not the fault of the defendant. But, in this case, the plaintiff's financial problems were in large part caused by his title problems. However, it is not necessary to decide whether impecuniosity alone would have precluded the plaintiff from recovering his Kincardine loss and I say no more about it.

For the foregoing reasons, I would allow in part the plaintiff's appeal and would vary the trial judgment by increasing the amount awarded by $10,750. The appellant is entitled to his costs of this appeal.

Sir Robin Cooke, "Remoteness of Damages and Judicial Discretion"

(1978) 37 Cambridge LJ 288 at 298

The purpose of the law is to ensure, as far as money can, that the plaintiff is in the same position as he would have enjoyed if his rights had not been violated by the defendant. Any damage of which the defendant's tort or breach of contract is a substantial cause is prima facie recoverable. Nevertheless, as between the parties it may be just, on the facts of any given case, to limit the damages by excluding certain heads; and in determining that question in any given case the court should have regard to a range of considerations. The main relevant considerations have already emerged from the case law and are somewhat as follows:

(i) The degree of likelihood that such damage, or damage of broadly the same kind, would be caused by such an act or omission. In all cases this should be considered from the point of view of a reasonable man in the defendant's position immediately before the act or omission in question; but in contract an assessment as at the date of the contract will also be relevant.

(ii) The directness or otherwise of the causation and its potency. Intervening human action comes in under this head.

(iii) The nature of the damage—whether to person, property or purely economic interests.

(iv) The degree of the defendant's culpability: for example, whether his action was deliberate or grossly negligent at the one extreme or in venial breach of a minor but strict contractual duty on the other.

(v) Whether the defendant had a reasonable opportunity of limiting his liability by an agreed term.

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An avowed discretionary approach would not necessarily make the law any more certain, in the sense of making the results of cases more predictable.

> But perhaps it would do something in that direction by reducing distraction and bringing into a more direct light the kind of considerations which tend to sway decisions. It should have the definite advantage of making it easier for a court to do justice without straining to fit the facts into old or new formulae. And it should also make decisions at first instance rather less vulnerable to challenge. The ordinary principles governing appellate review of discretionary decisions, liberal enough at the present day, would apply. A decision could be set aside if—but only if—it gave no or insufficient weight to relevant considerations or were shown to have resulted in an injustice. Perhaps an appellate judge may be permitted to say that such limitations on the appellate court as are involved in that proposition are not unhealthy.

NOTES

1. In *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*, [2009] 1 AC 61, the House of Lords held that the charterer of a ship was not liable for the loss, caused by late redelivery of the ship, of an exceptionally profitable contract made by the owner with another charterer to start after the end of the current charter. Though the loss of such a follow-on contract was readily foreseeable in general terms, it was held by Lords Hoffmann and Hope, with whom Lord Walker agreed, not to be the type of loss for which the charterer could be taken to have assumed responsibility. It is not absolutely clear, however, that this reason commanded the assent of a majority, because Lord Rodger, with whom Lord Walker also agreed, avoided the language of assumption of responsibility, and Baroness Hale expressly preferred the approach of Lord Rodger.

In *Saipol SA v Inerco Trade SA*, [2014] EWHC 2211 (Comm), Field J said:

> *The Achilleas* was a highly exceptional case. On its facts, there was not only a generalised understanding in the trade or the market that losses for late delivery of a vessel under a time charter were to be assessed simply by reference to the market rate at the time the vessel should have been redelivered, but that was also the considered view of the legal profession. Accordingly, it could safely be said in those circumstances that there was a legitimate expectation within the trade that a time charterer would not be liable for a loss of profit suffered by the owner in respect of a particular follow-on charter but instead, for late delivery would be liable only on a basis that took account of the difference between the rate and the market rate.

2. Although the test in tort is foreseeability, as it is in contract, only in exceptional cases will the law of remoteness operate to deny a claim in tort, particularly where personal injury is involved. For cases where quite unforeseeable injuries were held not to be too remote, see, for example, *School Division of Assiniboine South, No 3 v Greater Winnipeg Gas Company Limited*, 1971 CanLII 959 (MBCA) and *Bradford v Kanellos*, 1970 CanLII 54 (ONCA).

3. Why do you think the tort standard of remoteness is less likely to limit liability than the contractual one?

B. IMPECUNIOSITY

The different ways that remoteness is applied in tort and contract are also apparent in the cases regarding impecuniosity. If a loss is incurred or increased because the plaintiff did not have the money to mitigate as soon as possible, it may be argued that that loss is too remote to be compensable. However, a rigid rule to this effect would depart from first principles of foreseeability and might seem unfair—particularly if the plaintiff is not a businessperson and had no realistic way of mitigating the loss. *Liesbosch Dredger v Edison Steamship*,

excerpted below, is often interpreted as stating a hard rule that losses due to the plaintiff's impecuniosity are not recoverable. Now, however, first principles of remoteness tend to apply.

Liesbosch Dredger v Edison Steamship

[1933] All ER Rep 144 (HL (Eng))

[On November 26, 1928, the respondents' steamship *Edison* fouled the moorings of the appellants' dredger *Liesbosch* and did not free them until it had carried the *Liesbosch* into the open sea, where it filled with water, sank, and was a total loss. Due to the appellants' impecuniosity, they could not immediately afford to buy a replacement ship and instead had to rent one, which was more expensive. At issue was whether the higher cost of rental could be recovered.]

LORD WRIGHT:

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I agree with the conclusion of the Court of Appeal that the Registrar and LANGTON J proceeded on a wrong basis and that the damages must be assessed as if the appellants had been able to go into the market and buy a dredger to replace the Liesbosch. On that basis it is necessary to decide between the conflicting views put forward, on the one hand by the respondents, that all that is recoverable is the market price of the dredger, together with cost of transport to Patras and interest, and on the other hand by the appellants that they are also entitled to damages in addition for loss during the period of inevitable delay before the substituted dredger could arrive and start work at Patras.

... In these cases the dominant rule of law is the principle of restitutio in integrum, and subsidiary rules can only be justified if they give effect to that rule.

... The true rule seems to be that the measure of damages in such cases is the value of the ship to her owner as a going concern at the time and place of the loss.

... The assessment of the value of such a vessel at the time of loss, with her engagements, may seem to present an extremely complicated and speculative problem. But different considerations apply to the simple case of a ship sunk by collision when free of all engagements, either being laid up in port or being a seeking ship in ballast, though intended for employment, if it can be obtained, under charter or otherwise. In such a case the fair measure of damage will be simply the market value, on which will be calculated interest at and from the date of loss, to compensate for delay in paying for the loss.

The contrasted cases of a tramp under charter or a seeking tramp do not exhaust all the possible problems in which must be sought an answer to the question what is involved in the principle of restitutio in integrum. ... The question here under consideration is again different; the Liesbosch was not under charter nor intended to be chartered, but in fact was being employed by the owners in the normal course of their business as civil engineers, as an essential part of the plant they were using in performance of their contract at Patras. Just as in the other cases considered, so in this, what the Court has to ascertain is the real value to the owner as part of his working plant, ignoring remote considerations at the time of loss. If it had been possible without delay to replace a comparable dredger exactly as and where Liesbosch was, at the market price, the appellants would have suffered no damage save the cost of doing so, that is in such an assumed case the market price, the position being analogous to that of the loss of goods for which there is a presently available market. But that is in this case a merely fanciful idea. Apart from any consideration of the appellants' lack of means, some substantial period was necessary to procure at Patras a substituted dredger; hence, I think, the appellants cannot

be restored to their position before the accident unless they are compensated (if I may apply the words of LORD HERSCHELL in *The Greta Holme* (31) ([1897] AC at p 605]: "In respect of the delay and prejudice caused to them in carrying out the works entrusted to them." ...

... But the best opinion I can form is that [the Court of Appeal] intended to give simply the replacement cost, without including in the value any allowance for disturbance and prejudice during the necessary period of delay. If that is so, though I agree with their disallowance of the claim as put forward, I do not agree with the disallowance, in ascertaining the value, of anything beyond the cost of replacement. I do not think in a case like this interest is a compensation for that factor, because I think that factor must be something to be taken into account in arriving at the figure of value on which interest must run. On the whole I think that counsel is right in urging that the matter should be referred back to the Registrar and Merchants to ascertain the true value on the principles I have stated. From these it follows that the value of the Liesbosch to the appellants, capitalized as at the date of the loss, must be assessed by taking into account: (i) the market price of a comparable dredger in substitution; (ii) costs of adaptation, transport, insurance, etc., to Patras; (iii) compensation for disturbance and loss in carrying out their contract over the period of delay between the loss of the Liesbosch and the time at which the substituted dredger could reasonably have been available for use in Patras, including in that loss such items as overhead charges, expenses of staff and equipment, and so forth thrown away, but neglecting any special loss due to the appellants' financial position. On the capitalized sum so assessed, interest will run from the date of the loss.

The result is that the appellants have substantially failed in the appeal, because they have failed in their claim that the judgment of Langton J should be restored, and accordingly they should have to pay to the respondents three-quarters of their costs of this appeal. The order of the Court of Appeal will be varied by substituting for the judgment for 9177 pounds 3s 4d a judgment for such sum as the Registrar and Merchants may find on reference back to them. Save as so varied the order of the Court of Appeal will stand. I cannot help expressing a hope that the parties may now compose this remaining difference without further proceeding in the Registry.

Order of the Court of Appeal varied by substituting for the judgment for such sum as the Admiralty Registrar may find on reference back to him; subject to such variation the said order affirmed. Cause remitted to the Registrar with a direction to assess the true measure of damage on the principles laid down by this House.

[The other law lords concurred in Lord Wright's speech.]

NOTES AND QUESTIONS

1. In *Liesbosch*, the measure of the loss takes account of the owner's particular situation and requirements. But when the House of Lords considered damages for delay between the loss of the dredger and its replacement, the owners were restricted to recovery for a period of time within which a replacement "could reasonably have been available ... neglecting any special loss due to the appellants' financial position." What justified the use of a fairly subjective approach to the assessment with respect to the dredger itself but a fairly objective assessment of the damages for delay? Would the result have been the same if the owners had been using an unnecessarily sophisticated (and therefore expensive) dredger at the time of loss? Why or why not?

2. In *Liesbosch*, Lord Wright stated that, in calculating damages, a court must ignore "any special loss due to the plaintiff's financial position." This seems to indicate that the plaintiff's impecuniosity is no excuse for its failure to mitigate. In other words, we must treat the reasonable person as having the means to mitigate. It is not clear that such a strict rule was ever the law, since some pre-*Liesbosch* cases indicated that impecuniosity might be an excuse for a failure to mitigate: see, for example, *Clippins Oil Co v Edinburgh and District Water Trustees*, [1907] AC 291 (HL). Regardless of what the old law was, Lord Wright's comments no longer represent English or Canadian law. In *Lagden v O'Connor*, [2004] 1 AC 1067, Lord Hoffmann referred to Lord Wright's words in *Liesbosch* and wrote (at 1073) that they "can no longer be taken as authoritative. They must now be regarded as overtaken by subsequent developments in the law." In *Lagden*, the Court held that whether a plaintiff's impecuniosity could be an excuse for its failure to mitigate was a question of foreseeability. In *Southcott Estates Inc v Toronto Catholic District School Board*, 2012 SCC 51 at para 76, the majority of the Supreme Court of Canada approved of this aspect of *Lagden*, in *obiter*.

V. MITIGATION

A. INTRODUCTION

Mitigation is used in several senses in the law of damages. Its principal meaning is to refer to a plaintiff's conduct that might have diminished the loss complained of or to events that have in fact diminished the loss. Where the plaintiff successfully avoids a loss that would otherwise have been incurred because of the defendant's wrong, damages are usually not recoverable for that loss. Where the loss was not avoided but could have been (i.e., it is an avoidable loss) had the plaintiff acted reasonably, again, damages are not recoverable for the loss.

B. AVOIDED LOSS

Erie County Natural Gas and Fuel Company Ltd v Carroll

[1911] AC 105 (PC (ON))

[The defendant wrongfully withheld a supply of gas needed by the plaintiffs for use in their business. The plaintiffs acquired other gas leases, constructed new works to secure their supply of gas, and later sold them at a profit.]

LORD ATKINSON (at 115-19): ... The Master by his report, dated April 20, 1907, found: —

1. That the plaintiffs were entitled to have the works operated by them supplied with natural gas from the mains of the Provincial Company from November 15, 1894 to August 1, 1902.
2. That the company consumed 911,722,303 cubic feet of their own gas for that purpose within the above-mentioned period.
3. That this gas was worth 12 1/2 cents per 1000 cubic feet, amounting to $113,965.29 in all, which sum he found the Provincial Company (not both the companies) liable to pay to the plaintiffs. The result in money if this award held good would, if the figures $60,000 and $75,000 be accurate, be something like this.

If the defendants had discharged their obligation the plaintiffs would have got from them gas presumably sufficient to operate their plant without paying for it

anything extra. The defendants, however, failed to discharge that obligation for about 7 3/4 years, and the plaintiffs by constructing works at a cost of less than $60,000 procured the necessary gas from elsewhere. After having this gas and worked their plant they sold these works presumably for $75,000, about $15,000 more than they cost; yet, because of the temporary default of the defendants, the plaintiffs are, notwithstanding their use and enjoyment of the substituted gas, to receive in addition the sum of $113,965.22 as damages, thereby making a profit by the defendants' breach of their obligation of about $128,965.22, a somewhat grotesque result.

Britton J. in delivering the judgment of the Supreme Court of Ontario apparently approved of the principle upon which the damages were assessed by the Master, and agreed with him as to the price at which it should be taken that the plaintiffs could have sold the gas which they had used, namely 12 1/2 cents per 1000 cubic feet, but thought the quantity found by the Master to have been produced was excessive, and reduced the damages to $54,031.82, less than half the sum at which they had been assessed by the Master. The Court of Appeal concurred in opinion with him, affirmed his judgment and decision, and dismissed the appeal of the defendants and the cross-appeal of the plaintiffs with costs.

Their Lordships are quite unable to adopt these conclusions. In their opinion they are erroneous; and they think the error is due to the fact that the Court of Appeal did not take a true view of the nature of the transaction embodied in the agreement of April 6, 1891, and the conveyance of the 20th of the same month as amended, or of the rights which in the circumstances of the case sprung from it.

It is plain, on the face of these documents, that the parties to them contemplated that more gas should be obtained from the properties leased than would be sufficient to operate the plant of the plaintiffs, and the reservation contained in the agreement and subsequently embodied in the conveyance merely amounts, in their Lordships' opinion, to a contract on the part of the Erie County Natural Gas and Fuel Company to supply the plaintiffs, out of this larger volume of gas, with sufficient to operate their plant. Upon the execution of the conveyance of July 18, 1894, that contract, of course, became binding on the defendants, the Provincial Natural Gas and Fuel Company, Limited; but the amount of gas to be supplied was not specifically set apart for or appropriated to the plaintiffs' use, or had ever become their property. Had the plaintiffs without the consent of the defendants tapped the latter's mains and helped themselves, they would, according to *The Queen v. White* (1853), 22 LJ (MC) 123, a case of the highest authority, and *The Queen v. Firth* (1869), LR 1 CCR 173, have been liable to be convicted of larceny, and certainly would have been liable in trover. They were merely in the position of a person who had, for instance, purchased from the owner of a large quantity of grain in bulk a portion of it, while the portion purchased remained part of the bulk and before it had been in any way set apart or identified. The defendants have admittedly broken their contract. They are liable for damages for that breach. The only question for decision is what, in the circumstances of the case, is the true measure of those damages. It would have been competent for the plaintiffs to have abstained from procuring gas in substitution for that which the defendants should have supplied to them, and have sued the defendants for damages for breach of their contract. They did not take that course. They chose to perform on behalf of the defendants, in a reasonable way, that contract for them and to obtain from an independent source a sufficient quantity of gas, similar as near as might be in character and quality to that which they were entitled to receive. In such cases it is well established that the measure of damages is the cost of procuring the substituted article, not at all the price at which the substituted article when procured could have been

sold by the person who has procured it. In *Hamlin v. Great Northern Ry. Co.* (1856), 26 LJ (Ex.) 20 at p. 23 Alderson B. thus lays down the law applicable to these cases: "The principle is that if the party does not perform his contract the other may do so for him, as near as may be, and charge him for the expenses incurred in so doing." In *Le Blanche v. London and North Western Ry. Co.* (1876), 1 CPD 286, at p. 302, Lord Esher (then Brett L.J.) thus expresses himself: "We think it may properly be said that if the party bound to perform a contract does not perform it the other party may do so for him, as reasonably near as may be, and charge him for the reasonable expense incurred in so doing," but whether the thing done was a reasonable thing to do must be determined having regard to all the circumstances. James, Mellish, and Baggallay L.JJ. expressly approve of the principle laid down by Alderson B, with this qualification, however, that the second party must not take a course which as regards the party in default would be unreasonable or oppressive. This principle appears to be generally accepted and applied: Sedgwick on Damages, 8th ed., vol. 1, pp. 322-325.

Where the contract is one for the sale of goods, one of the modes in which a party to it may, on the default of the party bound to perform it, perform it for him is by going into the market and buying goods of a description and quality similar to those contracted for; but if he purchases at a sum equal to or less than the contract price, he can only recover nominal damages, because, the cost of procuring the substituted article not being greater than the contract price, he has got goods equal to those contracted for and at the same or a less cost, and has therefore suffered no loss: *Valpy v. Oakeley* (1851), 16 QB 941; 117 ER 1142; *Griffiths v. Perry* (1859), 1 E & E 680; 120 ER 1065. The case of *Western Wagon and Property Co. v. West*, [1892] 1 Ch. 271 is an illustration of the same principle.

The same rule must apply whether the substituted goods or commodities are manufactured, or mined for, or otherwise produced, or purchased in open market. In the latter case the cost of procuring the goods is the price at which they were bought; in the former cases the cost of procuring them is the cost of their production. The method adopted to procure them cannot make any difference.

If then the cost to which the plaintiffs were put to acquire gas to operate their plant during the 7 3/4 years mentioned be the true test of damages in this case, as it clearly is, the next question to consider is what have the plaintiffs shewn to be the amount of the initial gross cost to which they were put, and what deductions, if any, the defendants have shewn should be made from that amount in order to ascertain the net cost, and consequently the actual loss, and therefore the sum recoverable. The plaintiffs have vouched expenditure to the amount of $58,297.52 in their before-mentioned statement of damages, and it was stated by Mr. Eldon Bankes, and not disputed, that this amount covered labour, materials, and sums paid for superintendence. The answers to certain questions in the record would go to shew that it included the expenses of the plaintiffs. It is not suggested that it included interest on the money spent. It may possibly not have included maintenance. A reference to the statement of damages shews that the main expenditure took place in the years 1898 and 1902. Even if the outlay be taken at $60,000, the interest at 5 per cent on the different sums expended from the dates given in evidence could not, as has been already pointed out, well exceed $12,000, but that is a mere matter of arithmetic which could be readily ascertained. If these works cost the plaintiffs more than this it was their business to shew it. They cannot be permitted to recover damages on guesswork or surmise. They have failed to shew it. Mr. Simon, on their behalf, contended that as the defendants by their conduct had compelled the plaintiffs to become producers of gas, they are bound to pay the latter for their courage and enterprise. There is no authority for such a proposition. The contention is in their Lordships' opinion unsound. It may well be that if several reasonable but

abortive attempts had been made to procure this gas the cost of these would have been properly treated as part of the cost of ultimately obtaining it, but that question does not arise in the case. The works having admittedly been sold, something must have been obtained for them. It is clear that if the defendants are to pay for the cost of making those works and of thereby supplying the plaintiffs with the gas the works produced they must get credit for the sum for which these works, after having supplied the gas, were sold, otherwise the plaintiffs would make by the defendants' breach of contract a profit equal to the price obtained on sale. The prima facie inference to be drawn from a document printed in the record is that $75,000 was the amount of it. That inference, unless rebutted, should in justice to the defendants be acted upon. The burden of rebutting it lay upon the plaintiffs. They have, in their Lordships' opinion, failed to discharge that burden, and should not be permitted, by leaving the matters in obscurity, to recover more than they have lost. The plaintiffs have not sued for the loss of their contract. They have only sued for the damages caused to them by the temporary deprivation of the gas. They have got the substituted article, identical in description and quality, have used it, and have failed to shew that it has not in the result been obtained by them free of cost. They are therefore, according to the principles established by the authorities already cited, only entitled to nominal damages.

Cockburn v Trusts & Guarantee Co

1917 CanLII 10 (SCC)

[The plaintiff, who had been wrongfully dismissed by his employer when it went into liquidation, bought assets at the liquidation sale and sold them at a profit of $11,000. The trial judge awarded damages for wrongful dismissal, but the Ontario Appellate Division substituted an award of nominal damages. A further appeal to the Supreme Court of Canada was dismissed.]

ANGLIN J (at 268-71): ... The fundamental basis of the assessment of damages for breach of contract—compensation for pecuniary loss naturally flowing from the breach—and its qualification—that the plaintiff cannot recover any part of the damages due to his own failure to take all reasonable steps to mitigate his loss—are too well settled to admit of controversy. The application of this qualified rule, however, sometimes presents difficulty. The qualification does not impose on the plaintiff claiming damages for the breach

> an obligation to take any steps which a reasonable and prudent man would not ordinarily take in the course of his business:

nevertheless,

> when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.

The applicability of the principles expressed in these passages from the judgment of Lord Chancellor Haldane in *British Westinghouse Elec. & Manufacturing Co. v. Underground Elec. Rlys. Co. of London*, [1912] A.C. 673 (HL (Eng.)), at 689, to breaches of contract for personal services is shewn by the authorities cited by Mr. Justice Hodgins in delivering the judgment of the Appellate Division—notably in *Beckman v. Drake* (1849), 2 H.L. Cas. 579 at p. 608; 9 E.R. 1213 at pp. 1223-24 (H.L. (Eng.)).

The action of the appellant in acquiring and disposing at a profit of a considerable part of the manufactured stock of his former employers arose out of his relations with them. It involved the employment by him of time, labour and ability which he had engaged to give to them. For his loss of an opportunity to use these in earning a salary from those employers he is now asking that the respondent shall be compelled to pay by way of damages. It would seem to be manifestly unfair that, if the appellant is thus to be remunerated on a contractual basis by way of damages, he should not be held accountable in mitigation for money made by using for his own purposes the time, labour and ability so to be paid for. The $11,000 profit which he made, although the making of it required some assumption of risk and responsibility and also an expenditure clearly beyond anything involved in his engagement by his former employers, and likewise beyond anything which it was his duty to them, or to the respondent, to undertake, is within the rule of accountability stated by Lord Haldane. The action which produced it arose out of his former employment in the sense in which the Lord Chancellor uses the phrase "arising out of the transaction," as is shewn by his illustration from *Staniforth v. Lyall* (1830), 7 Bing. 169; 131 E.R. 65 (C.P.). Again to quote his Lordship (p. 691):

> The transaction was ... one in which the person whose contract was broken took a reasonable and prudent course quite naturally arising out of the circumstances in which he was placed by the breach.

By devoting his time, energy and skill for two years to the service of his former employers the appellant would have earned $10,000. A breakdown in his health, or other foreseen contingencies might have prevented his doing so. Excused from that service, he was enabled by a happy combination of making use of the time, labour and ability thus set free and taking advantage of the opportunity afforded by his employer's misfortune within 66 days to make a clear profit of $11,000—and he still had at his disposal, in which to add to his earnings, if so inclined, or to amuse himself if he preferred doing so, the remaining year and 299 days. Were he to be now awarded not the $10,000 claimed in his action but the $4,000 allowed him by the trial judge, he would, as a result of his employers' disaster, be better off by at least $5,000 than he would have been had he put in his two years of service—"a somewhat grotesque result," as Lord Atkinson put it in *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A.C. 105 (P.C. (Ont.)) at p. 115. Making due allowance for extra time and trouble expended and all other elements proper to be considered involved in the efforts which resulted in the plaintiff's securing the profit of $11,000, and taking into account the year and 299 days left at his disposal after that was accomplished, it seems reasonably clear that he did not sustain any actual damage as a result of losing his position. He was probably, on the whole, better off.

Upon the facts, when "allowed to speak for themselves," not only is the conclusion reached by the Appellate Division in conformity with legal principles and the authorities but any other would shock the common sense of justice.

Slater v Hoyle & Smith Ltd

[1920] 2 KB 11 (CA)

WARRINGTON LJ: The plaintiffs are the sellers, and the defendants are the buyers under a contract dated June 20, 1918, for the sale and purchase of certain goods, to wit, 3000 pieces of cotton cloth of a description mentioned in the contract. After 1625 pieces had been delivered the defendants refused to accept the remaining 1375, alleging that the cloth already delivered had been persistently of a quality not in

accordance with the contract and that they were entitled to assume that future deliveries would be as bad, and to treat the plaintiffs as repudiating the contract. The plaintiffs sued the defendants for non-acceptance of the undelivered goods, and the defendants counterclaimed for damages, (1.), for the non-delivery of the undelivered goods; and (2.), for breach of warranty of quality in respect of the goods delivered.

The learned judge decided the main issue in the defendants' favour, and on the counterclaim he awarded no damages for non-delivery, on the ground that the market price at the date of the breach was below the contract price; but as damages for breach of warranty he awarded the difference between the value at the date of delivery of the goods actually delivered and the value they would have had if they had answered to the warranty, eliminating from consideration certain sub-contracts made by the defendants, which I will refer to more particularly in a moment, in partial fulfilment of which 691 pieces of the cloth delivered by the plaintiffs had been employed. On the main question I agree with the judgment of Greer J. and Bankes L.J., and have nothing to add. I also agree that taking, as he did, 4 1/2 *d.* a yard as the difference in the two values, the judge was doing the best he could on the materials before him, and we ought not to interfere.

But the plaintiffs say that as to the 691 pieces delivered under the sub-contracts, the learned judge ought to have taken into account the prices realized by the defendants under the sub-contracts, and that as those prices were equal to or exceeded the contract price, the defendants in fact suffered no damage and ought to have had none awarded to them. There were two sub-contracts, both with the West Somerset and Devon Manufacturing Co., one dated December 14, 1917, before the date of the contract in question, and the other dated June 26, 1918. The price under the first was 8 1/2 *d.* a yard, and under the second 1*s.* 3*d.* The cloth to be delivered under the head contract was to be unbleached, or "grey" cloth, that under the sub-contracts, was, as I understand, to be bleached. The plaintiffs knew nothing of these contracts, and the defendants were under no obligation to their purchasers to deliver the plaintiffs' goods. Under these circumstances the question is: Was the learned judge right in the course he took?

The general principle on which he acted is that laid down by s. 53, sub-s. 3, of the *Sale of Goods Act, 1893*, and this appears to be clearly the right principle where goods are delivered not of the right quality and the buyer elects not to reject them but to claim damages. Into the calculation for the purpose of applying this principle the contract price as such does not enter at all, though I suppose it may be an element in assessing the value.

The defendants rely on the rule laid down by Lord Esher M.R. in *Rodocanachi v. Milburn* (1886), 18 QBD 67 (CA) at p. 77. He said: "It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods." In those cases the elements for comparison are, in general, the contract price and the market price at the date when the goods should have been delivered or accepted, as the case may be, and if in such cases sub-contracts are not to be taken into account I do not see why they should be in such a case as the present. Indeed on the facts of the case there are special reasons against doing so. The sub-contracts were not for the identical goods, being for bleached instead of grey cloth, and they might or might not be performed by delivering the goods the subject of the head contract. The decision in *Rodocanachi v. Milburn* was followed in the House of Lords in *Williams v. Agius*, [1914] AC 510 (HL (Eng.)).

But it is said that the present case is governed by *Wertheim v. Chicoutimi Pulp Co.*, [1911] AC 301 (PC (Qué.)). That was an action for delayed delivery of goods.

The purchaser had sold the goods, the subject of the head contract, at a price exceeding that prevailing at the date of delivery, and it was held that the higher price so obtained must be substituted for the lower one as one of the elements of comparison. I do not think the present case is governed by *Wertheim's Case*. The purchaser here has received inferior goods of smaller value than those he ought to have received. He has lost the difference in the two values, and it seems to me immaterial that by some good fortune, with which the plaintiffs have nothing to do, he has been able to recoup himself what he paid for the goods. If the goods had been of the quality contracted for he might have sold them at a higher price and made a profit. In truth, as I have already pointed out, in the class of case we are dealing with, the contract price does not directly enter into the calculation at all.

Ontario Law Reform Commission, "'Seller's Remedies' and 'Buyer's Remedies'"

in *Report on Sale of Goods*, vol 2 (Toronto: Ministry of the Attorney General, 1979) chs 16 and 17 at 409-10, 422, and 501-2 (footnotes omitted)

2. Real Remedies

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(b) The Code Position

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(iii) Right of Resale

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The points requiring clarification are as follows. In the first place, it is not clear whether the seller is bound by the results of a resale in claiming damages as measured under the provisions of UCC [Uniform Commercial Code] 2-708, which employs a market price test. The commentators are divided on the issue, although there is substantial historical evidence that the Code draftsmen envisaged the right of resale enuring only for the seller's benefit. To permit the seller to ignore the results of the resale and to claim damages based on the difference between the market price and the contract price could, however, lead to undesirable consequences. It could provide the seller with an unjustifiable windfall, thus violating the general principle in UCC 1-106 that the object of the Code's remedial provisions is to put an aggrieved party in the same position as if the other party had fully performed. It could also leave the buyer in an uncertain state. UCC 2-706 requires the seller to give the buyer notice of his intention to resell and, in the case of a public sale, of the time and place of the sale. It would be pointless for the buyer to attend the sale, or to take other protective steps, if he had no assurance that the seller would be bound by the results of the sale.

In the Commission's opinion, where a seller has exercised his right of resale, he should be bound by the results of the resale in claiming his damages, and we so recommend. To ensure this result, the recommended general provision in the revised Act dealing with the computation and measure of the seller's damages should provide that, where the seller resells, he is not entitled to sue for the difference between the contract price and the price that we later recommend for adoption in lieu of the market price, if his actual loss is less than this difference. Some of the implications of this restatement of the compensatory principle of contract damages are examined later in this chapter; suffice it to say for the moment that it is

broad enough to answer the problem at hand. Implicit, also, in this recommendation is our rejection of the concept that the market price test provides a liquidated measure of damages which the seller (and, in a converse case where the seller is in breach, the buyer) should be entitled to recover as a statutory minimum.

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3. Personal Remedies

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(b) Damages

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We have touched earlier on one aspect of the problem of overcompensation in recommending, in the context of UCC 2-706, that the seller should not be entitled to invoke the test that we later recommend in lieu of the market price test where he has actually resold the goods for a price higher than market, but that he should be bound by the results of the resale. This recommendation is consistent with the reasoning of the Privy Council in *Wertheim v. Chicoutimi Pulp Co.*, [1911] AC 301 (PC (Qué.)), which involved a claim for damages by a buyer. The question whether a defaulting buyer should be able to resist a market price claim, or a similar claim for damages, by the seller on the ground that the seller's cost of production would have exceeded the contract price appears to be unsettled. If the compensatory basis of contract damages is taken to its logical conclusion, the buyer's defence should succeed unless the market price test is regarded as establishing a minimum, liquidated form of measure of damages. The reasoning in *Wertheim* implicitly rejects such a characterization, as does our Draft Bill.

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D. The Buyer's Claim for Damages

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3. The Computation of Damages Under the Rules in Hadley v. Baxendale: Some Particular Problems

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(d) Sub-Contracts, the Foreseeability Test, and Mitigation Principles

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The second question is the extent to which the seller can take advantage of the buyer's actual resale or compensating purchase, as the case may be, in order to show that the buyer's actual loss was *less* than the figure that would otherwise be arrived at by the market price formula. The rule in the *Rodocanachi* case [*Rodocanachi Sons & Co. v. Milburn Brothers* (1887), 18 QBD 67 (CA)], just referred to, does not furnish an automatic answer to this question, because it fails to take into account the buyer's general obligation to mitigate his damages, which arises *after* he has learned of the seller's breach. The point does not appear to be covered by authority, but textwriters generally take a negative view. We have earlier recommended that a provision equivalent to UCC 2-712, which confers upon the buyer a right to "cover," should be incorporated into the revised Act. If this recommendation is accepted, then the mitigation issue will resolve itself in cases where the buyer has made a compensating purchase. The reason is that the covering price will measure the extent of the buyer's damages, whether the price is lower or higher than the prevailing market price.

Our recommended right to cover does not, however, provide a complete answer to the broad policy issue presented by the question under discussion. The right to cover is by its nature limited to a post-breach event and does not relate to events that occur prior to breach. To what extent should evidence of such pre-breach events be admissible? Our response to this policy issue is contained in our Draft Bill which, following the controversial decision of the Privy Council in *Wertheim v. Chicoutimi Pulp Co.*, limits the aggrieved party to such damages as he has actually suffered without distinguishing between events occurring before or after the date of breach. We have adopted this position because, in our view, the criticism of the *Wertheim* case confuses two separate issues. If the question is whether the aggrieved party should be entitled to recover enhanced damages because of loss of, or liability under, a sub-contract, the foreseeability of such damages is a relevant issue. But foreseeability has nothing to do with the question whether damages higher than those actually suffered should be recoverable. We agree with the Privy Council that the compensatory purpose of damages should be as applicable here as in other branches of contract law. Admittedly, this may lead to a lesser award than would otherwise be the case, but, in our view, this possibility is irrelevant. What is relevant is that the judgment leaves the aggrieved party in approximately the same position as if the contract had been performed, and this is what a damage award is supposed to do. We recognize that a market price test is easier to apply and that it has the appearance of being even-handed. However, its equitable nature disappears once it is conceded that the buyer's damages may be based on the results of a covering purchase. The question then becomes whether only post-breach factors may be taken into account, or whether the admissible evidence may also include antecedent events. For the reasons we have given we prefer the rule that is more generous to the seller. Accordingly, we recommend that the buyer should be limited to such damages as he has actually suffered without distinguishing between events occurring before or after the date of breach.

PROBLEM

The following is an extract from a trial judgment. You are instructed to appeal on behalf of the defendant. What are the arguments? Will you succeed?

The plaintiff engaged the services of the defendant, a building contractor for the construction of a building. When the building had been completed, the plaintiff realized that the defendant had failed to meet contract specifications as to reinforced steel in the roof and immediately brought this action against the defendant alleging damages. After bringing the action, the plaintiff was able to sell the building to a purchaser for whom the reinforcing was unimportant and acquired another building which fully met the plaintiff's own needs. It is clear on the evidence that the price was fully equal to the price which would have been obtained had the defendant fully performed the contract. It is also clear that the special needs of the plaintiff for a reinforced roof have been met as the plaintiff has been able to acquire another satisfactory site for its operation. Indeed, the plaintiff appears to have got just enough from the sale to cover all costs of acquiring and moving to the alternate site. The fundamental principle of contract remedies is that the innocent party should be put in the position he would have been in had the contract been performed. Had this contract been performed, the plaintiff would have had constructed a building with proper steel reinforcing. Accordingly, the proper measure of damages is the difference in cost of the actual work done and the work specified. This is not a departure from the fundamental principle of compensation. The fact that the plaintiff has sold the property advantageously is irrelevant to his dispute with this defendant. The defendant should not be allowed to profit from his breach and the plaintiff's skillful mitigation

efforts. The amount which the defendant saved through breach is properly owed to the plaintiff since the plaintiff has already paid the defendant the full contract price.

C. ANTICIPATORY BREACH

Where an innocent party refuses to accept an anticipatory breach, the contract is not at an end and there is therefore no obligation to mitigate damages at the time of the anticipatory breach.

Finelli v Dee

1968 CanLII 260 (ONCA)

LASKIN JA (orally): This case arises out of a written contract between the plaintiffs and the male defendant, for the paving of the driveway at the defendant's home. The contract was made on June 18, 1966, and while a price was fixed and other terms included, it did not fix any particular time for the commencement or completion of the work. It appears from the evidence that the parties agreed that the work would not begin immediately because the defendant was then in no position to pay for it, but that it would be performed sometime in October or about that time, in 1966.

There is evidence, which was accepted by the trial Judge, that the defendant telephoned the office of the plaintiffs, after the contract was made and before any performance was contemplated, cancelling the contract, and that the plaintiffs' sales manager at the office who received the telephone call, agreed that it would be cancelled. On or about November 1, 1966, when the defendants were away from home, the plaintiffs carried out the contract and the defendants were confronted with the completed work on their return to their premises in the evening. The plaintiffs sued for the price of the work done under the contract but their claim was rejected by the trial Judge.

On appeal, a question was raised whether the cancellation of the contract amounted to rescission or simply represented a repudiation by the defendant. Of course, if there was rescission (and I should say that, notwithstanding the contrary argument of the plaintiffs' counsel, rescission could be effected by oral agreement even though the contract in question was in writing), then there would be no basis on which an action to enforce the provision as to price could be founded. If, on the other hand, the cancellation amounted to repudiation, a question arises as to the applicability of the principles canvassed by the House of Lords in *White & Carter (Councils) Ltd. v. McGregor*, [1961] 3 All E.R. 1178. It was the view of the majority of that Court that a repudiation by one party to a contract does not preclude the innocent party from carrying out the contract and suing for the price, at least where this can be done without the assent or cooperation of the party in breach. I am not, of course, bound by this judgment, but, respecting as I do the considered opinion of the majority, I must say that I am attracted by the reasons of the two dissenting members of the Court. Repudiation is not something that calls for acceptance when there is no question of rescission, but merely excuses the innocent party from performance and leaves him free to sue for damages. But, even accepting the majority view in the *McGregor* case, I should point out that it was a case in which the innocent party could carry out the contract notwithstanding the repudiation, without the assent or co-operation of the party in breach. This is not the situation here.

In the first place, it was necessary for the plaintiffs to enter upon the defendants' land in order to perform; and without wishing to embark on any issue as to trespass,

the plaintiffs, in my view, were obliged to give previous intimation to the defendant that they were prepared to do the work called for by the contract and proposed to do it on a certain day. This, of course, was not done.

It follows that whether the cancellation amounts to rescission or merely to repudiation by the defendant, the plaintiffs are not entitled to recover the contract price. Accordingly, I would dismiss the appeal with costs and with a counsel fee of $25 to the defendants.

D. TIME OF ASSESSMENT

The general rule is that damages should be assessed as of the date of the legal wrong, since it is the wrongdoing that triggers the obligation to compensate. Implicit in this rule is an assumption that the plaintiff could and should have taken steps immediately after the wrongdoing to protect themselves from further losses. That is, they should have mitigated. However, where it is impossible, impractical, or unwise for the plaintiff to immediately restore themselves to their pre-injury position, the question arises of who should derive the benefit or suffer the consequences of gains and losses incurred after the breach. Expressed differently, the issue is when to assess the value of the loss.

Jamal v Moolla Dawood Sons & Co

[1916] 1 AC 175 (PC (Burma))

LORD WRENBURY: Under six contracts made at various dates between April and August 1911, the plaintiff (the appellant) was seller to the defendants of certain 23,500 shares at prices amounting in the aggregate to Rs. 184,125.10 [184,125.10 rupees]. The date for delivery was December 30, 1911. The contract notes contained a term providing that in the event of the buyer not making payment on the settlement day the seller should have the option of reselling the shares by auction, and any loss arising should be recoverable from the buyer. In some cases the words ran, "by auction at the Exchange at the next meeting."

By December 30 the shares had fallen largely in value. On that day the vendor tendered the shares and asked payment of the price, adding, "Failing compliance with this request by to-day our client will be forced to sell the said shares by public auction on or about the 2nd proximo, responsible for all losses sustained thereby." The purchasers did not pay the sum demanded. They set up a contention that the seller was indebted to them on another transaction, and they sent cheques for the differential sum of Rs. 75,925.10, and called for a transfer of the shares. On January 2, 1912, the seller repudiated the claim to a set-off, and repeated, "We have now to give you notice that our client intends to resell these shares and to institute a suit against you for the recovery of any loss which may result from that course." The purchasers stopped payment of the cheques, and nothing turns upon the fact that they were given.

Negotiations ensued between the parties which extended to February 26, 1912. On that day the seller, by his agents, wrote to the purchaser a letter as follows: "We are instructed by Mr. A.K.A.S. Jamal that he has not hitherto taken any steps to enforce his claim against you for failing to pay for and take delivery of 23,500 shares in the British Burma Petroleum Company, Limited, at your request, in order that his claim might, if possible, be settled. It now appears that no active steps are being taken to settle the matter but that much time is being lost. Our client will therefore now proceed to enforce his rights by suit unless the sum of Rs. 109,219.6 is paid to

him by way of compensation before the end of this week. The amount claimed is arrived at by deducting Rs. 74,906.4, the value of 23,500 shares at 4*s.* 3*d.* [4 shillings and 3 pence], from Rs. 184,125.10, the agreed price of the shares." The 4*s.* 3*d.* a share there mentioned was the market price of the shares on December 30.

On March 22 the seller commenced a suit to recover Rs. 109,218.12 as damages for breach measured by the difference between the contract price of the shares and their market price (4*s.* 3*d.* a share) on the date of the breach, December 30, 1911. This is (with a trifling variance) the same sum and arrived at in the same way as the Rs. 109,219.6 mentioned in the letter.

Immediately after the letter of February 26, 1912, namely, on February 28, the seller commenced to make sale of the shares. He sold them all at various dates from February 28 onwards. In one case the sale was at less than 4*s.* 3*d.* (namely, at 4*s.*). In one case it was at 4*s.* 3*d.* In every other case it was at a higher price.

The decision under appeal is one which gives the purchaser the benefit of the increased prices which the shares realized, by giving him credit in reduction of the damages for the increased prices in fact realized over the market price at December 30, the date of the breach. The appellant contends that this is wrong.

Their Lordships will first deal with the contractual term as to resale. Upon breach by the purchaser his contractual right to the shares fell to the ground. There arose a right to damages, and the stipulation in question was in their Lordships' opinion only a stipulation that the seller might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale as specified. If the seller availed himself of that option he was not selling the purchaser's shares with a consequential obligation to account to him for the price but was selling shares belonging to the seller which the purchaser ought to, but failed to, take up and pay for in order to ascertain what was the loss arising by reason of the purchaser not completing at the contract price. Their Lordships are unable to agree with the original judge that the plaintiff's letters of December 30 and January 2 amounted to an election to take a measure of damages to be arrived at by a resale. Moreover, there never was any sale by auction under the option. Nothing turns upon this provision as to resale.

The question therefore is the general question and may be stated thus: In a contract for sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach—with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach—or is the seller bound to reduce the damages, if he can, by subsequent sales at better prices? If he is, and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordships' opinion impossible, and the former is equally unsound. If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer; the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

It is undoubted law that the plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss *at the date of the breach*. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. *Staniforth v. Lyall* (1830), 7 Bing. 169 [131 E.R. 65] is an illustration of this. But the fact that by reason of the loss of the contract which the defendant has failed to perform the plaintiff obtains the benefit of another contract which is of

value to him does not entitle the defendant to the benefit of the latter contract: *Yates v. Whyte* (1838), 4 Bing. N.C. 272 [132 E.R. 793]; *Bradburn v. Great Western Railway* (1874), L.R. 10 Ex. 1; *Jebsen v. East and West India Dock Co.* (1875), L.R. 10 C.P. 300.

The decision in *Rodocanachi v. Milburn* (1886), 18 Q.B.D. 67 [CA], that market value at the date of the breach is the decisive element, was upheld in the House of Lords in *Williams Brothers v. Agius*, [1914] A.C. 510 [HL (Eng.)]. The breach in *Rodocanachi v. Milburn* was a breach by the seller to deliver, but in their Lordships' opinion the proposition is equally true where the breach is committed by the buyer.

The respondents further contend that ss. 73 and 107 of the India Contract Act, or one of them, is in their favour. As regards s. 107 their Lordships are unable to see that it has any application in the present case. It deals with cases in which a seller has a lien on goods or has stopped them in transitu. The section follows upon sections dealing with those subject-matters. The present case is not one which falls under either of those heads. The seller was and remained the legal holder of the shares. As regards s. 73 it is but declaratory of the right to damages which has been discussed in the course of this judgment.

Their Lordships find that upon the appeal the officiating Chief Judge rested his judgment on a finding that the seller reduced his loss by selling the shares at a higher price than obtained at the date of the breach. This begs the question by assuming that loss means loss generally, not loss at the date of the breach. The seller's loss at the date of the breach was and remained the difference between contract price and market price at that date. When the buyer committed this breach the seller remained entitled to the shares, and became entitled to damages such as the law allows. The first of these two properties, namely, the shares, he kept for a time and subsequently sold them in a rising market. His pocket received benefit, but his loss at the date of the breach remained unaffected.

Their Lordships will humbly advise His Majesty that this appeal ought to be allowed, and the orders in the original Court and in the Appeal Court discharged, and judgment entered for the plaintiff according to his plaint, and that the respondent ought to pay the costs in the Courts below and of this appeal.

Campbell Mostyn (Provisions) Ltd v Barnett Trading Company

[1954] 1 Lloyd's Rep 65 (CA)

[The plaintiff sold 350 cans of ham that the defendants wrongfully refused to accept. On October 24, the date of the refusal to accept, the market price was below the contract price, but the market price suddenly rose in November, and the plaintiff resold the ham at a price above the contract price.]

SOMERVELL LJ (at 67-69): ... The goods tendered were not sold on October 24. The goods were South African tinned ham of a particular brand, which was said to be not a popular brand on the market. Early in that year, 1951, recapitulating part of the Master's findings of fact, there had been considerable imports of tinned ham; the best varieties, one gathers, coming from Germany and Belgium. The market became somewhat overcharged and prices fell. The fact that the market was inactive affected, apparently, the Dominion ham, particularly the brand in question, more than the German brand. There was undoubtedly a fall in price. Subsequently, after the breach, within a fortnight, the Government, which had been then recently elected and had taken office, made an announcement with regard to imposing an extra measure of control on imports from Continental countries. That, with

Christmas not very far off, improved the market for ham and with it the less popular Dominion brands, with one of which we are concerned. In fact, the sellers sold these 18 oz. tins after Nov. 7 at a sum in excess of the market price, and therefore, on the face of it, suffered no damage. One can understand, in those circumstances, the buyers thinking that that was the end of it and feeling aggrieved if the provisions of the law held them liable to pay a sum in damages.

The learned Master and Divisional Court have held that the defendants are liable to pay damages, notwithstanding the events, which I have recounted, on the principle which is stated concisely in the Privy Council opinion in *A.K.A.S. Jamal v. Moolla Dawood, Sons & Co.*, [1916] 1 AC 175 (PC (Burma.)) at p. 179. That dealt, as will be seen, with negotiable securities, but in my opinion the principle is equally applicable to the sale of goods:

> The question therefore is the general question and may be stated thus: In a contract for sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach—with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach—or is the seller bound to reduce the damages, if he can, by subsequent sales at better prices? If he is, and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordships' opinion impossible, and the former is equally unsound. If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer; the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

No doubt it is small comfort to the defendants in this case to know that if the market had gone even worse than it was on Oct. 24 they would not have been liable to pay more than whatever sum was fixed, assuming there was a market, for the market price on that day.

This appeal is a curious one in this way. The appellants are in effect asking this Court, as they asked the Master and as they asked the Divisional Court, to disregard the evidence given by their own witnesses and to find that there was no market. ... Just reading the note of the evidence, it would seem fairly clear that, as it were, all the witnesses went into the box with the idea of assisting the Master to find out what was the market price on Oct. 24. The plaintiffs, who put in their claim on the basis that the price was 45s. per dozen, were seeking to say that it was a poor market for this type of goods; the sort of man you would have got to buy might well have been described as a speculator and they, the plaintiffs, would have been lucky to get 40s. The witnesses for the defendants, on the other hand, went into the box and they drew a much more rosy picture of the market. One of them said: "The demand was there in October. It is an astounding suggestion that the market remained flooded until Nov. 7. If I had been asked to handle 350 cases in October I could have disposed of them at about 1s. less than the German."

Mr. Shaw, who appeared for the defendants, as I have said, took the point at that stage, and it was taken before the Divisional Court and before us, that, relying on what had happened and on certain answers given by Mr. Wand for the plaintiffs, there was no market within the meaning of the *prima facie* rule. Though we have not heard the other side, I will assume for the purposes of this judgment that if it could have been established that there had been no market within the meaning of the rule the appellants would have succeeded and the Court would have taken the

actual ultimate transaction as the measure. Certainly if Mr. Beyfus had satisfied me that there was no market within the meaning of the rule I would have wanted to hear the other side. But he has failed to do so, and I must state my reasons. I will read the passages on which he very rightly relies. Mr. Wand, after giving a general account of the market which I have summarized, said: "If we had had to sell 350 cases of 36 it would have been to a speculative buyer who would have paid far less ... If we had put the 350 cases in this action on the market then I doubt whether a speculator would have given me 3s. a lb." Mr. Beyfus relied very much on the word "speculator," but I do not think that helps very much. Then Mr. Wand says this in cross-examination, which is rather the other way: "At the beginning of October the market was extremely quiet." However, going back to the passage the appellants rely on, "On or about Oct. 24, we wrote or telephoned to our agents to try and sell the goods," the name of the agent for some reason was not written down. No light has been thrown on that and it was not disclosed and I do not think we can derive any help from the non-disclosure. If the defendants had wanted to know, they should have taken that up before the Master. "Our market man would have been offering them (Mr. Case, not with us now)." Then Mr. Wand says in re-examination, "So far as I know attempts were being made to sell the goods in October 1951." Then this is, I think, an important answer: "Before writing the letter of Oct. 26 we tried to find out the market price. As we could not get what we thought was a fair price we did not sell." Then there is another sentence: "We had bought from a French company. We were both trying to sell."

The Master in a full and careful judgment comes to deal with this point and he uses words which Mr. Beyfus relies on as showing that he had misdirected himself. He finds that there was a market for these goods and he finds the market price. He later is dealing with this argument. He refers to the fact that Mr. Shaw had a sentence in his note which the learned Master had not got in his: "There was no market then for these goods. I cannot remember anyone making an offer for these goods." The Master goes on:

> Nevertheless the mere fact that the plaintiffs did not [—and these are the words relied on—] or could not get an offer is not conclusive of the matter, and if Mr. Wand did say "There was no market," I think the words must be taken in conjunction with his previous answer, "As we couldn't get what *we thought* was a fair price we didn't sell." The matter is, I think, put beyond question by the evidence of the defendants' own witnesses Mr. Churchman and Mr. Dewar, whose evidence in effect was that 350 cases would have been a mere bagatelle and that there would have been no difficulty in disposing of them.

Those words "or could not get an offer," taken out of their context, might suggest a misdirection, but they must be read with the rest of the judgment and with regard to the words which follow, where the Master is saying that Mr. Wand did say "There was no market" in connection with the other answer "As we couldn't get what we thought was a fair price." Therefore, having done my best to consider the point put by Mr. Beyfus, I think the Master came to the right conclusion and that he was entitled to find on this evidence that there was a market.

On the basis that he was entitled to find that there was a market, Mr. Beyfus does not seek to disturb the actual figure which he arrived at. Mr. Beyfus submitted that there might, and I am not saying there might not, be a sort of half-way house where it could not be said that you could not sell at a sacrifice but where it was reasonable not to sell. I think there might be difficulty in taking such a case out of what I will call the principle in the *Jamal v. Moolla* case unless the buyer who was available was

given a chance of agreeing, because on this basis the damages might be increased. I do not think those complications arise here, because I think on the evidence, particularly that of the defendants which the learned Master was entitled to accept, there was a market within the terms of the *prima facie* rule, and the answers relied on in Mr. Wand's evidence are explicable in the way I have tried to indicate.

For these reasons, I think this appeal fails.

Asamera Oil Corp Ltd v Sea Oil & General Corporation

1978 CanLII 16 (SCC)

ESTEY J: These appeals arise out of a long series of agreements concerning the shares and operations of the appellant, Asamera Oil Corporation Ltd. (hereinafter referred to as "Asamera"), which company was in one way or another involved in exploration for oil in Indonesia. Three separate actions were commenced by the parties.

[At issue before the Supreme Court was the remedy in the third action, in which the defendant, Brook, wrongfully disposed of 125,000 shares in Asamera owned by the plaintiff, Baud. Baud sought the return of the shares, which had increased significantly in value since the defendant wrongfully refused to deliver them.]

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The learned trial Judge dismissed Baud's claims in detinue and conversion and assessed damages on the basis that Brook's failure to deliver constituted a breach of contract. The action in substance is a simple case of breach of contract to return 125,000 Asamera shares and, in my view, the claims made and the issues arising in this action should be disposed of on that basis. That being so, we come to the only real issue in this appeal, namely, to what recovery is the appellant Baud in these circumstances entitled and, if the appropriate relief be a monetary award, the quantum of damages?

Baud has asked this Court to award specific performance of the agreement to return 125,000 Asamera shares, and in particular, in its statement of claim has requested an order directing the return or replacement of the shares. The jurisdiction to award specific performance of contractual obligations is ordinarily exercised only where damages would be inadequate to compensate a plaintiff for his losses. As the original 125,000 shares are indistinguishable from all other Asamera shares, and since there has been no suggestion that corporate control is at issue in this case, or that shares were not readily available in the stock market, an order for delivery of shares would merely be another method or form for the payment of any judgment awarded. Asamera shares are listed on the public stock exchanges and consequently some estimate of their market value can be readily ascertained from day to day. The parties themselves therefore throughout the 21 years since these transactions began have had the benefit of the daily assessment by the stock market of the value of these shares. It is obvious that damages are an adequate remedy and that the Courts in such circumstances do not resort to the equitable remedy of specific performance.

The assessment of the quantum of damages for this breach of contract is somewhat complex. The calculation of damages relating to a breach of contract is, of course, governed by well-established principles of common law. Losses recoverable in an action arising out of the non-performance of a contractual obligation are limited to those which will put the injured party in the same position as he would have been in had the wrongdoer performed what he promised.

Not all kinds of losses are recoverable in actions for breach of contract. The limitations on damages recoverable in contract were discussed in *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] 2 K.B. 528 (CA), wherein Asquith L.J., at p. 539, went to great lengths to explain such limits.

> (1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: (*Sally Wertheim v. Chicoutimi Pulp Company*). This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule. Hence,
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> (2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach. ...

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In cases dealing with the measure of damages for non-delivery of goods under contracts for sale, the application over the years of the above-mentioned principles [of remoteness] has given the law some certainty, and it is now accepted that damages will be recoverable in an amount representing what the purchaser would have had to pay for the goods in the market, less the contract price, at the time of the breach. This rule, which was authoritatively stated in *Barrow v. Arnaud* (1846), 8 Q.B. 595, may be seen as a combination of two principles. The first, as stated earlier, is the right of the plaintiff to recover all of his losses which are reasonably contemplated by the parties as liable to result from the breach. The second is the responsibility imposed on a party who has suffered from a breach of contract to take all reasonable steps to avoid losses flowing from the breach. This responsibility to mitigate was explained by Laskin CJC, in *Red Deer College v. Michaels*, 1975 CanLII 15 (SCC), [1976] 2 S.C.R. 324 at pp. 330-1:

> It is, of course, for a wronged plaintiff to prove his damages, and there is therefore a burden upon him to establish on a balance of probabilities what his loss is. The parameters of loss are governed by legal principle. The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff. The reference in the case law to a "duty" to mitigate should be understood in this sense.
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> In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation.

and later in the judgment at p. 331:

> If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial Judge's assessment of the plaintiff's evidence on avoidable consequences.

Thus, if one were to adopt, without reservation, in the settlement of Baud's damage claims, the rules governing recovery for non-delivery of goods in sales contracts, the *prima facie* measure of damages in the case at bar would be the value of the shares on the date of breach, that is, December 31, 1960. The learned trial Judge

found the market price on December 31, 1960 to be 29 cents per share. The value of the 125,000 shares wrongfully retained by Brook, and thus the loss to Baud by reason of its not being in possession of those shares, on that date therefore was $36,250 assuming, for the purposes of discussion only, the market price to be constant throughout the purchase or sale of such a number of shares. To this must be added other expenses which could reasonably be said to be incidental to steps taken to mitigate the damages flowing from the breach. ...

Assuming for the moment that the breach of contract occurred on December 31, 1960 and that the appellant's right to damages came into being at that time, and assuming that it should then have acted to forestall the accumulation of avoidable losses, what action did the law then require of the appellant by way of mitigation of damages? A plaintiff need not take all possible steps to reduce his loss and, accordingly, it is necessary to examine some of the special circumstances here present. The appellant argues that there exist in this case clear circumstances which render the duty to purchase 125,000 Asamera shares an unreasonable one. The first of these has its foundations in the established principle that a plaintiff need not put his money to an unreasonable risk including a risk not present in the initial transaction in endeavouring to mitigate his losses. This principle was demonstrated in *Lesters Leather & Skin Co. v. Home & Overseas Brokers* (1948), 64 T.L.R. 569 (CA), and in *Jewelowski v. Propp*, [1944] K.B. 510, as well as in *Pilkington v. Wood*, [1953] Ch. 770. The appellant here was placed in the unusual position where mitigative action would require that it purchase as replacement property, shares of a company engaged in a speculative undertaking under the effective control and under the promotional management of a person in breach of contract, the respondent, Brook, who thereafter was in an adversarial position in relation to the appellant.

On the evidence adduced at trial, the market value of shares in Asamera had fallen from $3 shortly before the dates on which Baud first loaned the two bloc[k]s of shares to Brook to between $1.62 and $1.87 in November 1958 and to 29 cents per share on December 31, 1960. Evidence of share values after that date indicates only that there was a relatively small recovery in value to about $1.21 a share by March 1965, when the fortunes of the company improved. The appellant argues that it could not have been expected in December 1960 to purchase shares in mitigation of its losses where the value of these shares had fallen as rapidly as is indicated in the evidence.

A more important circumstance which might render unreasonable any requirement that Baud purchase shares in the market was the existence of the aforementioned injunction issued on July 27, 1960, restraining the respondent from selling 125,000 Asamera shares. The appellant contends that it is inconceivable that the law should require a party, who has suffered a misappropriation of his property and who has requested and been afforded the considerable protection of an injunction granted by a Court of Equity, to ignore the force and effect of that injunction and to go out and acquire the same number of shares as Brook was required to retain, however the terms of the injunction be construed.

Even if one accepts that submission, it must be acknowledged that the right of Baud to rely on the injunction as a shield against an obligation to minimize its losses is not absolute. In the first place, Baud was informed by Brook in his pleadings of July 6, 1967 that shares which were subject to the injunction had been sold. As of that date the shares were selling at $4.30 to $4.35 and had been rising in value since April 1965, and at a median price of $4.33 would have cost Baud $541,250. Accordingly, at least by July of 1967, it could not be said that Baud would reasonably be discouraged from replacing the 125,000 shares in the open market because of the low price of an inactive company, nor could it be said that thereafter it could

reasonably refrain from prosecuting its claim for damages because of the order enjoining the disposition of the shares by Brook. It remains the case, however, that the market price for such speculative shares as those of an oil-exploration company was subject to wide price fluctuations sometimes inspired by management which itself held, as did Brook, a considerable number of shares.

The learned trial Judge referred to a number of English authorities in support of the proposition that in the case of a loan of shares a plaintiff need not mitigate his losses either by purchasing shares on the market or even by bringing a suit for recovery of damages within a reasonable time. The result under these authorities where the market value of the shares has risen or fallen between breach and trial, has been an award of damages representing the value of the shares at the time of the breach or of the trial at the election of the plaintiff... These cases were adopted in Canada and other jurisdictions: *vide Vicary v. Foley* (1891), 17 V.L.R. 407 (Australia); *Galigher v. Jones* (1889), 129 U.S. 193, and cases cited therein. These authorities raise no responsibility in the plaintiff to mitigate his losses: *Shepherd v. Johnson*, ... [(1802), 2 East 211], *per* Grose J. at p. 212 [350 (ER)]. The application of the principle developed in these early cases would produce damages calculated at the end of the trial or perhaps at the highest point prior to that date. The trial proceeded intermittently from June 1969 to December 1971, and final judgment was pronounced in May 1972. The latter price would be about $21 a share and the highest price attained was about $46.50 per share, allowing recovery of approximately $2,625,000 and $5,812,500 respectively.

A proper analysis of these cases is made difficult by reason of their antiquity, and after serious consideration, I have concluded that they ought not to be followed by this Court. In the first place, they were decided long before modern principles of contractual remedies had been developed. Secondly, they are not in accord with recent decisions of this Court. Thirdly, they ignore the all-important and overriding considerations which have led to the judicial recognition of the desirability and indeed the necessity that a plaintiff mitigate his losses arising on a breach of contract. There is a fourth consideration. This old principle produces an arbitrary, albeit a readily ascertainable result because it lacks the flexibility needed to take into account the infinite range of possible circumstances in which the parties may find themselves at the time of the breach and before a trial can in practice take place. The pace of the market place and the complexities of business have changed radically since this rule or principle was developed in the early nineteenth century.

Before proceeding further with the analysis of the nature and extent of damages in the field of contract law, it will be helpful to examine briefly the principles which have evolved in analogous situations in the law of torts. In conversion, the measure of damages has been said to be the value of the shares at the date of conversion, and in addition, consequential damages represented by the loss of the opportunity to dispose of the shares at the highest price attained prior to the end of the trial: *Vide McNeil v. Fultz* (1906), 1906 CanLII 41 (SCC), 38 S.C.R. 198, *per* Duff J. at p. 205; *The Queen in right of Alberta v. Arnold*, 1970 CanLII 174 (SCC), [1971] S.C.R. 209 *per* Spence J. at p. 230. I am aware of course that these cases were for the most part dealing with the wrongful refusal of a person under the liability of a trustee to deliver property to a beneficiary, but on principle the result would be the same in simple cases of conversion: *vide McGregor on Damages* (13th ed. 1972) at p. 671.

In detinue, the measure of damages has been said to be the value of the shares at the end of the trial and, in addition, damages for the detention. The value of the shares at the end of the trial must be awarded on the basis that the action in detinue is, in fact, a *quasi*-proprietary action for return of the plaintiff's goods. If that cannot be done, then the clearest approximation of the plaintiff's loss is the value of those

goods when they would have been recovered, that is, at the end of trial. In addition, an award must compensate the plaintiff for damages flowing from the wrongful detention of his property, which it seems must be assessed on the basis of the highest value of the goods between the date at which the plaintiff ought to have recovered possession and the end of trial. In *McGregor on Damages*, *supra*, at p. 699, the case is put this way:

> As with conversion there is no clear case of a market rise followed by a market fall between the time of the initial detention and the time of judgment. Although in *Williams v. Peel River Co.* [(1887), 55 LT 689 (CA)] the market appears to have risen and then fallen, it seems that the plaintiff was only claiming, as damages for detention, the value at initial default less the value at judgment. In *Archer v. Williams* [(1846), 2 C & K 26; 175 ER 11 (Nisi Prius)], in detinue for scrip certificates, Cresswell J. directed the jury that "the measure of damages is the highest sum the scrip could have been sold for from the time of the detention till the time when it was returned," but on appeal the case was argued only on whether the plaintiff was entitled to recover the amount by which the market value of the scrip certificates had fallen between the defendant's refusal to deliver and his actual delivery. It is submitted that the highest price which the market had attained before the time when the plaintiff ought to have sued should control here also.

One should pause here to point out that I have advisedly referred to the cut-off time as being the end of the trial. In some cases and texts, reference is made to "judgment." No authority has come to my attention where a significant factual change has occurred during the gap between the end of trial and judgment. Protracted difficulties could arise if the books must be kept open for a last-value measurement after trial and before settlement of the final judgment. Therefore I would apply the principle as closing off valuation considerations at the end of the trial. Holland J., in *Metropolitan Trust Co. of Canada v. Pressure Concrete Services Ltd.*, [1973 CanLII 480 (ON SC), [1973] 3 OR 629; aff'd (1976), 60 DLR (3d) 431 (ONCA)] directed the assessment officer to take into account damages incurred beyond the end of trial to the date reserved judgment was delivered. In the course I propose to follow herein, this point need not be determined.

The application of the basic principles of remoteness and causality enunciated in the leading cases mentioned earlier points to the conclusion that Baud may have, in the absence of a duty to mitigate, a right of recovery in damages for breach of contract represented by the highest value attained by the shares between the date of breach and the end of trial, that is, $46.50 or $5,812,500. ...

It is very likely that Brook would have foreseen the probable loss to be suffered by Baud on the non-return of its property, particularly bearing in mind his activity as a stock broker and his own dealings in Asamera shares. In the absence of a contrary indication he may be taken to have assumed the risk of its occurrence. Such a loss is not speculative; neither is it so improbable nor so remote as to remove it from the kind of damages recoverable in an action in contract. As to quantum of damages, it is not unreasonable to scale the recovery for the loss suffered by Baud by virtue of its loss of the opportunity to sell the shares to a price or prices at least approaching the median point between breach and trial, subject to the varying influences of the many relevant factors to be discussed below.

The application of another basic principle relating to the computation of contract damages, namely, that the plaintiff should be, so far as money may do so, placed in the same position as he would have enjoyed had the breach not occurred, produces a like result. Had Brook returned the shares when the contract provided,

Baud would then have been in a position to dispose of those shares during the period of market appreciation. The range of damages on such a basis would be from 29 cents or, more realistically, $2 per share to $46.50 per share. The $2 per share is more properly the baseline for computation of value because that is the option price agreed upon between the parties for the period ending at the time the breach of contract occurred. Since it is entirely unrealistic to assume that the peak price was attainable for a block sale of 125,000 Asamera shares, and as it is most unlikely that Baud or anyone else would enjoy such perspicacity, a median range of $20 to $25 for the period from mid-1967 to the end of trial is more appropriate: *Vide Fales v. Canada Permanent Trust Co.*, 1976 CanLII 14 (SCC), [1977] 2 S.C.R. 302 at p. 322, *per* Dickson J. This would produce damages of about $3,000,000 before any consideration is given to the required mitigation.

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The cases which establish the exceedingly technical rules relating to recovery of damages for the non-return of shares turn on the theory that only where a breach of contract gives rise to an asset in the hands of the plaintiff will the law require him to mitigate his losses by employing that asset in a reasonable manner. Thus if an employer wrongfully dismisses an employee the breach results in the employee obtaining an asset, an ability to work for another employer, or at least the opportunity to offer his services to that end, which he did not enjoy prior to the dismissal. This is no more than a philosophical explanation of the simple test of fairness and reasonableness in establishing the presence and extent of the burden to mitigate in varying circumstances.

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It follows that a contrary result should arise where damages are recoverable for a breach of contract by a vendor on a *sale of shares*. There the breach would normally allow a buyer the use of his funds formerly committed to the purchase, and consequently damages should be calculated on the basis that he ought to have taken steps to avoid his losses by the purchase of shares on the market at the time of the breach. ...

A different consideration arises where the plaintiff–buyer has prepaid the contract price and has not received delivery. As in the case of non-return of shares, the breach does not give rise to any asset in the hands of the plaintiff since he has already parted with his funds, and on that basis some Courts have held that the injured party need not purchase like goods in the market. ...

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... The creation of an 'asset' on a breach of contract cannot be an invariable prerequisite to the operation of the principle that a party injured by a breach of contract must respond in mitigation to avoid an unconscionable accumulation of losses. Nor should the absence of such an 'asset' invariably exonerate a plaintiff from taking mitigative action. The presence or absence of such an 'asset' is but one of many factors which bear on the task of determining in a particular case what is or is not reasonable on the part of the injured party in all the circumstances. ...

In short, it would appear that the principles of mitigation in respect of contracts for the sale of goods generally may not be applied without reservation to the determination of the duty to mitigate arising in respect of contracts for the sale of shares and, in any case, differ fundamentally from the case of a breach of a contract for the return of shares. It is inappropriate in my view simply to extend the old principles applied in the detinue and conversion authorities to the non-return of shares with the result that a party whose property has not been returned to him could sit by and await an opportune moment to institute legal proceedings, all the while imposing on a defendant the substantial risk of market fluctuations between breach and trial which might very well drive him into bankruptcy. Damages which could have been

avoided by the taking of reasonable steps in all the circumstances should not and, indeed, in the interests of commercial enterprise, must not be thrown onto the shoulders of a defendant by an arbitrary although neatly universal rule for the recovery of damages on breach of the contract for redelivery of property.

We start of course with the fundamental principle of mitigation authoritatively stated by Viscount Haldane LC, in *British Westinghouse Electric & Mfg. Co., Ltd. v. Underground Electric R. Co. of London, Ltd.*, [1912] A.C. 673 [(HL (Eng))] at p. 689:

> The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in *Dunkirk Colliery Co. v. Lever* [(1898), 9 Ch D 20 (CA) at p. 25], "The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business."
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> As James L.J. indicates, this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.

The principle has been applied in the case of conversion of shares, as well as in the case of breach of contract to sell shares, and should, for the reasons developed above, be applied according to the circumstances to the case of a breach of contract to return shares.

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While the circumstances of the case prompted the Court to direct if not to confine its direction to conversion of the shares and its consequences, the broader principle is simply the right to damages arising on the breach of contract to redeliver whatever the reason for breach might have been, that is with or without a conversion. The application of such a principle to the circumstances arising herein following the breach to redeliver raises some additional considerations.

This Court in *The Queen v. Arnold*, *supra* [1970 CanLII 174 (SCC), [171] SCR 209], considered in some detail the limitations to be placed on the damages recoverable in conversion upon a failure to return securities. The majority dismissed the plaintiff's claim for reasons not here relevant. Spence J. would have allowed the claim in part and in doing so stated at p. 230:

> Surely a plaintiff whose securities have been converted cannot wait to issue process for their recovery or damages for the conversion until just before the period of limitation lapses, then be entitled to claim damages fixed at the highest value of those securities within the six-year limitation term.

Spence J. concluded that the plaintiff could not recover losses which might have been avoided by the purchase of alternate shares. The majority judgment by Martland J as I have noted, did not have to deal with damages but concluded at p. 220:

> ... but, if I had had to deal with that issue, I would have concurred in the views expressed by my brother Spence.

... The same principle was applied in assessing damages for conversion of personal property other than corporate securities in *Sachs v. Miklos*, [1948] 2 K.B. 23 [CA]. There may, as already discussed, be instances where mitigation will not require a plaintiff to incur the significant risk and expense of purchasing replacement property, but in any case the plaintiff must crystallize his claim either by replacement acquisition or in some circumstances by prompt litigation expeditiously prosecuted which will enable the Court to establish the damage with reference to the mitigative measures imposed by law. The failure of the appellant either to mitigate or litigate promptly makes difficult the task of applying these principles to the circumstances of this case.

In the light of the enormous hardships sometimes occasioned by the application of the old doctrine of damage assessment, and in view of the massive distortion which may follow when the principles of mitigation are, as in the older authorities, made inapplicable to non-delivery of shares, I have come to the conclusion that the authorities cited from the early 1800s, principally from the Courts of England, which in effect allow recovery of "avoidable losses" ought not to be followed. Rather the lead furnished by *The Queen v. Arnold*, *supra*, should be taken. Subject always to the precise circumstances of each case, this will impose on the injured party the obligation to purchase like shares in the market on the date of breach (or knowledge thereof in the plaintiff) or, more frequently, within a period thereafter which is reasonable in all the circumstances. The implementation of this principle must take cognizance of the realities of market operations, including the nature of the shares in question, the strength of the market when called upon to digest large orders to buy or sell, the number of shares qualified for public trading, the recent volatility of the price, the recent volume of trading, the general state of the market at the time, the susceptibility of the price of the shares to the current operation of the corporation and similar considerations.

Some classes of property, including shares, whose value is subject to sudden and constant fluctuations of unpredictable amplitude, and whose purchase is not lightly entered into, call for a modification of the general rule that the value of the property on the "date of breach" be taken as the starting point for the calculation of damages. There is some authority for this view in English law as well. In P.J. Atiyah, *Sale of Goods* ([London: Pitman,] 4th ed., 1974) at p. 294, the learned author has this to say:

> Although the market price rule is now firmly established in English law it may be observed that there are cases in which it does not do full justice to the buyer. In particular it is unrealistic to suppose that a buyer will in practice be able to buy goods on the market on the very day on which the seller fails to deliver. The buyer will often wish to consider his position, or to negotiate with the seller on breach and some delay before he buys substitute goods is likely to be the rule rather than the exception. ...

It is contended by the appellant, Baud, however, that the peculiar circumstances of this case rendered the purchase of highly speculative shares in a company controlled by its adversary unreasonable in all of the circumstances, particularly the injunction obtained by the appellant restraining the sale of 125,000 Asamera shares held by Brook. Nonetheless, it remains the case that at least some of the losses claimed by the appellant could have been avoided by the taking of other reasonable steps. The most obvious of these would have been to move with reasonable speed to institute and proceed with legal action in an effort either to recover the shares and, if that was not possible, then to recover damages. ...

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One must not become so lost in the technicalities of damages in the law of contract as to lose sight of the practical consideration of the cost of money and of the reality of the risks to be imposed on a plaintiff by a requirement of complete mitigating measures. In this case the magnitude of the operation, in the range of $800,000 to $1,000,000 if the shares were to cost $7 to $8 each, leads one to conclude that a "reasonable" time for mitigative action must be allowed after the appropriate point of time in law has been isolated.

The appellant bases its contention that it has no obligation to purchase shares in the market in part on the ground that it ought to be allowed to seek specific performance of the contract to return the shares, and while relying on an injunction restraining their disposition it need not have any concern with losses occasioned by its inaction. Counsel for the appellant did not refer this Court to any cases in which the principle of mitigation has interacted and conflicted with recovery by way of specific performance, and such authority as I have been able to discover supports the common sense view that the principle of mitigation should, unless there is a substantial and legitimate interest represented by specific performance, prevail in such a case.

This conflict sometimes occurs on the interaction of the principle of mitigation and an award of damages in lieu of or in addition to specific performance in equity. In decisions relating to damages, the Courts of Equity have acted on the authority of *Lord Cairns' Act* (more properly cited as the *Chancery Amendment Act*, 1858 [UK], 21 & 22 Vict. c. 27, s. 2), which empowers a Court of Equity to award damages "either in addition to or in substitution for ... specific performance." Accordingly, in a number of cases concerning contracts for the sale of land, damages calculated on the value of the land as of the date of judgment, as opposed to the date of breach, have been awarded: *Vide Wroth v. Tyler* [[1974] Ch 30]*; Metropolitan Trust Co. of Canada v. Pressure Concrete Services Ltd.*, *supra*; *Calgary Hardwood & Veneer Ltd. v. C.N.R. Co.* (1977), 5 A.R. 582 (SC TD). The Supreme Court of New Zealand in *Hickey v. Bruhns*, [1977] 2 N.Z.L.R. 71, had occasion to review *Wroth v. Tyler*, *supra*, and the earlier authorities and, after concluding that specific performance was inappropriate, held that an award of damages in substitution for specific performance must take into account the conduct of the parties, particularly when inordinate delay has occurred thereby making critical the date selected for the computation of damages: *Vide Kaunas v. Smyth et al.* (1976), 1976 CanLII 823 (ON SC), 75 D.L.R. (3d) 368.

On principle it is clear that a plaintiff may not merely by instituting proceedings in which a request is made for specific performance and/or damages thereby shield himself and block the Court from taking into account the accumulation of losses which the plaintiff by acting with reasonable promptness in processing his claim could have avoided. Similarly, the bare institution of judicial process in circumstances where a reasonable response by the injured plaintiff would include mitigative replacement of property, will not entitle the plaintiff to the relief which would be achieved by such replacement purchase and prompt prosecution of the claim. Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternative property in mitigation of his losses, some fair, real and substantial justification for his claim to performance must be found. Otherwise its effect will be to cast upon the defendant all the risk of aggravated loss by reason of delay in bringing the issue to trial. The appellant in this case contends that it ought to be allowed to rely on its claim for specific performance and the injunction issued in support of it, and thus recover avoidable losses. After serious consideration, I have concluded that this argument must fail.

It is, of course, an eminently reasonable position to take if, as Lord Reid suggests in *White & Carter (Councils) Ltd. v. McGregor*, [1962] A.C. 413 [HL (Sc)], in the case of

anticipatory breach, there is a substantial and legitimate interest in looking to performance of a contractual obligation. So a plaintiff who has agreed to purchase a particular piece of real estate, or a block of shares which represent control of a company, or has entered into performance of his own obligations, and where to discontinue performance might aggravate his losses, might well have sustained the position that the issuance of a writ for specific performance would hold in abeyance the obligation to avoid or reduce losses by acquisition of replacement property. Yet, even in these cases, the action for performance must be instituted and carried on with due diligence. This is but another application of the ordinary rule of mitigation which insists that the injured party act reasonably in all of the circumstances. Where those circumstances reveal a substantial and legitimate interest in seeking performance as opposed to damages, then a plaintiff will be able to justify his inaction and on failing in his plea for specific performance might then recover losses which in other circumstances might be classified as avoidable and thus unrecoverable; but such is not the case here.

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Having regard to the complex issues raised in all three actions (and the period devoted to this litigation must take into account more than the simple action for the recovery of shares loaned to Brook) and taking into account the other circumstances mentioned, it would be unreasonable to hold the appellant to any timetable which contemplated the trial of these many issues prior to the end of 1966 or early in 1967. If litigation may represent an alternative to the investment by a plaintiff of substantial funds to avoid the accumulation of losses, the Courts cannot apply in the computation of damages a principle recognizing some relevance of the fluctuating value of the *res* of the contract between breach and trial and not at the same time maintain a strict surveillance on the assiduity of a plaintiff in bringing his claim to judgment.

... When Brook pleaded (on July 6, 1967) (a) his right to refuse return of the shares, and (b) the previous sale of shares by Brook, the shares were trading from $4.30 to $4.35 per share. The volume of trading was very low. By the end of 1967 the price had climbed to $7.25 but the volume of trading remained low. Unfortunately there is no evidence of the depth or strength of the market, but it is reasonable to conclude from the small volume of trade over a lengthy period of time that the market was thin and probably could not have absorbed large purchases or sustained the quoted prices in the face of large sales. By the time of the examination for discovery in May 1968, the price per share had reached a range from $7.60 to $8.20. The volume of trading had increased markedly over the preceding year but was sporadic. By the end of the year the price quoted on the Exchange was $27, in comparatively active trading. The price of Asamera shares peaked at $46.50 in 1969 during the opening session of the trial. By the time of the issuance of the reasons for judgment in April 1971, as mentioned above, the price had declined to $22 per share and, when final issues were disposed of and formal judgment entered in May 1972, the price of Asamera shares on the Stock Exchange was about $21.

The Courts below determined from different approaches that the critical date for assessment of damages was the date of the breach of the contract to return the shares on December 31, 1960. The price was then 29 cents on the open market. Each Court observed as well that the parties had agreed that the purchase price (if the option be exercised) on that date was $2 and, accordingly, damages could not be assessed at less. Furthermore, the evidence indicated that Brook, on the sale of a like number of shares in 1957 and 1958, had realized prices ranging from $1.50 to $1.80 so that an award based on the market price on the date of breach would allow Brook to profit from his wrongdoing. It would appear from the judgments in the Courts below that Brook's enrichment through his breach of contract played an important

role in the assessment of damages. Accordingly damages were assessed at $2 per share or $250,000 in gross.

It seems to me that the motives or unjust enrichment of the defendant on breach are generally of no concern in the assessment of contractual damages: *vide* G.H. Treitel, *The Law of Contract* (4th ed., [London: Stevens,] 1975), at p. 618:

> In general, damages are based on loss to the plaintiff and not on gain to the defendant. They are not, in other words, based on any profit which the defendant may have made out of the breach.

An appellate tribunal in such an appeal as this is in an invidious position. The record at trial is deficient. In the result precise evidence as to market conditions, credit facilities, rates of interest, borrowing power of the appellant, effect on market price of mitigative action by it, the time reasonably required to acquire by purchase such a volume of shares on the open market, and other evidence relevant to the assessment of damages is not before this Court. On the other hand, the transaction occurred 20 years ago, and the trial which was extensive and no doubt expensive, was completed seven years ago. To direct a reassessment of the damages would be time-consuming, difficult to carry out after such a lapse of time, and expensive for the parties. Faced with these unsatisfactory alternatives, an appellate Court must discern if at all possible from the record the elements necessary to permit the completion of the assessment process.

We therefore approach the matter of the proper appraisal of the damages assessable in the peculiar circumstances of this case on the following basis: that the same principles of remoteness will apply to the claims made whether they sound in tort or contract subject only to special knowledge, understanding or relationship of the contracting parties or to any terms express or implied of the contractual arrangement relating to damages recoverable on breach; that Baud was under the general duty to mitigate its losses and may not escape this duty by relying on the 1960 injunction interminably; that the specific duty to mitigate and to crystallize its claim for damages within a reasonable time of the breach of contract by bringing action seeking appropriate remedies and to prosecute such action with due diligence, was qualified or postponed by Brook's request of Baud some time prior to 1966 to refrain from enforcing its claims; that any postponement of such requirement to prosecute and to acquire replacement shares had come to an end at the latest on the awareness of Baud that the defaulting party was not only in breach of the duty to return the shares but had disposed of shares at least equal in number to those loaned by Baud; that any postponement of the duty to acquire replacement shares, which may have been due to the sharp reduction in the value of the shares which occurred during the loan, was ended with the revival in values on the public market at least by the end of 1966; that a plaintiff in the position of Baud may not successfully assert throughout the years of litigation a right to specific performance of the contract to redeliver the subject-matter of the contract and at the same time seek to avoid or reduce his losses on the grounds that to do so by buying replacement shares would involve him in investing his funds in the shares of a company managed or dominated by his adversary, Brook; that having regard to the nature of a common share, neither the terms of the injunction or the loan contract, nor the action by Brook in disposing of shares in number equal to those loaned, have any effect on the characterization of the rights of Baud or the obligation of Brook throughout this long and tortuous transaction; that damages are an adequate remedy, and that a Court in these complex and particular circumstances will not invoke the extraordinary remedies of equity.

The application of these principles and determinations to the particular circumstances in this case requires, in my respectful view, a determination of the damages payable by Brook on the assumption that Baud ought to have crystallized these

damages by the acquisition of replacement shares so as to minimize the avoidable losses flowing from the deprivation by Brook of Baud's opportunity to market the 125,000 shares. Such share purchases should have taken place within a reasonable time after the date of breach. Having regard to all the above-noted special circumstances, the time for purchase in my opinion was the fall of 1966, when Baud was, by its own admission, free from any agreed restraint not to press its claim against Brook. It would be unreasonable to impose on Baud the burden of going into the market and acquiring replacement shares at a time when the litigation of its claims was in a dormant state at Brook's request. Furthermore, Baud acknowledged that by the fall of 1966 the fortunes of Asamera had improved and this had begun to be reflected in the market price of its shares. In short, the appellant is not, in my view, entitled in law to any compensation for the loss of opportunity to sell its shares after that date. Thereafter its loss of this opportunity is of its own making. The theory of such a damage award is to provide the funds needed to replace the shares at the time the law required it to do so in order to avoid an accumulating claim. There should be an allowance of a reasonable time to permit the organization of the finances and the mechanics required for the careful acquisition of 125,000 shares either by a series of relatively small purchases or by negotiated block purchases. This would carry the matter into the fall of 1967. By this time the price had risen to a range of $5 to $6. Making allowance for the upward pressure on the market price which would be generated by the purchase of such a large number of shares on a relatively low-volume stock, the purchase price would surely have exceeded the $6 price reached in mid-1967 without any market intervention by Baud. For this factor, in my best consideration, an allowance of $1 per share should be made. Taking into account the effect of market intervention by Baud, the median price during the period from late 1966 to mid-1967, adjusted accordingly, would be about $6.50, and in my view, the damages should be awarded to Baud on that basis, that is, the total damages for breach of agreement to return the Asamera shares should amount to $812,500. In weighing the magnitude of this award one should not lose sight of the essential fact that Brook at any time right down to trial could, if he had remained in compliance with the injunction of July 1960, have avoided this result or the risk of this award by delivering from any source 125,000 Asamera shares.

Brook has below and before this Court asserted a claim for damages in respect of the undertaking given by Baud upon the issuance of the interim injunction in July 1960. This claim was dismissed by the learned trial Judge and in this dismissal the Court of Appeal of Alberta concurred. Nothing has been advanced in this Court to indicate error below, and therefore I would dismiss this cross-appeal by Brook.

I would therefore allow the appeal and vary the judgment below by awarding damages payable by Brook to Baud in the amount of $812,500, together with costs to Baud throughout.

Dodd Properties v Canterbury City Council

[1980] 1 WLR 433 (CA)

MEGAW LJ: This is an appeal from a judgment of Cantley J.

The first plaintiffs, Dodd Properties (Kent) Ltd., are the owners of a building in Rose Lane, Canterbury, known as Marlowe Garage. The second plaintiffs, Marlowe Garage (Canterbury) Ltd., have been the occupiers of Marlowe Garage as lessees of the first plaintiffs. They carry on their business there as motor car dealers and they sell petrol, oil and accessories.

In 1968 the first defendants, the mayor, aldermen and citizens of the city of Canterbury, erected a large multi-storey car park close to Marlowe Garage. The second defendants, Truscon Ltd., were the main contractors; the third defendants, Frankipile Ltd., were their subcontractors for the foundations of the car park. As a result of their operations, damage was caused to the plaintiffs' building. Liability was for long denied, but shortly before the action came on for hearing before Cantley J. in 1978 liability was admitted in nuisance by the second and third defendants, though the extent of the damage was in issue and also the basis of assessment of the amount of damages to which the plaintiffs were entitled. The first defendants did not formally admit liability, but they took no part in the proceedings, having received an undertaking of indemnity from the other defendants.

Cantley J. held that the first defendants also were liable. They are not parties to the appeal. There is no dispute as to liability. The issues are as to damages.

No question of fact is now in dispute; Cantley J.'s findings of fact are accepted as to the extent of the physical damage and as to other matters.

On the question of the extent of the damage, Cantley J. to a large degree accepted the evidence of the defendants' experts. On their evidence, the necessary repairs would, at the prices prevailing at the time of the hearing in 1978, cost about £30,000. On the evidence of the plaintiffs' expert, the repairs required were much greater and the cost much higher.

The question which remained, and which is the primary issue before us, is this: by reference to which of two dates is the cost of the repairs to be ascertained, for purposes of arriving at the amount of the defendants' liability for their tort? The plaintiffs say that the relevant date for this purpose is the date of the hearing, or of the judgment: that is, that the 1978 prices are relevant and decisive. The defendants say that the relevant date is 1970 and the relevant prices are the 1970 prices. As a result of inflation, the difference between the computations at those respective dates is very large. The 1978 figure, for the repairs which Cantley J. held to be required, is £30,327. The 1970 figure, for the same work, is approximately £11,375.

The second plaintiffs also have a claim. It gives rise to the same issue as to the proper date of assessment. The second plaintiff's claim arises out of prospective interruption of their business during the time that would be required for the carrying out of the appropriate repairs, if and when that work is done. The figure, if the repairs were to be carried out in 1978, would be £11,951. In 1970 the corresponding amount would have been £4,108.

Taking the first and second plaintiffs' potential entitlements together, the sums payable by the defendants as damages (apart from any question of interest) would be: on the 1970 assessment, £15,483; on the 1978 assessment, £42,278.

Cantley J. held that in law, in the circumstances, judgment had to be given on the 1970 basis. He also awarded interest, making the total payable by the defendants to the first and second plaintiffs £22,974.20.

Against the judgment, the plaintiffs appeal and the defendants cross-appeal. The plaintiffs say that Cantley J. was wrong in law to make his assessment of damages on the basis of the cost of the repairs in 1970. They say that he should have taken the 1978 computation. They say, in the alternative, that, if they should be wrong on this, which is their first and main contention, then he ought to have awarded interest from an earlier date and at a higher rate. They accept that, if they are right on their first contention—that is, the acceptance of 1978 as the date by reference to which the cost of the repairs is to be assessed—then they could not claim interest.

The defendants' cross-appeal raises an issue affecting the damages of the second plaintiffs only. The defendants say that, since Cantley J. held that it was only "just about established" that it was probable that the repairs would in fact be carried

out after his judgment, he ought not to have awarded to the second plaintiffs the full amount of the prospective loss to them arising from the interruption of their business which would be caused by those potential repairs. He, say the defendants, should have awarded the second plaintiffs only, say 60 per cent. of the total prospective loss by interruption, because the chance that the loss would in fact occur was no greater than a chance of that order.

On the first, and main, issue raised by the plaintiffs, it is necessary to see what Cantley J. found were the reasons why the repairs for this damage to Marlowe Garage, caused in 1968, had still not been carried out when the action was heard in 1978. Because I think it is important to see precisely what Cantley J. held in this respect, I shall quote his own words, ante, p. 442E-F:

> I find that the first plaintiffs could probably have raised the money for repairs but this would have increased their annual losses and their financial stringency. As a commercial decision, judged exclusively from the point of view of the immediate and short-term welfare of the companies, it was reasonable to postpone incurring the very considerable expense of these repairs while no harm was being done to the building by the delay in repairing it and while these three rich defendants with apparent if not genuine belief in the validity of their defences were firmly denying liability to make even a contribution.

Cantley J. then referred to the well-known, much discussed, case, *The Liesbosch*, [1933] A.C. 449 [HL (Eng.)]. He said, ante, p. 443C: "In the case of destruction of a chattel, the normal measure of the damage is the market value at the time of the loss. That was the measure of damage applied in *The Liesbosch*." He then cited from the judgment of Denning L.J. in *Philips v. Ward*, [1956] 1 W.L.R. 471 [CA], 474:

> The general principle of English law is that damages must be assessed as at the date when the damage occurs, which is usually the same day as the cause of action arises. ... A fall thereafter in the value of money does not in law affect the figure, for the simple reason that sterling is taken to be constant in value.

Although this may not affect the statement of "the general principle," I think that the reasoning as to sterling having to be taken to be constant in value is unfortunately no longer good law, having regard to the facts of life and the recent authoritative decisions, including *Miliangos v. George Frank (Textiles) Ltd.*, [1976] A.C. 443 [HL (Eng.)].

Cantley J. then said:

> No authority has been cited to me, and in my very limited opportunity lately I have discovered none for myself, where a court has considered the time at which damages are to be assessed in the cases of buildings damaged and put in need of repair by a tortious act. If there is no authority on that precise point, it may be because no one has ever before thought to contend that the general principle did not apply to it. The general principle is that damages must be assessed as at the date when the damage occurs. In my view, that general principle applies here. It is not, of course, to be rigidly applied as a rule of thumb, fixing the time rigidly by the calendar and the clock. The damage may be concealed by some fault of the wrongdoer or not reasonably discoverable by the victim until some time after it has first appeared: see, for example, *East Ham Corporation v. Bernard Sunley & Sons Ltd.*, [1966] A.C. 406 [HL (Eng.)] and *Applegate v. Moss*, [1971] 1 Q.B. 406. Moreover, repairs cannot usually be put in hand at once and at prices ruling at the very date of damage. There may have to be inspections and specifications and tenders and an available contractor may have to be found before the work can be started. Furthermore, the nature and circumstances of the

> damage may be such that it would be imprudent and possibly wasteful to begin the work before waiting longer to ensure that no further damage is going to develop from the same cause. This is particularly true when the foundations of a building have been disturbed by vibrations. I would put it in this way. The appropriate damages are the cost of repairs at the time when it was reasonable to begin repairs. Whether the time is reasonable must be judged objectively and not taking into account such matters as impecuniosity or financial stringency which, in the words of Lord Wright in *The Liesbosch*, [1933] A.C. 449 [HL (Eng.)], 460, 461, are extrinsic.

He then held that it had been reasonable for the plaintiffs not to begin repairs until 1970 even though the damage had all occurred, and had been known, in 1968. On that basis he adopted "as the measure of damage the cost of repairs ... on the prices ruling in 1970"; that is, £11,375.

There is no dispute in this case but that the appropriate measure of damages on this claim of the first plaintiffs is by reference to the cost of the repairs required.

The defendants do not challenge Cantley J.'s acceptance of the 1970 figures. That means that they do not now contend that he should have taken the lower prices for the repair work prevailing in 1968 when the tort was committed.

It is important to bear in mind that we are not concerned with any suggestion that the plaintiffs were under a duty towards the defendants to repair the premises damaged by the defendants' wrongdoing. The plaintiffs did not lose their right to recover damages from the defendants because they did not effect the repairs. True, in certain circumstances with which we are not concerned here, such as the building being destroyed by fire before the repairs had been carried out, the amount of the plaintiffs' entitlement to damages might have become nil. But what we are concerned with here is: by reference to what date is the amount of the recoverable loss to be calculated, during a period when the cost of the necessary work is rising as time goes on? Since the defendants do not suggest that Cantley J. was wrong in taking the 1970 prices instead of the 1968 prices, it is accepted, and I think necessarily and rightly accepted, by the defendants that there are circumstances in which the proper amount of damages, where, as here, the damages are to be computed by reference to the cost of repairs, has to be computed by reference to that cost at a date later than the date of the wrongdoing which caused the damage.

The general principle, referred to in many authorities, has recently been recognised by Lord Wilberforce in *Miliangos v. George Frank (Textiles) Ltd.*, [1976] A.C. 443 [HL (Eng.)], 468, namely, that "... as a general rule in English law damages for tort or for breach of contract are assessed as at the date of the breach ... ." But in the very passage in which this "general rule" is there stated, it is stressed that it is not a universal rule. That it is subject to many exceptions and qualifications is clear. Cantley J. in the present case rightly recognised that that was so, in the passage from his judgment which I have recently read.

Indeed, where, as in the present case, there is serious structural damage to a building, it would be patently absurd, and contrary to the general principle on which damages fall to be assessed, that a plaintiff, in a time of rising prices, should be limited to recovery on the basis of the prices of repair at the time of the wrongdoing, on the facts here being two years, at least, before the time when, acting with all reasonable speed, he could first have been able to put the repairs in hand. Once that is accepted, as it must be, little of practical reality remains in postulating that, in a tort such as this, the "general rule" is applicable. The damages are not required by English law to be assessed as at the date of breach.

The true rule is that, where there is a material difference between the cost of repair at the date of the wrongful act and the cost of repair when the repairs can,

having regard to all relevant circumstances, first reasonably be undertaken, it is the latter time by reference to which the cost of repair is to be taken in assessing damages. That rule conforms with the broad and fundamental principle as to damages, as stated in Lord Blackburn's speech in *Livingstone v. Rawyards Coal Co.* (1880), 5 App. Cas. 25 [HL (Sc.)], 39, where he said that the measure of damages is

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

In any case of doubt, it is desirable that the judge, having decided provisionally as to the amount of damages, should, before finally deciding, consider whether the amount conforms with the requirement of Lord Blackburn's fundamental principle. If it appears not to conform, the judge should examine the question again to see whether the particular case falls within one of the exceptions of which Lord Blackburn gave examples, or whether he is obliged by some binding authority to arrive at a result which is inconsistent with the fundamental principle. I propose to carry out that exercise later in this judgment.

Cantley J. has held, in a passage which I have already read, that as a commercial decision, judged exclusively from the plaintiffs' point of view, it was reasonable to postpone incurring expense of the repairs up to—for so I understand what Cantley J. says—the time when the action had been heard and liability decided, resulting in a judgment which, when complied with, would have put the plaintiffs in funds. The reasons why that deferment of repairs was reasonable from the plaintiffs' point of view included the fact, not that they were "impecunious," meaning poverty-stricken or unable to raise the necessary money, but that the provision of the money for repairs would have involved for them a measure of "financial stringency." Other reasons, consistent with commercial good sense, why the repairs should have been deferred include those mentioned in evidence by a director of the plaintiff companies, whose evidence was accepted by Cantley J. as truthful and reliable. If there had been no money problem, he said, he would still not have spent money on the building before he was sure of recovering the cost from the defendants. It would not have made commercial sense to spend this money on a property which would not produce corresponding additional income. So long as there was a dispute, either as to liability or as to the amount of compensation, he would have done no more than to keep the building weatherproof and "in working order."

If that was, as Cantley J. held, reasonable from the point of view of the plaintiffs as being grounds for deferring the carrying out of repairs, and if the time at which the cost of the repairs falls to be computed in order to ascertain the amount of damages is the time when it has become reasonable to do the repairs, why did Cantley J. reject 1978, for which the plaintiffs contended, and accept 1970 for which the defendants contended?

There are, as I see it, two possible answers to that question. The first answer is that what is reasonable has to be looked at from the point of view of both parties and a balance struck. Cantley J.'s finding of reasonableness of the deferment from the point of view of the plaintiffs does not, therefore, conclude the matter. But I do not think that that was the answer intended to be given by Cantley J. He nowhere refers to the question in any such form and there is no indication of any attempt by him to strike a balance. If a balance had to be struck, surely it would be right, even in a climate of indulgence to contract-breakers or tortfeasors, that the scales should move heavily in the favour of the innocent party as against the wrongdoer, in any comparison of respective disadvantages or unfairness? It has to be borne in mind

that these were defendants who were wrongly maintaining a denial of any liability and thereby leaving the plaintiffs faced with all the potentially heavy expenditure of money required for the mere purpose of establishing by litigation what we now know to have been their rights. Moreover, as the plaintiffs concede, they could not claim interest on the amount of their compensation starting to run before the date when the money was expended on repairs. So the defendants, being liable, as we now know, to recompense the plaintiffs for the tort which the defendants committed in 1968, will have enjoyed the free use for their own account of the money which would have been the appropriate compensation at that date, with the opportunity of earning compound interest thereon, from 1968 until the date of judgment. If that were the ground on which Cantley J. held in favour of the defendants on this issue, I would respectfully hold that it was a wrong ground. But I do not think that he did so hold.

The second possible answer is that which I believe to have influenced Cantley J. He thought that the decision in *The Liesbosch,* [1933] A.C. 449 precluded him from taking into account, in considering the reasonableness of the deferment of repairs, any part of the deferment which was caused by "financial stringency."

The Liesbosch has been the subject of much debate and much speculation, and a considerable measure of disagreement, as to its ratio decidendi and the scope of its application, particularly in the light of later House of Lords decisions: see, for example, the discussion of the case by the learned author of the article on "Damages" in *Halsbury's Laws of England*, 4th ed., vol. 12 (1975), para. 1144, footnote 4. I agree with the analysis of *The Liesbosch* and the comments thereon in the judgment which Donaldson L.J. will deliver hereafter. I do not think that, on any fair view of the ratio decidendi of *The Liesbosch*, it applies to the issue with which we are concerned. Amongst other reasons, there are these two. First, it was not "financial stringency," let alone "impecuniousness" as in *The Liesbosch*, which on any fair view, on Cantley J.'s findings, was *the* cause, or even, I think, an effective cause, of the decision to postpone repairs. The "financial stringency" which would have been created by carrying out the repairs was merely one factor among a number of factors which together produced the result that commercial good sense pointed towards deferment of the repairs. The second reason which I would mention is that, once it is accepted that the plaintiff was not in any breach of any duty owed by him to the defendant in failing to carry out repairs earlier than the time when it was reasonable for the repairs to be put in hand, this becomes, for all practical purposes, if not in theory, equated with a plaintiff's ordinary duty to mitigate his damages. Lord Wright in his speech in *The Liesbosch*, at p. 461, accepted Lord Collin's dictum in *Clippens Oil Co. Ltd. v. Edinburgh and District Water Trustees*, [1907] AC 291 [HL (Sc.)], 303:

> [I]n my opinion the wrongdoer must take his victim talem qualem, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrongdoer. ...

I agree with the observations of Oliver J. in *Radford v. De Froberville*, [1977] 1 W.L.R. 1262 [Ch. D], 1268 as to the relationship between the duty to mitigate and the measure, or amount, of damages in relation to a question such as the question with which we are here concerned. A plaintiff who is under a duty to mitigate is not obliged, in order to reduce the damages, to do that which he cannot afford to do: particularly where, as here, the plaintiffs' "financial stringency," so far as it was relevant at all, arose, as a matter of common sense, if not as a matter of law, solely as a consequence of the defendant's wrongdoing.

My provisional answer to the question raised in the first issue would, thus, be that the damages in this case are to be assessed by reference to the 1978 cost of repairs. I now carry out that exercise which I mentioned earlier. Once it is accepted, as it is accepted by the parties, that the damages fall to be computed by reference to the cost of repairs to the building, and once *The Liesbosch*, [1933] A.C. 449 [HL (Eng.)] and *Philips v. Ward*, [1956] 1 W.L.R. 471 [CA] are out of the reckoning, there is no exception of which I am aware which is relevant here to exclude application of Lord Blackburn's fundamental principle. On the relevant facts as found by Cantley J., the 1978 cost of the repairs gives the answer which accords with that principle. The calculation of damages by reference to the 1970 cost of repairs would not so accord.

On that issue, I would allow the appeal.

The result is that the plaintiff's alternative ground of appeal, as to the appropriate calculation of interest, does not arise. For it is a necessary part of their submission on the first issue that, damages being referable to the deferment of repairs, interest is not payable up to the date of the hearing. In the circumstances, I think it better to say nothing on that point, on which the argument on either side was commendably brief.

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BROWNE LJ: I agree that this appeal should be allowed and the cross-appeal dismissed, for the reasons given by Megaw L.J. and the reasons which will be given by Donaldson L.J. in the judgment he will deliver very soon. I can summarise my own reasons fairly shortly, because they are in substance the same as theirs.

The first principle for the assessment of damages is that the injured person should, so far as money can do it, be put in the same position as if the wrong—in this case the tort—had not been committed against him: see *Halsbury's Laws of England*, 4th ed., vol. 12, title "Damages," para. 1129, and—for example—the authority cited by Megaw L.J., *Livingstone v. Rawyards Coal Co.* (1880), 5 App. Cas. 25 [HL (Sc.)], *per* Lord Blackburn, at p. 39. This the damages of £11,375 awarded to the first plaintiffs, for the cost of repairs in 1970, glaringly fail to do. By the time of the hearing in 1978 the cost had risen to £30,327. In fact, the repairs had not been done by that time, and the cost will probably have risen still further by the time they are done, but the plaintiffs do not make any further claim beyond the cost at the date of the hearing.

It is not disputed that in this case the measure of the first plaintiffs' damages is the cost of repair, as opposed to the other possible measure in a case of this sort, *i.e.* the diminution of the value of the building. The only question is the time as at which that cost shall be taken.

The general rule, both in contract and tort, is that damages should be assessed as at the date when the cause of action arises, but they may be assessed as at some later date. In my view, Cantley J. was plainly right in saying, ante, pp. 444H-445A: "The appropriate damages are the cost of repairs at the time when it was reasonable to begin repairs." In *Johnson v. Agnew*, [1980] A.C. 367 [HL (Eng)], Lord Wilberforce said, at p. 499:

> The general principle for the assessment of damages is compensatory, i.e. that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach—a principle recognised and embodied in section 51 of the Sale of Goods Act 1893. But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances. In cases where a breach

> of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost. Support for this approach is to be found in the cases. In *Ogle v. Earl Vane* (1867), L.R. 2 Q.B. 275; (1868), L.R. 3 Q.B. 272 the date was fixed by reference to the time when the innocent party, acting reasonably, went into the market; in *Hickman v. Haynes* (1875), L.R. 10 C.P. 598 at a reasonable time after the last request of the defendants (buyers) to withhold delivery. In *Radford v. De Froberville*, [1977] 1 W.L.R. 1262 (Ch. D), where the defendant had covenanted to build a wall, damages were held measurable as at the date of the hearing rather than at the date of the defendant's breach, unless the plaintiff ought reasonably to have mitigated the breach at an earlier date.

Lord Wilberforce, of course, was there speaking of damages for breach of contract, but I have no doubt that the same principle applies to this case, where it is common ground that the measure of damages is the cost of repairs. I think this view is supported by analogy by the decision of the House of Lords in *West Midland Baptist (Trust) Association (Inc.) v. Birmingham Corporation*, [1970] A.C. 874 [HL (Eng)].

In this case, it was common ground, and Cantley J. accepted that it had been reasonable to postpone the doing of the repairs from 1968, when damage had first been discovered, until 1970, and that 1970 was the earliest date as at which the cost of repairs should be assessed. The defendants contended that the assessment should not be any further postponed; Cantley J. accepted this contention, and assessed the damages on the cost of repairs in 1970.

In the course of the passage in his judgment which Megaw L.J. has already read, ante, pp. 442E-F, 449C-D, he held that:

> As a commercial decision, judged exclusively from the point of view of the immediate and short-term welfare of the companies, it was reasonable to postpone incurring the very considerable expense of these repairs. ...

Like Megaw L.J., I understand this to mean that it was in this sense reasonable to postpone doing the repairs until after the hearing. This was based on the evidence of Mr. Smith, a director of both the plaintiff companies and a chartered accountant, which is set out in Cantley J.'s judgment and has been summarised already by Megaw L.J. Cantley J. gave a number of reasons for the decision. Only one of what he said were the relevant factors was financial, and I think that his finding on this point falls far short of "impecuniosity" or "financial embarrassment" in the *Liesbosch* sense.

Cantley J. said, ante, pp. 444E-445A:

> Whether the time is reasonable must be judged objectively and not taking into account such matters as impecuniosity or financial stringency which, in the words of Lord Wright in *The Liesbosch*, [1933] A.C. 449, 460, 461, are extrinsic.

I am afraid I do not clearly understand what Cantley J. meant by "objectively" in that sentence. If he meant that the decision to postpone, although reasonable from the point of view of the plaintiff companies, was not reasonable from the point of view of a hypothetical reasonable commercial man, I cannot agree; it seems to me that any commercial man in the circumstance with which Mr. Smith was faced could reasonably, and probably would, have come to the same decision.

The judge relied on *Philips v. Ward*, [1956] 1 W.L.R. 471 [CA] and *Clark v. Woor*, [1965] 1 W.L.R. 650 [QB], in which Lawton J. simply followed and applied *Philips v.*

Ward. I agree with Megaw L.J. that the reasoning of Lord Denning M.R. in *Philips v. Ward*, at p. 474, can no longer be regarded as good law.

That leaves only *The Liesbosch*. I do not propose to analyse that difficult case, because I entirely agree with Megaw L.J. and Donaldson L.J. that, for the reasons they give, it did not compel Cantley J. to take the 1970 cost of repairs. I will only say that, like Megaw L.J., I agree with the observations of Oliver J. in *Radford v. De Froberville*, [1977] 1 W.L.R. 1262, 1272 as to the relationship between the duty to mitigate and the measure of damages in a case such as this.

I would, therefore, allow the first plaintiffs' appeal and vary the judgment by substituting £30,327 for £11,375.

Perry v Sidney Phillips & Sons

[1982] 1 WLR 1297 (CA)

LORD DENNING MR: In 1976 the plaintiff, Mr. Perry, was minded to buy a house. He saw what looked like a very attractive property. It was Kyre Bank Cottage, Kyre, near Tenbury Wells, in Worcestershire. He made an offer of £27,000 subject to survey and contract. He employed a firm of surveyors, Messrs. Sidney Phillips & Son, the defendants, to carry out the survey. They surveyed the property and prepared a report. Mr. Perry read the report. On the faith of it—although it did disclose some defects in the property—he was satisfied that the cottage was a sound buy. So, on July 2, 1976, he completed the contract of sale for £27,000.

Unfortunately, after Mr. Perry took possession, he found many defects. They had not been mentioned in the report. In particular, there were serious defects in the roof and in the septic tank. The surveyors had not noticed them. The roof leaked and the rain came in. The septic tank gave off an offensive odour. Mr. Perry consulted a different firm of surveyors. They made a report showing that there were many defects which had not been mentioned by Messrs. Sidney Phillips & Son in their report. Mr. Perry instructed solicitors. They wrote to Messrs. Sidney Phillips & Son listing the defects. Messrs. Sidney Phillips & Son instructed their own solicitors. The upshot was that the surveyors denied any liability.

This placed Mr. Perry in a quandary. He simply did not have the money to undertake major repairs. He carried out what minor repairs he could on a "do-it-yourself" basis. As Messrs. Sidney Phillips & Son were denying liability, he could not risk doing the repairs on borrowed money.

On his solicitors' advice, Mr. Perry brought an action against Messrs. Sidney Phillips & Son for damages for their negligence in making their report. The claim was put both in breach of contract and in negligence. In 1981 the case was tried by Mr. Patrick Bennett Q.C. sitting as a deputy High Court judge. He dealt with liability before considering the quantum of damages. At that stage Mr. Perry and his wife were still living in the cottage.

The judge found that the surveyors were negligent in making their report. He held that damages should be assessed according to the cost of repairing the defects in 1981 when the action was tried. He also held that Mr. Perry ought to be awarded damages for vexation—that is, the worry, discomfort and distress which he had suffered by reason of the house being in poor condition. The defendants appeal to this court.

But then the unexpected happened. After the trial and pending the appeal, Mr. Perry decided to sell the house. After the trial in April 1981 Mr. Perry found himself in financial difficulties. He had received bills from his solicitors for £4,788 costs. He could not get any assurance as to the date when damages would be assessed.

He was faced with the prospect of the appeal and long-drawn-out hearings as to damages. So Mr. Perry put the cottage on the market without doing any of the repairs. He sold it for £43,000.

Mr. Perry made an affidavit to explain why he had found it necessary to sell the cottage. In August 1981 he had been offered a job as a clerk with stockjobbers on the London Stock Exchange. It was necessary that he should live nearer to his new place of work. So he sold the cottage and bought a house at Fittleworth in Sussex.

We now have to consider how the damages are to be assessed. The cases show up many differences. I need only draw attention to these:

First, where there is a contract to build a wall or a house, or to do repairs to it, then if the contractor does not do the work or does it badly, the employer is entitled, by way of damages, to recover the reasonable cost of doing such work as is reasonable to make good the breach. The cost is to be assessed at the time when it would be reasonable for the employer to do it, having regard to all the circumstances of the case, including therein any delay due to a denial of liability by the contractor or the financial situation of the employer. The work may not have been done even up to the date of trial. If the cost has increased in the meantime since the breach—owing to inflation—then the increased cost is recoverable, but no interest is to be allowed for the intervening period (see *Radford v. De Froberville*, [1977] 1 W.L.R. 1262 [Ch. D] and *William Cory & Son Ltd. v. Wingate Investments (London Colney) Ltd.* (1980), 17 B.L.R. 104 [CA]); likewise if a wrongdoer damages his neighbour's house by nuisance or negligence, and the neighbour is put to expense in the repairing of it: see *Dodd Properties (Kent) Ltd. v. Canterbury City Council*, [1980] 1 W.L.R. 433 [CA].

Second, where there is a contract by a prospective buyer with a surveyor under which the surveyor agrees to survey a house and make a report on it—and he makes it negligently—and the client buys the house on the faith of the report, then the damages are to be assessed at the time of the breach, according to the difference in price which the buyer would have given if the report had been carefully made from that which he in fact gave owing to the negligence of the surveyor. The surveyor gives no warranty that there are no defects other than those in his report. There is no question of specific performance. The contract has already been performed, albeit negligently. The buyer is not entitled to remedy the defects and charge the cost to the surveyor. He is only entitled to damages for the breach of contract or for negligence. It was so decided by this court in *Philips v. Ward*, [1956] 1 W.L.R. 471 [CA], followed in *Simple Simon Catering Ltd. v. Binstock Miller & Co.* (1973), 117 S.J. 529 [CA].

The former case was concerned with breach of contract by surveyors. It is their duty to use reasonable care and skill in making a proper report on the house. In our present case Messrs. Sidney Phillips & Son failed in that duty in 1976 when they made the negligent report. Mr. Perry acted on the report in 1976 when he bought the house in July 1976. The general rule of law is that you assess the damages at the date of the breach: so as to put the plaintiff in the same position as he would have been in if the contract had been properly performed. Even if the claim be laid in tort against the surveyor, the damages should be on the same basis.

So you have to take the difference in valuation. You have to take the difference between what a man would pay for the house in the condition in which it was reported to be and what he would pay if the report had been properly made showing the defects as they were. In other words, how much more did he pay for the house by reason of the negligent report than he would have paid had it been a good report? That being the position, the difference in valuation should be taken at the date of the breach in 1976. We were given some approximate figures of

the difference in the valuation. The plaintiff's figure was £6,000. The defendants' figure was £2,250.

I would go on to say—and this is important—that although the date for the assessment of damages is 1976, there is some compensation for inflation because those damages carry interest. Probably 9 per cent., 10 per cent. or even 11 per cent. would be awarded nowadays from 1976 until the date when the damages are paid: or, at least, up until judgment is given and then afterwards at the judgment rate.

The second point is as to the distress, worry, inconvenience and all the trouble to which Mr. Perry was put during the time when he was in the house. Mr. Hicks sought to say before us that damages ought not to be recoverable under this head at all. He referred to the *The Liesbosch*, [1933] A.C. 449 [HL (Eng)]. In that case Lord Wright said at p. 460 that the loss due to the impecuniosity of the plaintiffs was not recoverable. I think that that statement must be restricted to the facts of *The Liesbosch*. It is not of general application. It is analysed and commented upon in this court in *Dodd Properties (Kent) Ltd. v. Canterbury City Council*, [1980] 1 W.L.R. 433 [CA]. It is not applicable here. It seems to me that Mr. Perry is entitled to damages for all the vexation, distress and worry which he has been caused by reason of the negligence of the surveyor. If a man buys a house—for his own occupation—on the surveyor's advice that it is sound—and then he finds out that it is in a deplorable condition, it is reasonably foreseeable that he will be most upset. He may, as here, not have the money to repair it and this will upset him all the more. That too is reasonably foreseeable. All this anxiety, worry and distress may nowadays be the subject of compensation. Not excessive, but modest compensation. That appears from such cases as *Jarvis v. Swans Tours Ltd.*, [1973] Q.B. 233 [CA]; *Jackson v. Horizon Holidays Ltd.*, [1975] 1 W.L.R. 1468; *Heywood v. Wellers*, [1976] Q.B. 446 [CA] and *Hutchinson v. Harris* (1978), 10 B.L.R. 19 [CA]. In our present case, the judge said [1982] 1 All E.R. 1005, 1016-1017:

> I think it was reasonably foreseeable that, if Mr. Perry bought the house in such a condition that he was exposed to the incursion of water, the anxiety resulting from the question of when the repairs should be done and the odour and smell from the defective septic water tank would cause him distress and discomfort which I have gathered together under the term "vexation." ... In my view, the plaintiff is entitled ... to damages for such discomfort, distress and the like which he has suffered as a result of the defendants' negligence in, in effect, giving this house a clean bill of health. ... I am satisfied that he has not acted unreasonably and he has not failed to mitigate his damage and that the consequences which have flowed from the defendants' breach of contract and/or negligence were foreseeable, are direct and have not been diminished or extinguished by any failure on the part of Mr. Perry to mitigate his loss.

Mr. Perry is entitled to damages on that score also. The quantum of damages is to be assessed by an official referee later on.

In the circumstances, I think that the appeal must be allowed in so far as it affects the date at which damages are to be assessed, but dismissed on the question of vexation.

OLIVER LJ: I agree with the order which Lord Denning M.R. has proposed. It is not now suggested that the measure of damages which was proposed by the deputy judge ought to be sustained in its totality, not because of any error in his reasoning—although no doubt the defendants would have wished to challenge that if the matter had proceeded on that basis—but because it has been overtaken by events, the house having now been sold by the plaintiff at a price very considerably in excess of that which the plaintiff paid for it in 1976. In these circumstances, the cost

of repairs, which have not in fact been carried out, cannot any longer be an appropriate measure; and the debate before us has concentrated on two points. The first is the question whether the appropriate measure of damage on the basis of what the deputy judge described as "differential in valuation" is, as Mr. Hicks submits, the difference between the price paid by the plaintiff and the value at the date of its acquisition—the property which he actually got—or whether it is, as Mr. Latham suggests, the difference between the value of the house at the date of the trial in its defective condition and the value which it would then have had if it had been in the condition in which on the basis of the surveyor's report it should have been. Speaking for myself, I have no doubt whatever that the basis suggested by Mr. Hicks is the right one. What Mr. Latham contends for in effect makes the surveyors warrant the value of the property surveyed, and indeed the deputy judge seems so to have thought. He said, [1982] 1 All E.R. 1005, 1011:

> Counsel for the defendants, in the course of an extremely helpful address, warned me against putting the surveyor into the shoes of the vendor, that is warranting the condition of the property and requiring, if that warranty is breached, the surveyor to pay compensation to the purchaser.

I interpose to say that I do not believe for a moment that vendors normally do do that and it may be that this is a misprint for "valuer." The judge then goes on to say:

> In reality the surveyor is not far removed from that situation. The purchaser is relying upon his skill, his expertise and his care to ensure that what he, the purchaser, is buying is worth what he is paying for it. In that sense, the surveyor is describing the property which is being bought.

With the greatest respect to the deputy judge, I cannot agree with that. The position as I see it is simply this, that the plaintiff has been misled by a negligent survey report into paying more for the property than that property was actually worth. The position, as I see it, is exactly the same as that which arose in *Philips v. Ward*, [1956] 1 W.L.R. 471 [CA], to which Lord Denning M.R. has already referred, and in the subsequent case of *Ford v. White & Co.*, [1964] 1 W.L.R. 885 [Ch. D]. It is said by Mr. Latham that this proposition is supported in some way by a more recent case, *Dodd Properties (Kent) Ltd. v. Canterbury City Council*, [1980] 1 W.L.R. 433 [CA]. That was a case in which the plaintiffs were claiming damages in tort against the defendants, they having removed a support to the plaintiffs' premises. It could not be suggested in that case that there was any other measure of damages than the cost of repair, the only question being the date at which the repairs ought to have been carried out; and the debate there was as to the date at which it was reasonable for the plaintiffs to have carried out the repairs. As I read the case, it merely exemplifies the general principle which is set out in the headnote to the case:

> [T]he fundamental principle as to damages was that the measure of damages was that sum of money that would put the injured party in the same position as that in which he would have been if he had not sustained the injury. ...

and the question was what loss the plaintiff, acting reasonably, had actually suffered.

I see nothing in that case which justifies the proposition for which Mr. Latham contends that damages are to be assessed on the basis of some hypothetical value at the date of the trial because the plaintiff has chosen—as he did in this case—to retain the property and not to cut his loss by reselling it. I therefore am of the same view as Lord Denning M.R. that the right measure of damage is the measure

suggested in both *Philips v. Ward*, [1956] 1 W.L.R. 471 [CA] and *Ford v. White & Co.*, [1964] 1 W.L.R. 885 [Ch. D], which is simply the difference between what the plaintiff paid for the property and its value at the date when he obtained it.

Specific performance and damages in lieu of specific performance are discussed in Chapter 10, Specific Performance. Their relevance to mitigation and time of assessing damages is that a claim for specific performance will often delay the obligation to mitigate damages. Because the plaintiff is seeking to have the contract performed, it usually isn't reasonable for them to also seek an alternate source of performance. This can provide a significant advantage to the plaintiff.

Courts of Justice Act

RSO 1990, c C.43

Damages in Substitution for Injunction or Specific Performance

99. A court that has jurisdiction to grant an injunction or order specific performance may award damages in addition to, or in substitution for, the injunction or specific performance.

[See also *Judicature Act*, RSA 2000, c J-2, ss 19, 20; *The Court of King's Bench Act*, CCSM c C280, s 36; and *The King's Bench Act*, SS 2023, c 28, s 10–16.]

Johnson v Agnew

[1980] AC 367 (HL (Eng))

[In November 1973, the plaintiff vendors entered into a written agreement to sell their properties. At the time, they were in arrears with the repayments of mortgages on those properties. The purchaser agreed to pay a price that exceeded the amounts required to discharge the mortgages and a loan raised by the vendors to enable them to buy another property. The purchaser failed to complete the contract, and in November 1974 the vendors obtained a summary order for specific performance. The order for specific performance was not carried out, and in July 1975 the mortgagees of the properties enforced their securities by selling the properties. The proceeds realized by the mortgagees were inadequate to discharge the mortgages in full, and the vendors moved for an order for the purchaser to pay the balance of the purchase price to the vendors, credit being given for the amounts realized by the mortgagees' sales. The judge made no order on the motion. The Court of Appeal allowed the vendors' appeal. The Court held that the order for specific performance should be discharged and damages awarded in lieu.]

LORD WILBERFORCE: ... My Lords, this appeal arises in a vendors' action for specific performance of a contract for the sale of land, the appellant being the purchaser and the vendors respondents. The factual situation is commonplace, indeed routine. An owner of land contracts to sell it to a purchaser; the purchaser fails to complete the contract; the vendor goes to the court and obtains an order that the contract be specifically performed; the purchaser still does not complete; the vendor goes back to the court and asks for the order for specific performance to be dissolved, for the contract to be terminated or "rescinded," and for an order for damages. One would think that the law as to so typical a set of facts would be both simple and clear. It is no credit to our law that it is neither. Learned judges in the

Chancery Division and in the Court of Appeal have had great difficulty in formulating a rule and have been obliged to reach differing conclusions. That this is so is due partly to the mystification which has been allowed to characterise contracts for the sale of land, as contrasted with other contracts, partly to an accumulated debris of decisions and text book pronouncements which has brought semantic confusion and misunderstandings into an area capable of being governed by principle. I hope that this may be an opportunity for a little simplification.

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[Having reviewed the facts, he continued:]

In this situation it is possible to state at least some uncontroversial propositions of law.

First, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can *either* treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; *or* he may seek from the court an order for specific performance with damages for any loss arising from delay in performance. (Similar remedies are of course available to purchasers against vendors.) This is simply the ordinary law of contract applied to contracts capable of specific performance.

Secondly, the vendor may proceed by action for the above remedies (viz. specific performance or damages) in the alternative. At the trial he will however have to elect which remedy to pursue.

Thirdly, if the vendor treats the purchaser as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact that, the purchaser having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance.

At this point it is important to dissipate a fertile source of confusion and to make clear that although the vendor is sometimes referred to in the above situation as "rescinding" the contract, this so-called "rescission" is quite different from rescission *ab initio*, such as may arise for example in cases of mistake, fraud or lack of consent. In those cases, the contract is treated in law as never having come into existence. (Cases of a contractual right to rescind may fall under this principle but are not relevant to the present discussion.) In the case of an accepted repudiatory breach the contract has come into existence but has been put an end to or discharged. Whatever contrary indications may be disinterred from old authorities, it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about rescission *ab initio*. I need only quote one passage to establish these propositions.

In *Heyman v. Darwins Ltd.*, [1942] A.C. 356 [HL (Eng)], Lord Porter said, at p. 399:

> To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that on acceptance of the renunciation of a contract the contract is rescinded is incorrect. In such a case the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded.

See also *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888), 39 Ch. D 339 [CA], 365, *per* Bowen L.J.; *Mayson v. Clouet*, [1924] A.C. 980 [PC (Sing.)], 985, *per* Lord Dunedin and *Lep Air Services Ltd. v. Rolloswin Ltd.*, [1973] A.C. 331 [HL (Eng)], 345, *per* Lord Reid, 350, *per* Lord Diplock. I can see no reason, and no logical reason has ever been given, why any different result should follow as regards contracts for the sale of land, but a doctrine to this effect has infiltrated into that part of the law with unfortunate results. I shall return to this point when considering *Henty v. Schröder* (1879), 12 Ch. D 666 and cases which have followed it down to *Barber v. Wolfe*, [1945] Ch. 187 and *Horsler v. Zorro*, [1975] Ch. 302.

Fourthly, if an order for specific performance is sought and is made, the contract remains in effect and is not merged in the judgment for specific performance. This is clear law, best illustrated by the judgment of Sir Wilfrid Greene MR in *Austins of East Ham Ltd. v. Macey*, [1941] Ch. 338 [CA], 341 in a passage which deals both with this point and with that next following. It repays quotations in full.

> The contract is still there. Until it is got rid of, it remains as a blot on the title, and the position of the vendor, where the purchaser has made default, is that he is entitled, not to annul the contract by the aid of the court, but to obtain the normal remedy of a party to a contract which the other party has repudiated. He cannot, in the circumstances, treat it as repudiated except by order of the court and the effect of obtaining such an order is that the contract, which until then existed, is brought to an end. The real position, in my judgment, is that, so far from proceeding to the enforcement of an order for specific performance, the vendor, in such circumstances is choosing a remedy which is alternative to the remedy of proceeding under the order for specific performance. He could attempt to enforce that order and could levy an execution which might prove completely fruitless. Instead of doing that, he elects to ask the court to put an end to the contract, and that is an alternative to an order for enforcing specific performance.

Fifthly, if the order for specific performance is not complied with by the purchaser, the vendor may *either* apply to the court for enforcement of the order, *or* may apply to the court to dissolve the order and ask the court to put an end to the contract. This proposition is as stated in *Austins of East Ham Ltd. v. Macey* (and see *Singh (Sudagar) v. Nazeer*, [1979] Ch. 474, 480, *per* Megarry V-C) and is in my opinion undoubted law, both on principle and authority. It follows, indeed, automatically from the facts that the contract remains in force after the order for specific performance and that the purchaser has committed a breach of it of a repudiatory character which he has not remedied, or as Megarry V-C puts it, [1979] Ch. 474, 480, 790, that he is refusing to complete.

These propositions being, as I think they are, uncontrovertible, there only remains the question whether, if the vendor takes the latter course, i.e. of applying to the court to put an end to the contract, he is entitled to recover damages for breach of the contract. On principle one may ask "Why ever not?" If, as is clear, the vendor is entitled, after, and notwithstanding that an order for specific performance has been made, if the purchaser still does not complete the contract, to ask the court to permit him to accept the purchaser's repudiation and to declare the contract to be terminated, why, if the court accedes to this, should there not follow the ordinary consequences, undoubted under the general law of contract, that on such acceptance and termination the vendor may recover damages for breach of contract?

I now consider the arguments which are said to support the negative answer.

(1) The principal authority lies in the case of *Henty v. Schröder* (1879), 12 Ch. D 666 [CA], 667 in which Sir George Jessel M.R. is briefly reported as having laid down

that a vendor "could not at the same time obtain an order to have the agreement rescinded and claim damages against the defendant for breach of the agreement." The unsatisfactory nature of this statement has often been remarked upon. It is unsupported by reasons, and is only reported in oratio obliqua. It is in direct conflict with previous authorities—*Sweet v. Meredith* (1863), 4 Giff. 207 [66 E.R. 680 (Ch.)]; *Watson v. Cox* (1873), L.R. 15 Eq. 219 (more fully in 42 L.J. Ch. 279); yet no reason is given why these authorities are not followed, nor is it said that they are overruled. If it were not for the great authority of the Master of the Rolls, I can hardly believe that so fragile and insecure a foundation for the law would ever have survived. Explanations have been canvassed—that Sir George Jessel was confusing discharge of a contract by accepted repudiation with rescission ab initio, a desperate hypothesis; that (much more plausibly) the statement was procedural in character, the emphasis being on "at the same time"; there was indeed authority that, at that time, in order to obtain damages a separate bill had to be filed; see *Hythe Corporation v. East* (1866), L.R. 1 Eq. 620. But it is not profitable to pursue these: the authority, weak as it is, is there and has been followed: it is necessary to see what strength it has gained in the process.

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Textbook authority in general supports the decision. George Russell Northcote (ed.), *Fry on Specific Performance* [London: Stevens,] 6th ed., (1921) p. 548 mentions the proposition with lack of enthusiasm but the main pillars in this case are Mr. T. Cyprian Williams' books on *The Contract of Sale of Land* [London: Butterworths,] (1930) and on *Vendor and Purchaser*, 4th ed., (1936). In the former work (p. 121) he firmly commits himself to the theory of rescission plus *restitutio in integrum* as remedies for breach of the contract. In the latter, a well-known book of reference on conveyancing matters, he equally firmly denies a right to damages. The learned author writes, at pp. 1025-1026 of vol. 2:

> And if he obtains an order for specific performance of the contract, that will be a bar to his recovering damages for the breach; for in equity the plaintiff suing on a breach of contract was required, as a rule, to elect which remedy he would pursue; and a man entitled to alternative remedies is barred, after judgment on the one, from asserting the other.

See also p. 1004.

My Lords, this passage is almost a perfect illustration of the dangers, well perceived by our predecessors but tending to be neglected in modern times, of placing reliance on textbook authority for an analysis of judicial decisions. It is on the face of it a jumble of unclear propositions not logically related to each other. It is "supported" by footnote references to cases (two of this House and one of the Privy Council) which are not explained or analysed. It would be tedious to go through them in detail. ...

The state of authority then, so far as English law is concerned, is that, starting from a judgment in which no reasons are given, and which may rest upon any one of several foundations, of which one is unsound and another obsolete, a wavering chain of precedent has been built up, relying upon that foundation, which is itself unsound. Systems based upon precedent unfortunately often develop in this way and it is sometimes the case that the resultant doctrine becomes too firmly cemented to be dislodged.

This is however the first time that this House has had to consider the right of an innocent party to a contract for the sale of land to damages on the contract being put an end to by accepted repudiation, and I think that we have the duty to take a

fresh look. I should certainly be reluctant to invite your Lordships to endorse a line of authority so weak and unconvincing in principle. Fortunately there is support for a more attractive and logical approach from another bastion of the common law whose courts have adopted a robuster attitude. I quote first from a judgment of Dixon J. in *McDonald v. Dennys Lascelles Ltd.* (1933), 48 C.L.R. 457 which with typical clarity sets out the principle—this, be it observed, in a case concerned with a contract for the sale of land. Dixon J. says, at pp. 476-477:

> When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach.

Closer to the present case, in *Holland v. Wiltshire* (1954), 90 C.L.R. 409 the High Court was directly concerned with a question of damages for breach of contract for the sale of land. The purchaser having failed to complete, the vendor claimed damages. Dixon C.J. said, at p. 416:

> The proper conclusion is that the vendor proceeded not under the contractual provision but on the footing that the purchasers had discharged him from the obligations of the contract. It follows that he is entitled to sue for unliquidated damages. Some suggestion was made for the defendants appellants that once the contract was treated by the vendor as discharged he could not recover for breach. This notion, however, is based on a confusion with rescission for some invalidating cause. It is quite inconsistent with principle and has long since been dissipated. It is enough to refer to the note upon the subject in Mr. *Voumard's Sale of Land in Victoria* (1939), at page 499.

Voumard's Sale of Land—judicially approved—p. 508—is explicit that damages can be recovered.

Then, in a case very similar to the present, *McKenna v. Richey*, [1950] V.L.R. 360, it was decided by O'Bryan J. in the Supreme Court of Victoria that, after an order for specific performance had been made, which in the events could not be carried into effect, even though this was by reason of delay on the part of the plaintiff, the plaintiff could still come to the court and ask for damages on the basis of an accepted repudiation. The following passage is illuminating, at p. 372:

> The apparent inconsistency of a plaintiff suing for specific performance and for common law damages in the alternative arises from the fact that, in order to avoid circuitry of action, there is vested in the one court jurisdiction to grant either form of relief. The plaintiff, in effect, is saying: "I don't accept your repudiation of the contract but am willing to perform my part of the contract and insist upon your performing your part—but if I cannot successfully insist on your performing your part, I will accept the repudiation and ask for damages." Until the defendant's repudiation is accepted the contract remains on foot, with all the possible consequences of that fact.

> But if, from first to last, the defendant continues unwilling to perform her part of the contract, then, if for any reason the contract cannot be specifically enforced, the plaintiff may, in my opinion, turn round and say: "Very well, I cannot have specific performance; I will now ask for my alternative remedy of damages at common law." This, in my opinion, is equally applicable both before and after decree whether the reason for the refusal or the failure of the decree of specific performance is due to inability of the defendant to give any title to the property sold, or to the conduct of the plaintiff which makes it inequitable for the contract to be specifically enforced. ...

And later the learned judge said, at p. 376:

> It is an appropriate case for a court of equity to say: "As a matter of discretion, this contract should not now be enforced specifically, but, in lieu of the decree for specific performance, the court will award the plaintiff such damages as have been suffered by her in consequence of the defendant's breach. That is the best justice that can be done in this case."

The learned judge in his judgment fully discusses and analyses the English cases but nevertheless reaches this view.

My Lords, I am happy to follow the latter case. In my opinion *Henty v. Schröder* (1879), 12 Ch. D 666 cannot stand against the powerful tide of logical objection and judicial reasoning. It should no longer be regarded as of authority: the cases following it should be overruled.

In particular *Barber v. Wolfe*, [1945] Ch. 187 and *Horsler v. Zorro*, [1975] Ch. 302 cannot stand so far as they are based on the theory of rescission *ab initio* which has no application to the termination of a contract on accepted repudiation.

The second basis for denying damages in such cases as the present is that which underlies the judgment of the Court of Appeal in *Swycher's* case [*Capital and Suburban Properties Ltd. v. Swycher*, [1976] Ch. 319 (CA)]. This is really a rationalisation of *Henty v. Schröder*, the weakness of which case the court well perceived. The main argument there accepted was that by deciding to seek the remedy of specific performance the vendor (or purchaser) has made an election which either is irrevocable or which becomes so when the order for specific performance is made. A second limb of this argument (but in reality a different argument) is that the vendor (or purchaser) has adequate remedies under the order for specific performance so that there is no need, or equitable ground, for allowing him to change his ground and ask for damages.

In my opinion, the argument based on irrevocable election, strongly pressed by the appellant's counsel in the present appeal, is unsound. Election, though the subject of much learning and refinement, is in the end a doctrine based on simple considerations of common sense and equity. It is easy to see that a party who has chosen to put an end to a contract by accepting the other party's repudiation cannot afterwards seek specific performance. This is simply because the contract has gone—what is dead is dead. But it is no more difficult to agree that a party, who has chosen to seek specific performance, may quite well thereafter, if specific performance fails to be realised, say, "Very well, then, the contract should be regarded as terminated." It is quite consistent with a decision provisionally to keep alive, to say "Well, this is no use—let us now end the contract's life." A vendor who seeks (and gets) specific performance is merely electing for a course which may or may not lead to implementation of the contract—what he elects for is not eternal and unconditional affirmation, but a continuance of the contract under control of the court which control involves the power, in certain events, to terminate it. If he makes an election at all, he does so when he decides not to proceed under the order for

specific performance, but to ask the court to terminate the contract: see the judgment of Sir Wilfrid Greene M.R. in *Austins of East Ham Ltd. v. Macey*, [1941] Ch. 338 [CA] quoted above. The fact is that the election argument proves too much. If it were correct it would deny the vendor not just the right to damages, but the right to "rescind" the contract, but there is no doubt that this right exists: what is in question is only the right on "rescission," to claim damages.

The authority most relied on to support this argument is in the end the passage already quoted from *Williams on Vendor and Purchaser*, 4th ed.—I have commented on this. The cases cited relate to different situations where an election might well be regarded as creating a new situation from which subsequent departure would be impossible. Cases relating to acceptance of defective goods, or to waiver or enforcement of forfeiture, or to a decision to sue one set of parties rather than another: *Scarf v. Jardine* (1882), 7 App. Cas. 345 [HL (Eng)], or to a case of fraud, to be asserted or waived: *Clough v. London and North Western Railway Co.* (1871), L.R. 7 Ex. 26, are examples, and there are many others, where an election creates, or recognises, a situation from which consequences flow and when the election is irrevocable. But this is clearly not such a case, or the right to "rescind" after an order for specific performance would not have been recognised.

So far as regards the subsidiary argument, it is equally the case that it proves too much, for if correct it would result in a denial of the undoubted power to "rescind." Moreover the argument is itself refuted by the action taken by the Court of Appeal itself, for after allowing the vendors to rescind they awarded damages under Lord Cairns' Act [*Chancery Amendment Act*, 1858 (UK), 21 & 22 Vict, c 27]. So clearly there was nothing inappropriate or unnecessary in granting the vendors "rescission" and damages. As Goff L.J. pointed out, it was not possible to leave the vendors to "work out" the decree for specific performance—their only remedy (if any) must lie in an award of damages.

In my respectful opinion therefore *Swycher's* case ... whether it should be regarded as resting upon *Henty v. Schröder* ... or upon an independent argument based on election was wrongly decided in so far as it denied a right to contractual damages and should so far be overruled. The vendors should have been entitled, upon discharge of the contract, on grounds of normal and accepted principle, to damages appropriate for a breach of contract.

There is one final point, on this part of the case, on which I should make a brief observation. Once the matter has been placed in the hands of a court of equity, or one exercising equity jurisdiction, the subsequent control of the matter will be exercised according to equitable principles. The court would not make an order dissolving the decree of specific performance and terminating the contract (with recovery of damages) if to do so would be unjust, in the circumstances then existing, to the other party, in this case to the purchaser. (To this extent, in describing the vendor's right to an order as "ex debito justitae" Clauson L.J. may have put the case rather too strongly: *John Barker & Co. Ltd. v. Littman*, [1941] Ch. 405 [CA], 412.) This is why there was, in the Court of Appeal, rightly, a relevant and substantial argument, repeated in this House, that the non-completion of the contract was due to the default of the vendors: if this had been made good, the court could properly have refused them the relief sought. But the Court of Appeal came to the conclusion that this non-completion, and the ultimate impossibility of completion, was the fault of the purchaser. I agree with their conclusion and their reasons on this point and shall not repeat or add to them.

It is now necessary to deal with questions relating to the measure of damages. The Court of Appeal, while denying the vendors' right to damages at common law, granted damages under Lord Cairns' Act. Since, on the view which I take, damages

can be recovered at common law, two relevant questions now arise. (1) Whether Lord Cairns' Act provides a different measure of damages from the common law: if so, the respondents would be in a position to claim the more favourable basis to them. (2) If the measure of damages is the same, on what basis they should be calculated.

Since the decision of this House, by majority, in *Leeds Industrial Co-operative Society Ltd. v. Slack*, [1924] A.C. 851 [HL (Eng)] it is clear that the jurisdiction to award damages in accordance with section 2 of Lord Cairns' Act (accepted by the House as surviving the repeal of the Act) may arise in some cases in which damages could not be recovered at common law: examples of this would be damages in lieu of a quia timet injunction and damages for breach of a restrictive covenant to which the defendant was not a party. To this extent the Act created a power to award damages which did not exist before at common law. But apart from these, and similar cases where damages could not be claimed at all at common law, there is sound authority for the proposition that the Act does not provide for the assessment of damages on any new basis. The wording of section 2 "may be assessed in such manner as the court shall direct" does not so suggest, but clearly refers only to procedure.

In *Ferguson v. Wilson* (1866), L.R. 2 Ch. 77, 88, Turner L.J. sitting in a court which included Sir Hugh Cairns himself expressed the clear opinion that the purpose of the Act was to enable a court of equity to grant those damages which another court might give; a similar opinion was strongly expressed by Kay J. in *Rock Portland Cement Co. Ltd. v. Wilson* (1882), 52 L.J. Ch. 214, and George Russell Northcote (ed.), *Fry on Specific Performance* [London: Stevens,] 6th ed. (1921), p. 602 is of the same opinion. In *Wroth v. Tyler*, [1974] Ch. 30, however, Megarry J., relying on the words "in lieu of specific performance" reached the view that damages under the Act should be assessed as on the date when specific performance could have been ordered, in that case as at the date of the judgment of the court. This case was followed in *Grant v. Dawkins*, [1973] 1 W.L.R. 1406 (Ch.). If this establishes a different basis from that applicable at common law, I could not agree with it, but in *Horsler v. Zorro*, [1975] Ch. 302, 316 Megarry J. went so far as to indicate his view that there is no inflexible rule that common law damages must be assessed as at the date of the breach. Furthermore, in *Malhotra v. Choudhury*, [1980] Ch. 52 [CA] the Court of Appeal expressly decided that, in a case where damages are given in substitution for an order for specific performance, both equity and the common law would award damages on the same basis—in that case as on the date of judgment. On the balance of these authorities and also on principle, I find in the Act no warrant for the court awarding damages differently from common law damages, but the question is left open on what date such damages, however awarded, ought to be assessed.

(2) The general principle for the assessment of damages is compensatory, i.e. that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach—a principle recognised and embodied in section 51 of the Sale of Goods Act 1893. But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.

In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost. Support for this approach is to be found in the cases. In *Ogle v. Earl Vane* (1867), L.R. 2 Q.B. 275; L.R. 3 Q.B. 272 the date was fixed by reference to the time when the innocent party, acting reasonably, went into the market; in *Hickman v.*

Haynes (1875), L.R. 10 C.P. 598 at a reasonable time after the last request of the defendants (buyers) to withhold delivery. In *Radford v. de Froberville*, [1977] 1 W.L.R. 1262 (Ch.), where the defendant had covenanted to build a wall, damages were held measurable as at the date of the hearing rather than at the date of the defendant's breach, unless the plaintiff ought reasonably to have mitigated the breach at an earlier date.

In the present case if it is accepted, as I would accept, that the vendors acted reasonably in pursuing the remedy of specific performance, the date on which that remedy became aborted (not by the vendors' fault) should logically be fixed as the date on which damages should be assessed. Choice of this date would be in accordance both with common law principle, as indicated in the authorities I have mentioned, and with the wording of the Act "in substitution for ... specific performance." The date which emerges from this is April 3, 1975—the first date on which mortgagees contracted to sell a portion of the property. I would vary the order of the Court of Appeal by substituting this date for that fixed by them—viz. November 26, 1974. The same date (April 3, 1975) should be used for the purpose of limiting the respondents' right to interest on damages. Subject to these modifications I would dismiss the appeal.

In an ordinary specific performance decree, should the plaintiff-purchaser have to pay interest to the defendant-vendor on the balance required to complete? Should the vendor have to account to the purchaser for the rents or use they have made of the property up to completion? Should the same rules that apply to non-commercial property apply to commercial property? The ramifications of *Wroth v Tyler*, [1974] Ch 30 and *Johnson v Agnew*, [1980] AC 367 HL (Eng) and the general topic of equitable damages are revisited in Chapter 11, Financial Relief in Equity, in Part Two, Equitable Remedies, of this book.

PROBLEM

The following is an extract from a trial judgment that you, on behalf of the defendants, have been instructed to appeal. What arguments would you make? What degree of success do you expect?

In this action, the plaintiff (vendor) sues for specific performance, and in the alternative damages, in respect of an agreement of purchase and sale of land, namely a restaurant operation. It is clear that the defendant is in breach of its obligation under the agreement of purchase and sale and the only question is that of the remedy to which the plaintiff is entitled. The agreement was to close in June 1976. At that time, the value of the property on the evidence produced was $150,000. In late 1977, the plaintiff resold the property for the price of $100,000. The contract price was $200,000. It is clear that the defendant realized shortly after he had made the agreement that he had overvalued the property and moreover that the property value was diminishing due to general market conditions. At first the plaintiff made no efforts to resell the property although it was clear to everyone that the value was declining. Apparently, the plaintiff had a sentimental attachment to the fact that pursuant to the agreement between the parties, the defendant undertook to carry on the restaurant business in the name of the plaintiff. He had worked long and hard to build up the business and although he had no commercial or economic reason, wanted his name to remain before the public as a restaurateur. Accordingly, upon the defendant's breach, he sued immediately for specific performance, but in 1977 was finally persuaded by his family and his solicitor to resell at a loss. Naturally, at the outset of the trial, the plaintiff abandoned his claim for specific performance and elected as his remedy damages. It appears to me that the crucial factor here is whether

> or not the party in the position of the plaintiff has kept the contract alive following its breach. In this case, the vendor had a right to specific performance and asserted that right. I do not think that he should be held to the risk of declining value of the property after the date of the breach. To award him anything but the difference between the contract price and the resale price would not achieve what is after all the goal of the contract remedies, namely, to put him in the position he would have been in had there not been any breach. Accordingly, there will be judgment for the plaintiff in the amount of $100,000.

When a buyer of property obtains an award of damages based on an increased value at the date of judgment, the question that arises is whether the buyer should give credit for interest on the unpaid purchase price. In *306793 Ontario Ltd in Trust v Rimes*, 1979 CanLII 1845 (ONCA), the Ontario Court of Appeal declined to reduce the buyer's damages on this account. The question was expressly left open in *Southcott Estates Inc v Toronto Catholic District School Board*, 2012 SCC 51.

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[S contracted with P to purchase a house under construction. The price was $205,000. S had $75,000 cash and was going to meet the balance of $130,000 by a mortgage on his present residence (worth $190,000 at that time). The vendor reneged on the transaction and transferred title in the property to a third party. S then commenced an action for specific performance of the contract with a claim in the alternative for damages. At the commencement of the trial, S elected to forgo his claim for specific performance and confined himself to a damages claim based on the difference between the purchase price of $205,000 and the value of the property at the date of trial ($325,000), an amount of $120,000 plus legal and appraisal fees incurred on the abortive transaction. (By that time, his own house, which he had retained, was worth $300,000.)

The trial judge, feeling bound by the decision of the Ontario Court of Appeal in *306793 Ontario Ltd in Trust v Rimes*, cited above, awarded the amount sought with the exception of the legal and appraisal fees. P appealed against this judgment, and S cross-appealed against the denial of his claim for the fees. The Ontario Court of Appeal allowed the appeal in part and also allowed the cross-appeal: 1994 CanLII 1194 (ONCA). In so doing, it held that *Rimes* had not obliged the trial judge to award $120,000. Rather, discounts had to be applied to that figure, reflecting the interest that S had notionally earned on his $75,000 in the meantime and the charges associated with carrying a mortgage of $130,000 to the date of trial as well as the legal costs that would have been associated with closing the transaction. However, this discount had to be offset by the legal and appraisal fees actually paid by the plaintiff. This produced an award of $80,810.21. Putting it another way, the plaintiff recovered damages on the following basis:

> ((current value of house – purchase price) + legal and appraisal fees) – (interest from completion date to date of trial on $70,000 + interest from completion date to date of trial on $130,000 mortgage + legal costs that would have been incurred on closing.)

P obtained leave to appeal to the Supreme Court of Canada. (There was no cross-appeal.) He contended that the damages should have been reduced even further because not only had S avoided costs as a result of the transaction not coming to fruition, but he had also benefited by the contemporaneous increase in value of his

existing residence. It was argued that, as a consequence, damages were more appropriately calculated by reference to either the current difference in value between the two properties ($25,000) or perhaps even the difference between the extent to which the two properties had risen in value ($5,000).

Among the facts found by the trial judge were the following: S had intended to sell his own house on the completion of the transaction, the $130,000 mortgage being a bridge to that event. Both parties were sophisticated property dealers. The house in question, while intended for occupation by the purchaser, was not "unique." She also suggested, though this was not argued by the defendant, that this was not a proper case for advancing a claim to specific performance.]

SOPINKA J (delivering the judgment of himself, Gonthier, Cory, McLachlin, Iacobucci, and Major JJ):

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IV. Analysis

[10] The trial judge expressed reservations about the propriety of an award of specific performance in this case. While I share those reservations and will return to the question as to the circumstances under which specific performance is an appropriate remedy, this appeal should be disposed of on the basis that specific performance was appropriate. The case was dealt with by the parties in both courts below and in this Court on the assumption that specific performance was an appropriate remedy.

[11] A party who is entitled to specific performance is entitled to elect damages in lieu thereof. The jurisdiction to award damages in lieu of specific performance was conferred on the Court of Chancery by *The Chancery Amendment Act, 1858* (U.K.), 21 & 22 Vict., c. 27 (known as *Lord Cairns' Act*). Although the Act was repealed, in *Leeds Industrial Co-operative Society Ltd. v. Slack*, [1924] A.C. 851, the House of Lords established that the jurisdiction to award damages in lieu of specific performance was maintained. This jurisdiction exists as part of the law of Ontario by virtue of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 99, which provides:

> 99. A court that has jurisdiction to grant an injunction or order specific performance may award damages in addition to, or in substitution for, the injunction or specific performance.

[12] *Lord Cairns' Act* permits damages to be awarded in some circumstances in which no claim for damages could be entertained at common law. See *Leeds*, *supra*, and *Wroth v. Tyler*, [1974] 1 Ch. 30, at p. 57. In cases in which damages could also be claimed at common law, the principles generally applicable are those of the common law. In *Johnson v. Agnew*, [1980] A.C. 367, at pp. 400-1, Lord Wilberforce stated that:

> (2) The general principle for the assessment of damages is compensatory, i.e., that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach—a principle recognised and embodied in section 51 of the *Sale of Goods Act 1893*. But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.

[13] The rationale for assessing the damages at the date of breach in the case of breach of contract for the sale of goods is that if the innocent purchaser is compensated on the basis of the value of the goods as of the date of breach, the purchaser can turn around and purchase identical or equivalent goods. The purchaser is therefore placed in the same financial situation as if the contract had been kept.

[14] Different considerations apply where the thing which is to be purchased is unique. Although some chattels such as rare paintings fall into this category, the concept of uniqueness has traditionally been peculiarly applicable to agreements for the purchase of real estate. Under the common law every piece of real estate was generally considered to be unique. Blackacre had no readily available equivalent. Accordingly, damages were an inadequate remedy and the innocent purchaser was generally entitled to specific performance. Given the flexibility of the rule at common law as to the date for the assessment of damages, it would not be appropriate to insist on applying the date of breach as the assessment date when the purchaser of a unique asset has a legitimate claim to specific performance and elects to take damages instead (see *Wroth v. Tyler*; *Johnson v. Agnew*; and *Mavretic v. Bowman*, 1993 CanLII 1270 (BC CA), [1993] 4 W.W.R. 329). The rationale that the innocent purchaser is fully compensated, if provided with the amount of money that would purchase an asset of the same value on the date of the breach, no longer applies. This disposition would not be a substitute for an order of specific performance. The order for specific performance may issue many months or even years after the breach. The value of the asset may have changed.

[15] Moreover, the claim for specific performance revives the contract to the extent that the defendant who has failed to perform can avoid a breach if at any time up to the date of judgment, performance is tendered. In cases such as the one at bar, where the vendor reneges in anticipation of performance, the innocent party has two options. He or she may accept the repudiation and treat the agreement as being at an end. In that event, both parties are relieved from performing any outstanding obligations and the injured party may commence an action for damages. Alternatively, the injured party may decline to accept the repudiation and continue to insist on performance. In that case, the contract continues in force and neither party is relieved of their obligations under the agreement. As is elaborated in *McGregor on Damages* (13th ed. 1972), at p. 149:

> Where a party to a contract repudiates it, the other party has an option to accept or not to accept the repudiation. If he does not accept it there is still no breach of contract, and the contract subsists for the benefit of both parties and no need to mitigate arises. On the other hand, if the repudiation is accepted this results in an anticipatory breach of contract in respect of which suit can be brought at once for damages. ...

Thus, the claim for specific performance can be seen as reviving the contract to the extent that the defendant who has failed to perform can avoid a breach if, at any time up to the date of judgment, performance is tendered. In this way, a claim for specific performance has the effect of postponing the date of breach.

[16] For all of these reasons, it is not inconsistent with the rules of the common law to assess damages as of the date of trial. It must be remembered that the rules of the common law did not contemplate awarding damages as a substitute for specific performance. The rules of the common law must be applied in light of the statutory imperative contained in s. 99 of the *Courts of Justice Act*. The damages that are awarded must be a true substitute for specific performance. This point is forcefully made by Megarry J. in *Wroth v. Tyler*. In that case, the purchaser had contracted for the purchase of a house for £6,000. The vendor defaulted. On the closing date, the property was worth £7,500. As of the date of trial the property was worth £11,500. In assessing damages as of the date of trial, Megarry J. stated, at p. 58:

> On the wording of the section, the power "to award damages to the party injured, ... in substitution for such ... specific performance," at least envisages that the damages awarded will in fact constitute a true substitute for specific performance.

> Furthermore, the section is speaking of the time when the court is making its decision to award damages in substitution for specific performance, so that it is at that moment that the damages must be a substitute. The fact that a different amount of damages would have been a substitute if the order had been made at the time of the breach must surely be irrelevant. In the case before me, I cannot see how £1,500 damages would constitute any true substitute for a decree of specific performance of the contract to convey land which at the time of the decree is worth £5,500 more than the contract price.

At p. 59 Megarry J. added:

> Yet on principle I would say simply that damages "in substitution" for specific performance must be a substitute, giving as nearly as may be what specific performance would have given. [Emphasis added.]

[17] This was also the basis upon which *Rimes* was decided by the Ontario Court of Appeal. The reasons for judgment of MacKinnon A.C.J.O. cite *Wroth v. Tyler* with approval, pointing out that that case was not overruled by *Johnson v. Agnew*, *supra*. I agree with that observation. In *Johnson v. Agnew*, Lord Wilberforce, speaking for the House of Lords, concluded that in view of the flexibility of the common law rule with respect to the date for the assessment of damages to which I have referred, the view taken by Megarry J. in *Wroth v. Tyler* was consistent with the common law.

[18] I therefore conclude that, in the circumstances of this case, the appropriate date for the assessment of damages is the date of trial as found by the trial judge. Technically speaking, the date of assessment should be the date of judgment. That is the date upon which specific performance is ordered. For practical purposes, however, the evidence that is adduced which is relevant to enable damages to be assessed will be as of the date of trial. It is not usually possible to predict the date of judgment when the evidence is given.

[19] The difference between the contract price and the value "given close to trial" as found by the trial judge is $120,000. I would not deduct from this amount the increase in value of the respondent's residence which he retained when the deal did not close. If the respondent had received a decree of specific performance, he would have had the property contracted for and retained the amount of the rise in value of his own property. Damages are to be substituted for the decree of specific performance. I see no basis for deductions that are not related to the value of the property which was the subject of the contract. To make such deductions would depart from the principle that damages are to be a true equivalent of specific performance.

[20] This approach may appear to be overly generous to the respondent in this case and other like cases and may be seen as a windfall. In my opinion, this criticism is valid if the property agreed to be purchased is not unique. ...

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[23] The trial judge was of the view in this case that the property was not unique. She stated that, "It was a building lot under construction which would be interchangeable in all likelihood with any number of others." Notwithstanding this observation, she felt constrained by authority to find that specific performance was an appropriate remedy. While I would be inclined to agree with the trial judge as to the inappropriateness of an order for specific performance, both parties were content to present the case on the basis that the respondent was entitled to specific performance. The case was dealt with on this basis by the Court of Appeal. In the circumstances, this Court should abide by the manner in which the case has been presented by the parties and decided in the courts below. In future cases,

under similar circumstances, a trial judge will not be constrained to find that specific performance is an appropriate remedy.

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Disposition

[27] In the result, the appeal is dismissed with costs.

[1] LA FOREST J: I have had the advantage of reading the reasons of my colleague, Justice Sopinka, and I agree with his proposed disposition in the circumstances of this case. However, given the assumption under which the case was argued, I prefer not to deal with the circumstances giving rise to entitlement to specific performance or generally the interpretation that should be given to the legislation authorizing the award of damages in lieu of specific performance. In considering modification to existing law, both these interdependent factors may well require examination, and the arguments in this case were not made in those terms.

This case is considered again in Chapter 10, Specific Performance. See also Chapter 11, Financial Relief in Equity.

NOTES AND QUESTIONS

1. Why might the defendant not have put in issue the legitimacy of the plaintiff's pursuit until trial of a claim for specific performance? What would have been the impact on the plaintiff's entitlement to damages of a finding that he did not have a legitimate interest in pursuing such a claim? What factors or considerations would have undermined the legitimacy of that claim?

2. Why does the court reject the defendant's contention that the plaintiff's expectations were defeated here only to the extent that the investment opportunity on the one house exceeded the investment value of the other house by only $5,000? Is there any justification for awarding more when a plaintiff before trial voluntarily forgoes his claim to specific performance even if there was initially a legitimate reason for making such a claim? By retaining his residence in a rising market, has the plaintiff not in effect mitigated his damages, particularly when it appears as though he was intending to occupy the house under construction as his residence? Are there any countervailing facts or assumptions that can be made to strengthen any claim for damages at the level awarded by the Court of Appeal and sustained by the Supreme Court of Canada?

VI. COLLATERAL BENEFITS

Often when plaintiffs are injured, they obtain benefits in relation to their loss. Someone suffering personal injury may receive medical treatment paid for by the government. Someone whose property is damaged may carry insurance that covers some or all of the damage. Someone who loses work because of wrongdoing may benefit from an unemployment insurance plan. When such collateral benefits are obtained, an issue arises whether the defendant should still have to compensate the plaintiff for losses covered by the benefits, or whether that would amount to an inappropriate windfall for the plaintiff.

While courts often refer to a "general rule" of avoiding double compensation, so that collateral benefits are not recoverable, in fact in most cases they are. It is seen as preferable for the plaintiff to be better off than for the defendant to obtain the benefit of the plaintiff's insurance policy or employment benefit. That said, the principle of subrogation has the potential to

eliminate the unfairness. The defendant compensates the plaintiff for losses, and the plaintiff returns any collateral benefits to the party with a right of subrogation. Much of this is now governed by statute, such as those excerpted below. Only where a right of subrogation does not exist, or where the party with that right chooses not to exercise it, does the problem remain.

At the margins, the courts continue to struggle in delineating the boundary between collateral benefits that are recoverable from the defendant and those that are not.

Insurance Act

RSNS 1989, c 231

Medical and Other Expense Coverage

140(1) Every motor vehicle liability policy shall provide

(a) medical, rehabilitation, loss of income, death and funeral expense benefits; and

(b) other benefits,

set forth in regulations made by the Governor in Council, which shall be printed in every policy under the heading "Section B—Accident Benefits."

(2) Where an insurer makes a payment under a provision of a contract of insurance referred to in subsection (1), the payment constitutes, to the extent of such payment, a release by the insured person or his personal representatives of any claim that the insured person or his personal representatives or a person claiming through or under him or by virtue of the *Fatal Injuries Act* [RSNS 1989, c 163] may have against the insurer and any other person who may be liable to the insured person or his personal representatives if that other person is insured under a contract of the same type as is specified in subsection (1), but nothing in the subsection precludes an insurer from demanding, as a condition precedent to payment, a release to the extent of the payment from the person insured or his personal representative or any other person.

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Subrogation

149(1) An insurer who makes any payment or assumes liability therefor under a contract is subrogated to all rights of recovery of the insured against any person and may bring action in the name of the insured to enforce those rights [as inserted by SNS 1966, c 79, s 4].

[Other provinces have similar, though not identical, provisions.]

Health Services and Insurance Act

RSNS 1989, c 197

Right of Recovery by Injured Person

18(1) Where, as a result of the negligence or wrongful act or omission of another, a person suffers personal injuries for which the person received insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment, home-care services, care for a person in a home for special care or child-care facility to which the Province has made

payment, insured professional services under this Act, or any other care, services or benefits designated by regulation, including the future costs of any such care, services or benefits, the person

(a) has the same right to recover the sum paid for the care, services or benefits against the person who was negligent or was responsible for the wrongful act or omission as the person would have had if that person had been required to pay for the care, services or benefits; and

(b) if the person makes any claim for the personal injuries suffered against the person who was negligent or who was responsible for the wrongful act or omission, shall claim and seek to recover the costs of the care, services or benefits.

(2) Where, under subsection (1), a person recovers a sum in respect of insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment or insured professional services received by the person under this Act, the person shall forthwith pay the sum recovered to the Minister.

(3) His Majesty in right of the Province shall be subrogated to the rights of a person under this Section to recover any sum paid by the Minister for insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment or insured professional services provided to that person, and an action may be maintained by His Majesty, either in His own name or in the name of that person, for the recovery of such sum.

[Other provinces have similar, though not identical, provisions.]

IBM Canada Ltd v Waterman

2013 SCC 70

[Waterman, aged 65, was an employee of IBM and a member of an IBM-defined benefit pension plan to which the employer had contributed a percentage of Waterman's salary over many years. IBM gave Waterman two months' notice of dismissal, whereupon he became entitled to a full pension. In an action for wrongful dismissal, the trial judge found that 20 months was the appropriate notice period and assessed damages accordingly, making no deduction for the pension benefits. Appeals to the BC Court of Appeal and to the Supreme Court of Canada were dismissed.]

CROMWELL J (LeBel, Fish, Abella, Moldaver, Karakatsanis, and Wagner JJ concurring):

I. Introduction

[1] When IBM Canada Ltd. wrongfully dismissed its long-time employee, Richard Waterman, he had to start drawing his pension. The question before the Court is whether his receipt of those pension benefits reduces the damages otherwise payable by IBM for wrongful dismissal. The British Columbia courts decided not to deduct the pension benefits and IBM appeals.

[2] The question looks straightforward enough at first glance. The general rule is that contract damages should place the plaintiff in the economic position that he or she would have been in had the defendant performed the contract. IBM's obligation was to give Mr. Waterman reasonable notice of dismissal or pay in lieu of it. Had it given him reasonable working notice, he would have received only his regular

salary and benefits during the period of notice. As it is, he in effect has received both his regular salary and his pension for that period. It therefore seems clear, under the general rule of contract damages, that the pension benefits should be deducted. Otherwise, Mr. Waterman is in a better economic position than he would have been in had there been no breach of contract.

[3] On closer study, however, the question raised on appeal is not as simple as that. The case in fact raises one of the most difficult topics in the law of damages, namely when a "collateral benefit" or a "compensating advantage" received by a plaintiff should reduce the damages otherwise payable by a defendant. The law has long recognized that applying the general rule of damages strictly and inflexibly sometimes leads to unsatisfactory results. The question is how to identify the situations in which that is the case.

[4] In my view, employee pension payments, including payments from a defined benefit plan as in this case, are a type of benefit that should generally not reduce the damages otherwise payable for wrongful dismissal. Both the nature of the benefit and the intention of the parties support this conclusion. Pension benefits are a form of deferred compensation for the employee's service and constitute a type of retirement savings. They are not intended to be an indemnity for wage loss due to unemployment. The parties could not have intended that the employee's retirement savings would be used to subsidize his or her wrongful dismissal. There is no decision of this Court in which a non-indemnity benefit to which the plaintiff has contributed, such as the pension benefits in issue here, has ever been deducted from a damages award.

[5] I would dismiss IBM's appeal and affirm the result arrived at by the British Columbia courts.

II. Overview of Facts and Proceedings

[6] When IBM dismissed Mr. Waterman without cause on March 23, 2009, he was 65 years old and had 42 years of service. He was a long-standing member of IBM's defined benefit pension plan, which I will refer to simply as "the plan." IBM contributed a percentage of his salary to the plan on his behalf and the plan guaranteed specific benefits, which became vested over time, upon retirement.

[7] At the time of the termination, there was no longer a mandatory retirement policy in place for IBM employees. However, Mr. Waterman was entitled to a full pension under the plan and his termination had no impact on the amount of his pension benefits. IBM told Mr. Waterman that on termination, he *would* be treated as a retiree and that he *must* begin receiving monthly pension payments as of that date.

[8] An employee like Mr. Waterman, who is entitled to retire with his full pension but has not reached the age of 71, cannot receive both pension and employment income from IBM at the same time. That changes at age 71, when he or she must start drawing benefits and may continue working and earning employment income from IBM. We have not been referred to any provision in the plan that would prevent a retiree, regardless of age, from receiving benefits under the plan and employment income from a different employer.

[9] Mr. Waterman sued for wrongful dismissal and the matter proceeded to summary trial in the Supreme Court of British Columbia. The trial judge, Goepel J., found that the appropriate period of notice was 20 months. IBM's position was (and is) that Mr. Waterman's pension benefits (approximately $2,124 per month starting June 1, 2009) should be deducted from the salary and benefits otherwise payable during this period. The trial judge rejected this position ... .

[10] IBM's appeal from this decision was dismissed by the British Columbia Court of Appeal. Writing for the court, Prowse J.A. relied on this Court's judgment in *Sylvester v. British Columbia*, 1997 CanLII 353 (SCC), [1997] 2 S.C.R. 315. However, she concluded that the distinctions between the benefits and the intentions of the parties in the two cases led to a different conclusion in this case: 2011 BCCA 337, 20 B.C.L.R. (5th) 241.

III. Positions of the Parties

[11] On its appeal to this Court, IBM makes two main points. It submits, first, that the result reached by the British Columbia courts is at odds with the compensatory goal of damages for wrongful dismissal. IBM points out that even if it had given Mr. Waterman adequate working notice of his termination, he would not have received both his employment income and his pension benefits during the notice period. By awarding him damages for the full notice period without deduction of the pension benefits received during that period, the British Columbia courts have placed him in a better economic position than he would have been in had IBM performed the contract. Second, IBM maintains that the Court in *Sylvester* held that these sorts of benefits are part of an integrated employment relationship and, unless deducted, the employee collecting them would receive greater compensation than would an employee lawfully dismissed with working notice.

[12] Mr. Waterman urges us to reject IBM's position. He submits that the pension is the property of the employee that is earned through work and consists of a benefit that is part of the employee's remuneration package. The pension is like a "nest egg," RRSP or savings account, which IBM could not take advantage of to offset the damages awarded. Mr. Waterman could have transferred the value of his pension to another vehicle if he had left employment with IBM before reaching the age of 65 and his retirement savings would consequently have been out of reach. As for the intention of the parties, there is no provision in the pension plan expressly prohibiting concurrent reception of salary and pension benefits. It was therefore up to the courts to determine the parties' intention, which the Court of Appeal correctly did in its decision.

IV. Analysis

[13] In my respectful view, both of IBM's main arguments must be rejected. The general principle of compensation is not a full answer to the issue. The question is whether this case falls within an exception to it and in my view it does. The Court's decision in *Sylvester* is distinguishable and, in fact, its reasoning supports the conclusion that the pension benefits should not be deducted.

[14] There are three key matters that need to be considered in order to answer the question posed by the appeal. I will set them out here with a summary of my conclusions.

A. Why Is There a "Collateral Benefit" Problem in This Case?

[15] A collateral benefit is a gain or advantage that flows to the plaintiff and is connected to the defendant's breach. This connection may exist either because there is a "but for" causal link between the breach and the receipt of the benefit or because the benefit was intended to provide the plaintiff with an indemnity for the type of loss caused by the breach. The problem raised by collateral benefits is the question of whether they should be deducted from the damages otherwise payable by the defendant on account of the breach. This case raises a collateral

benefit problem because there is a "but for" causal link between the IBM's breach of contract and Mr. Waterman's receipt of the benefit. He would not have received the pension benefits and full salary in lieu of working notice "but for" the dismissal.

B. Is the Compensation Principle the Answer to the Problem?

[16] The principle that the defendant should compensate the plaintiff only for his or her actual loss is not, on its own, an answer to the problem. There are exceptions to the strict application of this principle, the most important of which is the exception for private insurance and other benefits which, for this purpose, are considered analogous to private insurance. That exception applies not only to insurance benefits in the strict sense, but also to other benefits such as pension payments to which an employee has contributed and which were not intended to be an indemnity for the type of loss suffered as a result of the defendant's breach.

C. Does the Court's Decision in *Sylvester* Support IBM's Position That the Pension Benefits Must Be Deducted?

[17] In my view, it does not. *Sylvester* is distinguishable. The reasoning in *Sylvester* in fact supports the conclusion that Mr. Waterman's pension benefits should *not* be deducted from the wrongful dismissal damages otherwise payable by IBM.

[18] My more detailed analysis follows.

A. Why Is There a Collateral Benefit Problem in This Case?

[19] It will be helpful to start by explaining what a collateral benefit problem is and why we have one here.

(1) What Is a Collateral Benefit Problem?

[20] In general terms, there is a collateral benefit when a source other than the damages payable by the defendant ameliorates the loss suffered by the plaintiffs as a result of the defendant's breach of legal duty: J. Cassels and E. Adjin-Tettey, *Remedies: The Law of Damages* (2nd ed. 2008), at p. 416. For example, if an employee is wrongfully dismissed, but receives employment insurance benefits, those benefits are a collateral benefit. The problem is whether they should be deducted from the damages the defendant will pay for wrongful dismissal.

[21] If we simply apply the compensation principle—that the plaintiff should recover his or her actual economic loss but not more—the answer is straightforward. If we do not deduct the collateral benefit, the plaintiff will be in a better position than he or she would have been in had the employment contract been performed. To apply the compensation principle, we should consider not only the plaintiff's losses but also any gains that flow from the defendant's breach. The collateral benefit problem asks whether we should apply the compensation principle and deduct or depart from it and not deduct.

[22] There is considerable overlap between the collateral benefit problem and the questions of mitigation. The main distinction is this: mitigation is concerned with whether the plaintiff acted reasonably after the defendant's breach in order to reduce losses. The collateral benefit question, in contrast, is concerned with whether some compensating advantage that was in fact received by the plaintiff, most often as a result of arrangements made before the breach, should be taken into account in assessing the plaintiff's damages: see A.I. Ogus, *The Law of Damages* (1973), at pp. 87-88.

(2) When Does a Collateral Benefit Problem Arise?

[23] Not all benefits received by a plaintiff raise a collateral benefit problem. Before there is any question of deduction, the receipt of the benefit must constitute some form of excess recovery for the plaintiff's loss and it must be sufficiently connected to the defendant's breach of legal duty.

[24] For example, there is no excess recovery if the party supplying the benefit is subrogated to—that is, steps into the place of—the plaintiff and recovers the value of the benefit. In those circumstances, the defendant pays the damages he or she has caused, the party who supplied the benefit is reimbursed out of the damages and the plaintiff retains compensation only to the extent that he or she has actually suffered a loss: see, e.g., *Cunningham v. Wheeler*, 1994 CanLII 120 (SCC), [1994] 1 S.C.R. 359, at pp. 386-88, *per* McLachlin J., as she then was, dissenting in part. (The employment insurance example that I mentioned earlier is now resolved in this way by statute: see below, at para. 44.)

[25] Even if there is some form of excess recovery, however, there is only a collateral benefit problem if the benefit is sufficiently connected to the defendant's breach. This requirement of sufficient connection serves a purpose with respect to collateral benefits that is analogous to that served by rules of causation and remoteness with respect to damages. Just as plaintiffs cannot recover all losses, no matter how loosely related to the defendant's breach or how far beyond the parties' reasonable contemplation, so too the defendant does not get credit for all benefits accruing to the plaintiff, no matter how loosely connected to the defendant's wrongful conduct.

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[32] To sum up, a potential compensating advantage problem exists if the plaintiff receives a benefit that would result in compensation of the plaintiff beyond his or her actual loss and *either* (a) the plaintiff would not have received the benefit but for the defendant's breach, *or* (b) the benefit is intended to be an indemnity for the sort of loss resulting from the defendant's breach. These factors identify a potential problem with a compensating advantage, but do not decide how it should be resolved.

(3) Why Is There a Problem About Deduction in This Case?

[33] A compensating advantage issue arises in this case. First, there is an element of excess compensation. Mr. Waterman has received his full pension benefits and, in addition, the salary he would have earned had he worked during the period of reasonable notice (less an allowance for his earnings from other employment). Had IBM not breached the contract of employment and instead given him working notice, he would have received only his salary during that period and not his pension. Second, there is a "but for" causal relationship between IBM's breach of contract and Mr. Waterman's receipt of the pension benefits. One could say that it was the pension plan rather than IBM's breach of contract that gave rise to the benefit, but it is artificial to suggest that there is no "but for" causal link between IBM's breach of contract and Mr. Waterman's receipt of his pension benefits: "but for" the breach, there would have been no termination and, "but for" the termination, Mr. Waterman would not have started to collect his pension. Given that there was double recovery and that the benefit would not have arisen but for IBM's breach, we must decide whether the benefit should or should not be deducted from damages otherwise payable by IBM.

B. Is the Compensation Principle the Answer to the Problem?

[34] IBM's first main point is that the compensation principle requires the pension benefits to be deducted. Mr. Waterman is better off as a result of the damage award than he would have been if IBM had given reasonable working notice. It follows, in IBM's submission, that the pension benefits must be deducted so that the damage award places Mr. Waterman in the economic position he would have been in had IBM given him reasonable working notice. This is essentially the position adopted by my colleague Rothstein J.

[35] While I agree that the damage award is a departure from the compensation principle, this in itself is not an answer to the problem posed by the appeal. As I will explain, the compensation principle cannot be, and is not, applied strictly or inflexibly in a manner that is divorced from other considerations. The question is whether the compensation principle should be strictly applied in this case. In my view, it should not. To explain why, it is helpful to look first at why the compensation principle is not applied strictly, or at all, in various situations.

(1) When Does the Compensation Principle Not Apply Strictly?

[36] Considerations other than the extent of the plaintiff's actual loss shape the way the compensation principle is applied and there are well-established exceptions to it. For example, the rule that contract damages compensate only the plaintiff's actual loss is not the only rule that applies to assessing contract damages. As a leading English case put it, "Damages are measured by the plaintiff's loss, not the defendant's gain. But the common law, pragmatic as ever, has long recognised that there are many commonplace situations where a strict application of this principle would not do justice between the parties. Then compensation for the wrong done to the plaintiff is measured by a different yardstick": *Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.), at p. 278. In some cases, for example, an award of damages in contract may be based on the advantage gained by the defendant as a result of the breach rather than the loss suffered by the plaintiff: see, e.g., *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 25. The rule that damages are measured by the plaintiff's actual loss, while the general rule, does not cover all cases. In addition, through the doctrines of remoteness and mitigation, the compensation principle gives way to considerations of reasonableness in relation to whether the plaintiff's expectations of the contract and his or her conduct in response to the breach of it were reasonable.

[37] Finally, there are well-recognized exceptions in which benefits flowing to plaintiffs are not taken into account even though the result is that they are better off, economically speaking, after the breach than they would have been had there been no breach. These exceptions are ultimately based on factors other than strict compensatory considerations. As Lord Reid put it in *Parry* [*v. Cleaver*, [1970] A.C. 1 (H.L.)], "[t]he common law has treated [the deductibility of compensating advantages] as one depending on justice, reasonableness and public policy": p. 13. Or, as McLachlin J. wrote, this issue raises a question of "basic policy": *Ratych* [*v. Bloomer*, 1990 CanLII 97 (SCC)], at p. 959.

(2) What Factors Help to Identify When Compensating Advantages Are Not Deducted?

[38] What are some of these considerations of justice, reasonableness and policy? An answer may be found by looking at the two well-established situations

in which compensating advantages are not deducted: charitable gifts and private insurance.

(a) Charitable Gifts

[39] The first is the less controversial. The rule is that charitable gifts made to the plaintiff are generally not deductible from the plaintiff's damages even though they were made as a result of and in response to the injury or loss caused by the defendant's wrong: see, e.g., Waddams [S.M. Waddams, *The Law of Damages* (5th ed. 2012)], at paras. 3.1550-3.1560; Cassels and Adjin-Tettey, at pp. 420-21. Two concerns explain the exception: first, that if these charitable gifts were deducted, "the springs of private charity would be found to be largely, if not entirely, dried up" and, second, that it rarely makes practical sense to spend the time and effort required to take these sorts of gifts into account: *Redpath v. Belfast and County Down Railway* (1947), N.I. 167 (K.B.), at p. 170. See also Ogus, at p. 223; Waddams, at para. 3.1550; Cassels and Adjin-Tettey, at pp. 420-21; *Cunningham*, at p. 370.

[40] These explanations of the exception suggest we may take into account the broader incentives created by deducting or not deducting a benefit as well as pragmatic considerations relating to whether the applicable rule is clear, coherent and easy to apply: *Cunningham*, at p. 388, *per* McLachlin J.

(b) Private Insurance

[41] A second and more controversial exception relates to payments from the plaintiff's private insurance. The core of the exception is well established: benefits received by a plaintiff through private insurance are not deductible from damage awards. However, both the precise scope and the rationale of the exception have been the subject of judicial and scholarly debate. Its practical importance is limited given the widespread use of subrogation, which avoids the compensating advantage issue altogether. While the exception more typically arises in tort cases, it has also been applied in contract actions, including actions for wrongful dismissal: *Jack Cewe Ltd. v. Jorgenson*, 1980 CanLII 177, [1980] 1 S.C.R. 812. The approach in both areas of law is the same in principle, although the terms of the contract and the dealings between the parties will inform the analysis in contract cases.

[42] One area of controversy relates to the sorts of benefits which fall within the private insurance exception. Does it apply to both indemnity and non-indemnity insurance? Does it extend to disability benefits, employment insurance or pensions payable on retirement? The Court has held that the answer to all of these questions is yes, but not, as we shall see, without well-reasoned dissent. In short, the so-called private insurance exception has been applied by analogy to a variety of payments that do not originate in a contract of insurance.

[43] In *Canadian Pacific Ltd. v. Gill*, 1973 CanLII 2 (SCC), [1973] S.C.R. 654, the Court applied the insurance exception to prevent deduction of the present value of Canada Pension Plan benefits available to surviving dependents from the damages awarded in a fatal injuries claim. Spence J., for the Court, held that the payments were "so much of the same nature as contracts of insurance that they also should be excluded from consideration when assessing damages under the provisions of that statute": p. 670; see also *Grand Trunk Railway v. Beckett* (1887), 16 S.C.R. 713, at p. 714, and *Quebec Workmen's Compensation Commission v. Lachance*, 1971 CanLII 184 (SCC), [1973] S.C.R. 428, at pp. 433-34.

[44] In *Guy v. Trizec Equities Ltd.*, 1979 CanLII 232 (SCC), [1979] 2 S.C.R. 756, Mr. Guy's injury led to his retirement and receipt of pension benefits. They were not deducted from damages for loss of earnings. Ritchie J., for the Court, viewed

pensions, whether contributory or non-contributory, as flowing from the employee's work and part of what the employer was prepared to pay for the employee's services. He agreed with Lord Reid's conclusion, in *Parry*, as quoted by Spence J., in *Gill*, that "[t]he fact that they flow from past work equates them to rights which flow from an insurance privately effected by [the employee]": *Guy*, at p. 763. Similarly, in *Jack Cewe*, the Court did not deduct a dismissed employee's unemployment insurance benefits from his wrongful dismissal damages. The benefits, wrote Pigeon J., for the Court, were a consequence of the contract of employment making them similar to contributory pension benefits: p. 818. (The collateral benefit issue that arose in *Jack Cewe* is now addressed by s. 45 of the *Employment Insurance Act*, S.C. 1996, c. 23, which states that a claimant who receives benefits and is subsequently awarded damages for the same period, "shall pay to the Receiver General as repayment of an overpayment of benefits an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid.")

[45] In *Ratych*, the Court found that sick leave benefits should be deducted from damages otherwise payable for loss of earning by the party whose negligence was responsible for the injuries. For the majority, McLachlin J. wrote that it may well be appropriate not to deduct benefits where the employee can show a contribution equivalent to payment of an insurance premium. In other words, benefits may not be deductible when they come about because the plaintiff has prudently obtained and paid for insurance. However, that was not the case in *Ratych*, making it a different situation than one in which the benefits flow from the employer/employee relationship: pp. 973-74. In *Cunningham*, disability insurance benefits payable under the terms of collective agreements were held not to be deductible because there was evidence that the plaintiffs had paid for these disability plans through reduced wages. The Court's earlier decision in *Ratych* was distinguished on this basis.

[46] Finally, in *Sylvester*, non-contributory disability benefits received during the notice period were deducted from wrongful dismissal damages otherwise payable. The benefits were intended to be an indemnity for lost wages while the plaintiff was unable to work, the plaintiff had not contributed to acquire the benefit, and policy considerations favoured deduction.

[47] The two cases in which the private insurance exception was *not* applied (*Ratych* and *Sylvester*) involved benefits that were intended to be an indemnity for the type of loss that resulted from the defendant's breach and to which the plaintiff had not contributed. Retirement pension benefits, which are not an indemnity for loss of wages resulting from inability to work and to which the employee contributes directly or indirectly, have been held by this Court and others to fall within the private insurance exception: *Guy*; *Gill*; *Chandler v. Ball Packaging Products Canada Ltd.* (1992), 2 C.C.P.B. 101 (Ont. Ct. J. (Gen. Div.)), aff'd (1993), 2 C.C.P.B. 99 (Ont. Ct. J. (Div. Ct.)); *Emery v. Royal Oak Mines Inc.* (1995), 1995 CanLII 7074 (ON SC), 24 O.R. (3d) 302 (Gen. Div.); *Parry*.

[48] IBM relies on *Canadian Human Rights Commission v. Canada (Attorney General)*, 2003 FCA 86, 301 N.R. 321, but, in my view, this reliance is misplaced. The human rights complainant in that case, Master Corporal (retired) Carter, complained that his release from the Canadian Forces by virtue of his age constituted discrimination; in other words, his claim was not that his employer had failed to give him reasonable notice of termination, but that it could not lawfully terminate him. Following his release from service, a proper legislative basis for compulsory retirement was put in place, thus ending the discrimination. The question was whether the compensation awarded by the Human Rights Tribunal for lost wages

during the period of discrimination should be reduced by the amount of pension benefits received during that period. The Federal Court of Appeal held that they should. However, it specifically declined to decide the case on the basis of the private insurance exception: para. 20. Instead, it reasoned that Master Corporal Carter should be treated as a member of the regular force during the period of discrimination. But, by virtue of the applicable provisions of the *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17, a person may *either* be a member of the regular armed forces contributing to the superannuation account *or* a person who has ceased to be a member and entitled to benefits, but not both at the same time. On that basis, his claim for both pension benefits and his full salary was inconsistent with the nature of his claim and the governing legislation. This reasoning cannot apply to this case, however. The private insurance exception applies to wrongful dismissal actions: *Jack Cewe*. In addition, the contractual provisions here, unlike the statute that governed Master Corporal Carter's case, do not have any general bar against receiving full pension entitlement and employment income.

[49] A second area of controversy concerns the basis of the private insurance exception. It has been explained on various grounds, which may be grouped under three main headings. One is concerned with the strength of the causal connection between receipt of the benefit and the defendant's breach, a second relates to the nature of the benefit, and a third concerns a variety of policy considerations that may be served by either deducting or not deducting the benefit.

[50] Before turning to those issues, however, I must address a contention advanced by my colleague Rothstein J. He maintains that application of the collateral benefit or private insurance exception is not appropriate where the plaintiff's cause of action and his right to a particular benefit arise from the same contract. I respectfully do not accept that there is or should be any such categorical "single contract" rule in relation to compensating advantages. This proposition is not consistent with this Court's jurisprudence.

[51] In *Jack Cewe*, unemployment insurance benefits were not deducted from wrongful dismissal damages. The Court held that the benefits were the "consequence of the contract of employment," making them similar to contributory pension benefits: p. 818. Thus, although the Court considered that the benefits and the claim for damages arose as a consequence of the same contract, the benefits were *not* deducted from the wrongful dismissal damages. Thus, my colleague's proposition is contradicted by a leading authority from this Court on the deduction of benefits from wrongful dismissal damages.

[52] The *Sylvester* case, from this Court, does not lay down any such broad "single contract" rule. If that had been the Court's view, it would have provided a much simpler solution to the issue in *Sylvester* than the one it unanimously adopted. Of course, in *Sylvester*, the sick leave benefits and the claim for wrongful dismissal damages both arose from the contract of employment, but the Court did not rely on, or even mention, the broad "single contract" rule advanced by my colleague. On the contrary, Major J., writing for the Court, was careful *not* to articulate any broad "single contract" rule in relation to compensating advantages. He stated that

> [t]here may be cases where an employee will seek benefits in addition to damages for wrongful dismissal on the basis that the disability benefits are akin to benefits from a private insurance plan for which the employee has provided consideration. This is not the case here. ... The issue whether disability benefits should be deducted from damages for wrongful dismissal where the employee has contributed to the disability benefits plan was not before the Court. [Emphasis added; para. 22.]

Of course, whether the employee contributes to the benefits or not, they equally arise under the employment contract. The fact that the Court explicitly left this point open is inconsistent with the Court intending to adopt the broad "single contract" rule espoused by Rothstein J. *Sylvester* teaches that, where a cause of action and a benefit arise under the contract of employment, we must look first to that contract to determine the issue of whether an employment benefit should be deducted from wrongful dismissal damages. As in *Sylvester*, Mr. Waterman's contract of employment is silent on this issue, so we must attempt to discern the parties' intentions in light of the express terms of the contract of employment.

[53] I return to the three areas of controversy in relation to the basis of the private insurance exception.

(i) Strength of Connection to the Defendant's Breach

[54] The strength-of-connection factor has often been referred to in the cases. The argument is that private insurance benefits (and benefits considered analogous to them) should not be deducted because they result from the plaintiff's contract of insurance, not from the defendant's wrongful act. This was part of the reasoning in *Bradburn v. Great Western Railway Co.* (1874), L.R. 10 Ex. 1, but at the distance of 140 years, this analysis seems artificial. Moreover, scholars have pointed out that decisions about legal as opposed to factual causation often simply disguise the true policy reasons underlying the decisions: see, e.g., Ogus, at p. 94; Burrows [A Burrows, *Remedies for Torts and Breach of Contract* (3rd ed 2004)], at p. 162. In the leading English case on the private insurance exception, *Parry*, Lord Pearce commented that strict principles of causation do not provide a "satisfactory line of demarcation" between benefits that are and are not deductible: p. 34. While, as discussed, considering the connection between the breach and the benefit helps to identify that there is an issue about whether the benefit should be deducted, principles of causation do not provide reliable markers of whether a benefit should be deducted or not.

(ii) The Nature and Purpose of the Benefit

[55] The nature and purpose of the benefit, on the other hand, is often a better explanation of why private insurance benefits should or should not be deducted. Two factors relating to the nature of the benefit have been particularly important: whether the benefit is an indemnity for the loss caused by the defendant's breach and whether the plaintiff has directly or indirectly paid for the benefit.

[56] I will not attempt to lay down general principles that will cover all possible types of benefits. However, as we shall see, a review of this Court's jurisprudence supports the following general propositions (subject, of course, to statutory or contractual provisions to the contrary).

- Benefits have *not* been deducted if (a) they *are not* intended to be an indemnity for the sort of loss caused by the breach *and* (b) the plaintiff has contributed to the entitlement to the benefit: *Gill*; *Guy*.
- Benefits have *not* been deducted where the plaintiff has contributed to an indemnity benefit: *Jack Cewe*; *Cunningham*.
- Benefits *have* been deducted when they *are* intended to be an indemnity for the sort of loss caused by the breach but the plaintiff has not contributed in order to obtain entitlement to the benefit: *Sylvester*; *Ratych*.

[57] The pension benefit in this case was not intended to be an indemnity for lost wages and Mr. Waterman contributed to the acquisition of his pension through his years of service. This, no doubt, is why it has never been argued that the benefits

should be deducted under the principle of mitigation. The pension benefit, therefore, is the type of benefit which should not be deducted. The reasoning leading me to this conclusion follows.

[58] I begin my review with the decision of the House of Lords in *Parry*, which is the foundation of much of the Canadian jurisprudence. Lord Reid ultimately based his conclusion that the benefit (a pension) should not be deducted based on its "intrinsic nature": "A pension is intrinsically of a different kind from wages. ... [W]ages are a reward for contemporaneous work, but ... a pension is the fruit, through insurance, of all the money which was set aside in the past in respect of his past work. They are different in kind": p. 16. Lord Pearce also considered the nature and purpose of the benefit when he asked: "Is there anything else in the nature of these pension rights derived from work which puts them into a different class from pension rights derived from private insurance? Their 'character' is the same": p. 37. Lord Wilberforce also focused on the nature of the pension benefit, noting that it did not prevent the injured officer from taking other paid employment, whether it be for a wage that was less, equal to or more than his police officer's salary: p. 42.

[59] The nature and purpose of the benefit was central to the minority's reasoning in *Cunningham*. While the majority was concerned with authority, fairness and deterrence, the minority refocused the analysis on the nature of the benefit, distinguishing between "indemnity" and "non-indemnity" insurance. The former should be deductible, while the latter should not:

> This distinction is critical to a discussion of collateral benefits. If the insurance money is not paid to indemnify the plaintiff for a pecuniary loss, but simply as a matter of contract on a contingency, then the plaintiff has not been compensated for any loss. He may claim his entire loss from the negligent defendant without violating the rule against double recovery. [pp. 371-72]

[60] Importantly, the minority judges accepted that the dominant tide of the jurisprudence in the common law world is that non-indemnity pension benefits should not be deducted: *Cunningham*, at p. 376. Although they mostly do not rely on the private insurance exception, Commonwealth decisions conclude that pension benefits should not be deducted from a damages award because pension benefits are not meant to compensate the plaintiff for the injury or breach of contract or to act as wage replacement. See for example: *National Insurance Co. of New Zealand Ltd. v. Espagne* (1961), 105 C.L.R. 569; *Graham v. Baker* (1961), 106 C.L.R. 340; *Parry*; *Smoker v. London Fire and Civil Defence Authority*, [1991] 2 A.C. 502 (H.L.). In *Hopkins v. Norcross plc*, [1993] 1 All E.R. 565 (Q.B.), the High Court applied this reasoning to the deductibility of pension benefits in a wrongful dismissal suit. The reasoning is also consistent with the decision of the U.K. Employment Appeal Tribunal in *Knapton v. ECC Card Clothing Ltd.*, [2006] I.C.R. 1084. The non-deductibility of pension benefits was affirmed by the New Zealand Court of Appeal in *Gilbert v. Attorney-General*, [2010] NZCA 421, 8 N.Z.E.L.R. 72. This is consistent with the approach in *Guy*, discussed earlier, which concerned pension benefits that were clearly not intended to be an indemnity for loss of earnings due to an inability to work. They were held not to be deductible from damages for loss of earnings payable by those responsible for the plaintiff's inability to work.

[61] The nature of the benefit was also an important factor in the Court's decision to deduct employer-funded disability payments from wrongful dismissal damages in *Sylvester*. The Court's analysis looked first to the nature and purpose of the benefit and, in particular, to the question of whether the benefit is in the nature of an indemnity for the sort of loss caused by the defendant's breach of contract.

The fact that the benefit was intended to be an indemnity for wage loss was one of the reasons for the Court's conclusion that the benefit should be deducted.

[62] Reliance on the distinction between indemnity and non-indemnity benefits is sound in principle. As McLachlin J. pointed out in her dissenting reasons in *Cunningham*, if the benefit "is not paid to indemnify the plaintiff for a pecuniary loss, but simply as a matter of contract on a contingency," the benefit cannot be seen as having compensated the plaintiff for that pecuniary loss: pp. 371-72. If that is the case, the arguments in favour of deducting the benefit are weaker in the sense that IBM is asking to deduct apples from oranges.

[63] The fact that Mr. Waterman's pension comes from a defined benefit plan does not change its nature as a non-indemnity benefit.

[64] The Court in *Sylvester* also considered another factor—that the plaintiff had not contributed to obtain the benefit by paying for it directly or indirectly—in support of its conclusion that the benefit should be deducted from the damages. This factor has often been mentioned and relied on in the cases.

[65] For example, the Court first applied *Parry* in the 1973 case of *Gill*, and reaffirmed it in *Guy*. In both cases, the Court emphasized that the plaintiff had directly or indirectly paid for the benefit in question. As Ritchie J., writing for the Court, put it in *Guy*:

> ... this contributory pension is derived from the appellant's contract with his employer and ... the payments made pursuant to it are akin to payments under an insurance policy. This view is in accord with the judgment of the House of Lords in *Parry v. Cleaver*, which was expressly approved in this Court in the reasons for judgment of Mr. Justice Spence in *Canadian Pacific Ltd. v. Gill*. ... [p. 762]

[66] This line of reasoning was repeated in *Jack Cewe*, which held that contributory unemployment insurance benefits were not deductible from wrongful dismissal damages. This factor was also an important one in *Cunningham*. As Cory J. put it, on behalf of the majority: "The application of the insurance exception to benefits received under a contract of employment should not be limited to cases where the plaintiff is a member of a union and bargains collectively. Benefits received under the employment contracts of non-unionized employees will also be non-deductible if proof is provided of payment in some manner by the employee for the benefits": p. 408 (emphasis added). The majority found that there was evidence of such payment and held that the benefit should not be deducted.

[67] While the cases from this Court have referred to whether the plaintiff has directly or indirectly contributed to the benefit, there are strong arguments against giving this consideration much weight as an explanation of why particular benefits should or should not be deducted. As McLachlin J. pointed out in her partial dissent in *Cunningham*, reliance on this factor may be seen as inconsistent with legal principle and logic. With respect to legal principle, the defendant takes the plaintiff as he or she is and the plaintiff is compensated for his or her actual loss and no more. As a matter of logic, it does not seem right to say that deducting the benefits deprives the plaintiff of the contributions made to gain entitlement to those benefits—whether deducted from damages or not, the plaintiff receives the benefits: *Cunningham*, at pp. 381-83; for a critique of reliance on this factor, see also Ogus, at pp. 226-27.

[68] The pension benefits in issue in this case are not an indemnity for loss of wages and, as we shall see, pension benefits earned through years of service are invariably found to be contributory. The fact that the pension plan here is a defined benefit plan does not detract from that conclusion. As a result, the problem

highlighted in the difference between the majority and the dissent in *Cunningham*, i.e. how to treat indemnity benefits to which the plaintiff contributed, does not arise in this case.

[69] I conclude from this review that whether the benefit is in the nature of an indemnity for the loss caused by the defendant's breach and whether the plaintiff has directly or indirectly paid for the benefit have been important explanations of why particular benefits fall, or do not fall, within the private insurance exception. The Court has been sharply and closely divided on the issue of the deduction for an indemnity benefit to which the plaintiff has contributed. However, there is no decision of the Court of which I am aware that has required deduction of a non-indemnity benefit to which the plaintiff has contributed, like the pension benefits in this case.

(iii) Broader Policy Considerations

[70] Three main policy considerations have often been advanced to explain why a benefit should or should not be deducted: punishment, deterrence, and the provision of incentives for socially responsible behaviour.

[71] The private insurance exception has often been justified on the basis that deducting the benefit from the damages reduces their punitive and deterrent value. However, the notion that the exception was intended to have a punitive and deterrent value has been widely, and, in my view, soundly, criticized. Authors agree that punitive and deterrent value ought not to be relied on to explain why a benefit is or is not deducted... . This view is supported by both the High Court of Australia and the House of Lords: see *National Insurance Co.*, at p. 571, *per* Dixon C.J., and *Parry*, at p. 33. In *Parry*, Lord Pearce put it this way at p. 33: "The word 'punitive' gives no help. It is simply a word used when a court thinks it unfair that a defendant should be saddled with liability for a particular item." I would add that it is hard to defend punishment and deterrence as rationales against the incisive critique advanced by McLachlin J. in her dissenting reasons in *Cunningham*, at pp. 383-84. I conclude that it is unsound to rely on a punitive or deterrent justification for the private insurance exception, particularly in breach of contract cases where fault is not an operating concept.

[72] This is not to say, however, that the approach to damages does or should ignore the underlying purposes of the substantive obligations the breach of which they seek to remedy. If, for example, an important purpose of the law of contracts is to protect the reasonable expectations of the parties to a contract, it is appropriate to consider how well the award of damages furthers that purpose in a particular case: see, e.g., A. Swan and J. Adamski, *Canadian Contract Law* (3rd ed. 2012), at §1.27. This consideration may be taken into account along with the other principles of damages law in order to ensure that there is a good "remedial fit" between the breach of obligation and the remedy.

[73] The private insurance exception has also been justified by the incentives it may provide. For example, deducting benefits that plaintiffs have provided for themselves might discourage plaintiffs from acting prudently in obtaining that sort of protection. This, however, has been a controversial explanation. The majority relied on it in *Cunningham*, but it was trenchantly criticized by the dissent and a similar critique has been made by scholars: see, e.g., Ogus, at pp. 226-27.

[74] In my view, we should be cautious about relying too heavily on the incentives that may result from deducting or not deducting. There will sometimes be little basis in fact for supposing that either deducting or not deducting certain benefits will have any impact on people's behaviour. For example, do we think it likely that

deducting insurance benefits will discourage people from buying insurance? The coverage is not limited to situations in which there will be legal recourse against a defendant. Even when legal recourse is available, it will likely require a longer and more expensive process, as compared to making an insurance claim. Nor is it likely that people will be less ready to buy insurance if they are not doubly compensated in cases in which fault can be established. It seems to me that we should generally rely on these broader policy concerns only when they are directly related to the particular benefit in issue and when there is some reasonable basis in fact or experience to suppose that deducting or not deducting will actually serve the policy objective.

[75] *Sylvester* provides an example of grounding policy considerations in the facts of the case. The result in that case was supported by the fact that deducting the disability benefits from wrongful dismissal damages ensured that all affected employees would receive equal damages: if the benefits were not deducted, a dismissed employee collecting disability benefits would receive more compensation than would the employee who is dismissed while working (para. 21). In the same paragraph, the Court considered the incentives created by the deduction or non-deduction of the disability benefits: failing to deduct the disability benefits could be an undesirable deterrent to employers establishing disability benefit plans. These concerns are directly related to the benefits in question and have a reasonable basis in fact.

[76] From this review of the authorities, I reach these conclusions:

(a) There is no single marker to sort which benefits fall within the private insurance exception.
(b) One widely accepted factor relates to the nature and purpose of the benefit. The more closely the benefit is, in nature and purpose, an indemnity against the type of loss caused by the defendant's breach, the stronger the case for deduction. The converse is also true.
(c) Whether the plaintiff has contributed to the benefit remains a relevant consideration, although the basis for this is debatable.
(d) In general, a benefit will not be deducted if it is *not an indemnity* for the loss caused by the breach and the plaintiff *has contributed* in order to obtain entitlement to it.
(e) There is room in the analysis of the deduction issue for broader policy considerations such as the desirability of equal treatment of those in similar situations, the possibility of providing incentives for socially desirable conduct, and the need for clear rules that are easy to apply.

(3) Application to This Case

[77] Where would these factors lead us in this case? In my view, they clearly support not deducting the retirement pension benefits from wrongful dismissal damages. The retirement pension is not an indemnity for wage loss, but rather a form of retirement savings. While the employer made all of the contributions to fund the plan, Mr. Waterman earned his entitlement to benefits through his years of service. As the plan states, its primary purpose is "to provide periodic pension payments to eligible employees ... after retirement ... in respect of their service as employees": art. 1.01, A.R., at p. 117. Thus, it seems to me that this case falls into the category of cases in which the insurance exception has always been applied: the benefit is not an indemnity and the employee contributed to the benefit. This result is consistent with the dominant view in the case law and among legal scholars: *Guy*; *Gill*; *Chandler*; *Emery*; *Parry*; Ogus, at p. 223.

[78] To conclude, the compensation principle should not be applied strictly in this case because the pension benefits fall within the private insurance exception and should not be deducted from the wrongful dismissal damages.

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V. Disposition

[99] I would dismiss the appeal with costs throughout.

ROTHSTEIN J (McLachlin CJC concurring) (dissenting):

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V. Analysis

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B. Applicability of the Private Insurance Exception

[136] The majority agrees that putting Mr. Waterman in the position he would have been in had the contract been performed would lead to the conclusion that the pension benefits must be deducted ... . According to the majority, however, the pension benefits that IBM paid to Mr. Waterman under his employment contract on the assumption that he was retired may be treated as a "private insurance" and, thus, need not be deducted under the private insurance exception. I disagree with this conclusion. In my view, the private insurance exception has no applicability to this case.

[137] This case involves the interpretation of a single employment contract that gives rise to Mr. Waterman's right to wrongful dismissal damages and his right to pension benefits. This Court has determined that employer-provided benefits "should not be considered contracts which are distinct from the employment contract, but rather as integral components of it" (*Sylvester*, at para. 13). The majority is correct that the words "'single contract' rule" do not literally appear in *Sylvester*, but the reasoning in *Sylvester* can lead to no other conclusion (para. 52).

[138] As I will explain, in the context of a single contract, the collateral benefit or private insurance exception has no application. The reason is straightforward: where the plaintiff's cause of action and his right to a particular benefit arise from the same contract and the plaintiff is indeed entitled to the benefits—i.e. he has "insured" himself in a manner that requires the defendant to pay the benefits—then the plaintiff will receive the benefits based on the ordinary governing principle that he should be placed in the position he would have been in had the contract been performed. There will be no need to reach the collateral benefit exception.

[139] Said another way, given that Mr. Waterman's pension flows from the same contract under which the court must assess his loss, the need to reach the private insurance exception is itself a concession that Mr. Waterman's pension was not "private insurance" that covered the breach in the first place. If he had "insured" the breach, he would get the benefits under the governing principle that he should be provided with what he would have expected to receive under the terms of the contract.

[140] For this reason, the majority's approach to this case contains an inherent inconsistency: the majority concludes that Mr. Waterman had "private insurance" that allows him to keep his pension benefits in addition to his salary. To the extent Mr. Waterman had such "private insurance," it must have come from his employment contract. However, if Mr. Waterman's employment contract indeed allowed him to have pension benefits in addition to his salary, there would be no need to

reach any exception: he would get the benefits based on what he would have expected under the terms of the contract.

[141] In addition to this troubling inconsistency, applying the private insurance exception to this case would not be consistent with the justification for the exception. The rationale for the private insurance exception is that it would be "unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the tortfeasor" (*Parry v. Cleaver*, [1970] A.C. 1 (H.L.), *per* Lord Reid, at p. 14). Accepting the assumption that Mr. Waterman's work for IBM over the years is analogous to paying premiums to obtain his pension plan, it remains that the contractual terms of the pension or "insurance" he paid for allowed him to receive salary or pension benefits, but not both at the same time. In other words, this is not a case where deduction would lead to some benefit that the plaintiff paid for enuring to the benefit of the defendant. Quite to the contrary, as explained above, deducting is necessary to provide the plaintiff with the pension or "insurance" he paid for. Not deducting has the effect of the plaintiff receiving more than he expected to receive under the terms of his contract and requiring the defendant to pay more than it agreed to pay.

NOTE

In *MB v British Columbia*, 2003 SCC 53, welfare benefits were held to be deductible from awards of damages.