DAMAGES FOR BREACH OF CONTRACT

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DAMAGES MEASURED BY RELIANCE

§§ 555-560 (from Waddams, The Law of Damages, 1983)

555 By the normal rule of contract damages the party complaining is entitled to be put in as good a position, so far as money can do it, as though the contract had been performed.[27] Where the plaintiff can show that he has made a profitable contract, therefore, the normal rule will afford full compensation. The plaintiff will not be entitled, in addition, to recover expenses incurred in reliance on the contract because such expenses would have had to be incurred in any event in order to earn the promised performance.[28]

556 If, on the other hand, the contract was an unprofitable one to the plaintiff, his expenses may exceed the value of the defendant's expected performance. In such a case it is not clear that the plaintiff ought to recover the full amount of his expenses. In a sense the defendant's breach confers a benefit on the plaintiff, the benefit of releasing him from a losing bargain. If the plaintiff is to be put by the award of damages only into as good a position as he would have occupied had the contract been performed, this benefit ought to be taken into account.

557 These questions arose in the English Court of Appeal in *Anglia*

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[26]See Sharpe, *op. cit., supra*, footnote 16, at §§669-70.
[27]See §538, *supra*.
[28]See *Pitcher v. Shoebottom* (1970), 14 D.L.R. (3d) 522, [1971] 1 O.R. 106 (H.C.J.).

Television Ltd. v. Reed.[29] The defendant, an actor, agreed to play a leading part in a television film to be produced by the plaintiff. The plaintiff had incurred expenses in preparation for production, some before the agreement with the defendant, and some afterwards. On the defendant's repudiation of the contract the plaintiff cancelled the production and abandoned the enterprise altogether. Application of the normal rule for measurement of contract damages would have required an assessment of the profits likely to have been made from the film had it not been cancelled. It was clearly, at best, a highly speculative matter. Further, there are facts that suggest that the film probably would not have been profitable. If the enterprise had been likely to succeed one would have expected the plaintiff to have procured a substitute actor rather than to have abandoned the enterprise altogether. Nor does Lord Denning's bald summary of the plot suggest the prospect of a great artistic achievement: "Anglia Television Ltd., the plaintiffs, were minded in 1968 to make a film of a play for television entitled 'The Man in the Wood'. It portrayed an American man married to an English woman. The American has an adventure in an English wood. The film was to last for 90 minutes."[30] The English Court of Appeal held that the plaintiff was entitled to elect to recover the expenses, including the pre-contract expenses, as an alternative to the normal measure of contract damages. One way of explaining the election would be to say that the plaintiff is entitled, if he wishes, to be put in as good a position as he was in before the contract was made. But this rationale would not explain recovery of the pre-contract expenses, which the plaintiff had already incurred before the defendant had undertaken any obligation at all.[31] Lord Denning justified the recovery of the pre-contract expenses as follows: "He [the defendant] must have contemplated — or, at any rate, it is reasonably to be imputed to him — that if he broke his contract, all that expenditure would be wasted, whether or not it was incurred before or after the contract. He must pay damages for all the expenditure so wasted and thrown away."[32] This, however, does not seem fully convincing, for the conclusion that the pre-contract expense was "wasted" by the

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[29][1972] 1 Q.B. 60 (C.A.). Reliance expenses were also allowed in *Bell v. Robutka* (1964), 48 D.L.R. (2d) 755 (Alta. Dist. Ct.), affd 55 D.L.R. (2d) 436 (S.C. App. Div.).

[30]*Anglia Television Ltd. v. Reed, supra,* footnote 29, at p. 62.

[31]The question of pre-contract expenses is discussed at §292, *supra.*

[32]*Anglia Television Ltd. v. Reed, supra,* footnote 29, at p. 64.

defendant's breach implies a supposition that had the defendant not broken his contract the expense would not have been "wasted". In other words, the presumption is that, had the defendant performed his contract, the expenses including the pre-contract expenses would have been recovered in profits, the very thing that the plaintiff failed to prove.

558 Nevertheless, the result of the case may be supported on the basis that, in the absence of proof one way or the other of the profitability of the movie, it is to be assumed against the wrongdoer that the enterprise would at least have broken even, that is, that the expenses would at least have been covered by revenue. It is suggested that it is not unjust to make such a presumption against the defendant, who is the party in breach of contract. It would still be open, on this approach, for the defendant to prove, if he could, that the expenses would not have been recovered from revenues, and on proof of that fact, the defendant ought not to be liable to pay for the expenses.

559 This view of the law is supported by the decision of the British Columbia Court of Appeal in *Bowlay Logging Ltd. v. Domtar Ltd.*,[33] where a logging contract was terminated by the timber owner's breach. It was held that in principle the logger could elect to claim its expenses, but that if the owner could show that the logger would have incurred a loss on completion of the contract, nominal damages only should be awarded. Berger, J., at first instance said clearly that the plaintiff was not to be put in a better position than it would have occupied on full performance, and that the onus of showing the contract to be unprofitable was on the defendant. He said:

> If the law of contract were to move from compensating for the consequences of breach to compensating for the consequences of entering into contracts, the law would run contrary to the normal expectations of the world of commerce. The burden of risk would be shifted from the plaintiff to the defendant. The defendant would become the insurer of the plaintiff's enterprise. Moreover the amount of the damages would increase not in relation to the gravity or consequences of the breach but in relation to the inefficiency with which the plaintiff carried out the contract. The greater his expenses owing to inefficiency, the greater the damages.
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> The fundamental principle upon which damages are measured under the law of contract is *restitutio in integrum*. The principle contended for here by the plaintiff would entail the award of damages not to compensate the plaintiff but to punish the defendant. So it has been

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[33] (1978), 87 D.L.R. (3d) 325 (B.C.S.C.), affd 135 D.L.R. (3d) 179 (C.A.).
followed by the English Court of Appeal in
C & P Haulage v. Middleton [1983] 1 W.L.R. 1461

> argued that a defendant ought to be able to insist that the plaintiff's damages should not include any losses that would have been incurred if the contract had been fully performed. According to Treitel, *Law of Contract*, 3rd ed. (1970), at p. 798:
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> > "It is uncertain whether the plaintiff can recover his entire expenses if those exceed the benefit which he would have derived from the contract, had there been no breach."
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> Ogus, in *The Law of Damages* (1973), has said at p. 347 that, "it is not yet clear whether English law imposes this limitation".
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> The tendency in American law is to impose such a limitation. And I think Canadian law ought to impose it too.
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> The onus is on the defendant.[34]

Berger, J., went on to hold that the onus had been met, and that the plaintiff was therefore entitled only to nominal damages.

560 In the British Columbia Court of Appeal the decision, and the reasoning, were affirmed. Seaton, J.A., made it clear that the damages recoverable, in the case of an unprofitable enterprise, will be the amount (if any) by which the plaintiff's loss is greater than it would have been if there had been no breach, approving a passage to this effect from Corbin:

> If, on the other hand, it is proved that full performance would have resulted in a net loss to the plaintiff, the recoverable damages should not include the amount of this loss. If the amount of his expenditure at the date of breach is less than the expected net loss, he should be given judgment for nominal damages only. If these expenditures exceed this loss, he should be given judgment for the excess.[35]

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[34] *Id.*, at p. 335.

[35] *Corbin on Contracts*, Vol. 5A (St. Paul, West Publishing Co., 1964), §1033, quoted in *Bowlay Logging Ltd. v. Domtar Ltd.* (1982), 135 D.L.R. (3d) 179 (C.A.), at p. 181.

(2) Breach of contract

454 Breaches of contract often cause mental distress, both in the shape of disappointment for the loss of anticipated enjoyment of the promised performance and the shape of anger, frustration and, in some cases, humiliation caused by the very occurrence of the breach.

455 One case in which such intangible injuries have always been recognized is that of breach of promise of marriage, now abolished in several jurisdictions.[445] A passage from Sedgwick's work on damages, cited with approval in England[446] and Canada,[447] summarizes the position:

> The action for breach of promise of marriage ... though nominally an action founded on the breach of an agreement, presents a striking exception to the general rules which govern contracts. This action is given as an indemnity to the injured party for the loss she has sustained, and has always been held to embrace the injury to the feelings, affections, and wounded pride, as well as the loss of marriage. ... From the nature of the case, it has been found impossible to fix the

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[445] Law Reform (Miscellaneous Provisions) Act 1970 (U.K.), s. 1; Marriage Act, Ont., s. 32(1). The British Columbia Law Reform Commission proposes abolition: Breach of Promise of Marriage, Working Paper No. 39, 1983.

[446] *Smith v. Woodfine* (1857), 1 C.B. (N.S.) 660, 140 E.R. 272 (*per* Willes, J., at p. 669); *Finlay v. Chirney* (1888), 20 Q.B.D. 494 (C.A.) (*per* Bowen, L.J., at p. 506).

[447] *D. v. B.* (1917), 38 D.L.R. 243 (Ont. S.C. App. Div.), at p. 249. See also *Lafayette v. Vignon*, [1928] 3 D.L.R. 613 (Sask. C.A.) ("wounded feelings and affections and wounded pride", *per* MacKenzie, J.A., at pp. 619-20); *Croll v. Edgley* (1963), 41 W.W.R. 459 (B.C.S.C.); *Tscheheidse v. Tscheheidse* (1963), 41 D.L.R. (2d) 138 (Sask. Q.B.); *Baxter v. Lear* (1975), 23 R.F.L. 342 (Man. Q.B.). See also *Thomson v. McEwen*, [1955] 1 D.L.R. 151 (N.B.S.C. App. Div.); *Chizek v. Tripp* (1912), 4 D.L.R. 369 (Sask. S.C.).

> amount of compensation by any precise rule; and, as in tort, the measure of damage is a question for the sound discretion of the jury in each particular instance. . . .[448]

Apart from this well-recognized exception, it was constantly asserted for many years that no damages could be awarded for breach of contract causing mere mental distress or disappointment,[449] though damages could be given for actual physical inconvenience[450] or physical illness, if foreseeable.[451] The case usually cited for this proposition was *Addis v. Gramophone Company*[452] where the House of Lords rejected an award of damages to an employee for wrongful dismissal: "in respect of the harsh and humiliating way in which he was dismissed, including, presumably, the pain he experienced by reason, it is alleged, of the imputation upon him conveyed by the manner of his dismissal."[453]

456 In *Cook v. Swinfen*,[454] an action by a client against a solicitor, Lord Denning, M.R., said: "It can be foreseen that there will be injured feelings; mental distress; anger; and annoyance; but for none of these can damages be recovered."[455] Six years later, however in *Jarvis v. Swans Tours Ltd.*[456] the English Court of Appeal, reversing the trial court, awarded damages against a travel agent both for loss of expected

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[448]Sedgwick on Damages, 10th ed., §637.

[449]See *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [1966] S.C.R. 673 at p. 684, 58 D.L.R. (2d) 1 at p. 10: "the claim being founded on breach of contract the damages cannot be increased by reason of . . . wounded feelings"; *Kristinacki v. Bongard* (1970), 12 D.L.R. (3d) 254 (Alta. S.C.T.D.); *Neville v. Page* (1977), 5 A.R. 8 (S.C.T.D.). *McGregor on Damages*, 13th ed. (London, Sweet & Maxwell, 1972), §67, though arguing in favour of exceptions in proper cases, §68.

[450]*Hobbs v. London & South Western Ry. Co.* (1875), L.R. 10 Q.B. 111; *Bailey v. Bullock*, [1950] 2 All E.R. 1167 (K.B.). See also *Spatz v. Metropolitan Trust Co.* (1972), 4 N.S.R. (2d) 803 (S.C. App. Div.); *Nurmi v. Michauel Pump Sales & Service Ltd.* (1975), 16 N.S.R. (2d) 161 (S.C.T.D.); *Reyno v. G.M.N. Construction Co. Ltd.* (1975), 16 N.S.R. (2d) 149 (S.C.T.D.); *Duemler v. Air Canada* (1980), 109 D.L.R. (3d) 402 (Alta. Q.B.); *Greenberg v. Stein* (1957), 10 D.L.R. (2d) 155 (B.C.S.C.). In *Thode Construction Ltd. v. Ross Brothers Cartage Ltd.* (1959), 20 D.L.R. (2d) 227 (Sask. C.A.), an award of damages for "trouble and other expenses" was set aside in the absence of proof of particular loss. A similar conclusion was reached in *Hawryluk v. Korsakoff* (1956), 6 D.L.R. (2d) 524 (Man. C.A.).

[451]See *Kolan v. Solicitor* (1969), 7 D.L.R. (3d) 481, [1970] 1 O.R. 41 (H.C.J.), aff'd 11 D.L.R. (3d) 672, [1970] 2 O.R. 686 (C.A.) (physical illness held too remote).

[452][1909] A.C. 488 (H.L.).

[453]*Id.*, at p. 493.

[454][1967] 1 W.L.R. 457 (C.A.).

[455]*Id.*, at p. 461.

[456][1973] Q.B. 233 (C.A.).

enjoyment of the holiday promised by the defendant, and for the mental distress and disappointment caused by the breach of contract. Lord Denning, M.R., said, referring to what had been regarded as a rule denying such damages: "I think that those limitations are out of date. In a proper case damages for mental distress can be recovered in contract, just as damages for shock can be recovered in tort."[457]

457 In *Jarvis v. Swan Tours Ltd.*, a contract to provide a holiday was held to be such a proper case, and this conclusion was reaffirmed in *Jackson v. Horizon Holidays*,[458] where Lord Denning said, referring to the *Jarvis* case, that it had been: "held by this court that damages for the loss of a holiday may include not only the difference in value between what was promised and what was obtained, but also damages for mental distress, inconvenience, upset, disappointment and frustration caused by the loss of the holiday."[460]

458 The measurement of damages poses an obvious difficulty. This, however, did not deter the court. In *Jarvis v. Swans Tours* Lord Denning, said: "I know that it is difficult to assess in terms of money, but it is no more difficult than the assessment which the courts have to make every day in personal injury cases for loss of amenities."[460] The price paid for the holiday had been £63. Lord Denning assessed the damages as follows: "Looking at the matter quite broadly, I think the damages in this case should be the sum of £125."[461] As one commentator said, it seems generous to allow the plaintiff, who had received the tangible benefits of transport and accommodation, 100 per cent profit on his disappointment.[462] In the *Jackson*[463] case, where the award included compensation for the distress and disappointment of the plaintiff's family, Lord Denning, M.R., said:

> . . . I think that the figure of £1,100 was about right. It would, I think, have been excessive if it had been awarded only for the damage suffered by Mr. Jackson himself. But when extended to his wife and children, I do not think it is excessive. People look forward to a holiday. They expect the promises to be fulfilled. When it fails they are greatly disappointed and upset. It is difficult to assess in terms of money; but it is the task of the judges to do the best they can.[464]

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[457] *Id.*, at pp. 237-8.
[458] [1975] 1 W.L.R. 1468 (C.A.).
[459] *Id.*, at p. 1472.
[460] *Supra*, footnote 456, at p. 238.
[461] *Ibid.*
[462] Yates, "Damages for Non-Pecuniary Loss", 36 Mod. L. Rev. 535 (1973), at p. 540.
[463] *Supra*, footnote 458.
[464] *Supra*, at p. 1473.

459 It was thought by some that the new doctrine might be confined to cases such as holidays, where peace of mind might be said to be the very thing bargained for. But in *Heywood v. Wellers*[465] the English Court of Appeal extended the doctrine to the case of a solicitor, who failed in breach of contract, to secure protection for a client against molestation. Lord Denning's own decision in *Cook v. Swinfen*[466] was cited together with an earlier case[467] also denying damages for mental distress against a solicitor. Lord Denning, said of these cases: "But those cases may have to be reconsidered."[468]

460 It would still be arguable that a case like *Heywood v. Wellers* is distinguishable from the ordinary case of a solicitor's services, in that peace of mind was obviously the client's main concern in seeking to restrain molestation, and mental distress was plainly to be contemplated as liable to occur if the molestation continued.[469] However, in view of Lord Denning's remarks that the earlier cases may have to be reconsidered, it remains unclear how far damages will be awarded for breach of contracts of professional service. It is well known that litigation causes mental stress, and it could well be held to be within the contemplation of a reasonable solicitor, that, if he failed to conduct litigation properly, his client would be liable to suffer unnecessary mental distress.

461 These cases have been applied in Canada to breaches of contract of a travel agent,[470] to the supplier of a vacation motor home,[471] to one who failed to provide entertainment at a wedding,[472] to an air carrier which caused the death of the plaintiff's pet dog,[473] to a surgeon who failed to improve the shape of the plaintiff's nose,[474] and to a case

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[465][1976] Q.B. 446 (C.A.).
[466]*Supra*, footnote 454.
[467]*Groom v. Crocker*, [1939] 1 K.B. 194 (C.A.). See also *Kolan v. Solicitor* (1969), 7 D.L.R. (3d) 481, [1970] 1 O.R. 41 (H.C.J.), affd 11 D.L.R. (3d) 672, [1970] 2 O.R. 686 (C.A.).
[468]*Supra*, footnote 465, at p. 459.
[469]See *per* Bridge, L.J., at pp. 463-4.
[470]*Keks v. Esquire Pleasure Tours Ltd.*, [1974] 3 W.W.R. 406 (Man. Co. Ct.); *Fuller v. Healey Transportation Ltd.* (1978), 92 D.L.R. (3d) 277, 22 O.R. (2d) 118 (Co. Ct.).
[471]*Elder v. Koppe* (1974), 53 D.L.R. (3d) 705 (N.S.S.C.T.D.).
[472]*Dunn v. Disc Jockey Unlimited Co. Ltd.* (1978), 87 D.L.R. (3d) 408, 20 O.R. (2d) 309 (Sm. Cl. Ct.).
[473]*Newell v. Canadian Pacific Airlines, Ltd.* (1976), 74 D.L.R. (3d) 574, 14 O.R. (2d) 752 (Co. Ct.).
[474]*LaFleur v. Cornelis* (1979), 28 N.B.R. (2d) 569 (Q.B.).

of breach of warranty of title to goods.[476] In a Nova Scotia case, damages were awarded by a trial court against a solicitor for mental distress caused to a client by failure to incorporate a company.[478] The Appeal Division, in allowing the appeal on procedural grounds, made no criticism of the principle of such an award.[477] In *Zuker v. Paul*[478] the Ontario Divisional Court allowed damages for mental distress ensuing on breach of warranty of title of an automobile.

462 Damages for mental distress have been awarded for breach of employment contracts, both in England[479] and Canada.[480] In a recent Ontario High Court case, *Pilon v. Peugeot Canada Ltd.*,[481] a long-term employee was wrongfully dismissed. The employee had served the company loyally for many years, and the company had led him to expect permanent security of employment. Because the plaintiff had mitigated his loss quite successfully, he was held to be entitled only to damages of about $1,000 in respect of the period for which he ought to have been given notice. Nevertheless, the Ontario High Court awarded damages for mental distress of $7,500.

463 The case is interesting and significant both in its application to employment contracts, and in its departure from the comparatively modest level of damage awards manifested by previous cases on mental distress. It has been suggested that punitive considerations are entering the calculation of damages in these cases.[482] Another possible explanation of the *Pilon* case is that the court intended to give compensation

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[475] *Zuker v. Paul* (1982), 135 D.L.R. (3d) 481, 37 O.R. (2d) 161 (Div. Ct.).

[476] *Allen v. P. A. Wournell Contracting Ltd.* (1979), 100 D.L.R. (3d) 62 (N.S.S.C.T.D.).

[477] 108 D.L.R. (3d) 723 (N.S.S.C. App. Div.).

[478] *Supra*, footnote 475.

[479] *Cox v. Philips Industries Ltd.*, [1976] 1 W.L.R. 638 (Q.B.).

[480] *Pilon v. Peugeot Canada Ltd.* (1980), 114 D.L.R. (3d) 378, 29 O.R. (2d) 711 (H.C.J.), followed in *Brown v. Waterloo Regional Board of Com'rs of Police* (1982), 136 D.L.R. (3d) 49, 37 O.R. (2d) 277 (H.C.J.). See *Delmotte v. John Labatt Ltd.* (1978), 92 D.L.R. (3d) 259, 22 O.R. (2d) 90 (H.C.J.).

Speck v. Greater Niagara General Hospital (1983) 43 O.R. (2d) 611 (H.C.) (damages for manner of dismissal); Pilato v. Hamilton Place Convention Centre (not yet reported).

Damages were, however, refused in *Cringle v. Northern Union Ins. Co. Ltd.* (1981), 124 D.L.R. (3d) 22 (B.C.S.C.); *Vorvis v. Insurance Corp. of British Columbia* (1982), 134 D.L.R. (3d) 727 (B.C.S.C.); *Dobson v. T. Eaton Co. Ltd.* (1982), 141 D.L.R. (3d) 362 (Alta. Q.B.) (No damages for insult). In *Bohemier v. Storwal Int'l Inc.* (1982), 142 D.L.R. (3d) 8 (Ont. H.C.J.). Bohemier aff'd on this point 44 O.R. (2d) 362 (C.A.).

Saunders, J., held that damages could be awarded only for the distress caused by the wrong (*i.e.*, failure to give adequate notice), not distress caused by the dismissal itself.

[481] *Supra*, footnote 480.

[482] Veitch, "Sentimental Damages in Contract", 16 U.W.O.L. Rev. 227 (1977).

for the employee's expectation of permanent employment, even though unwilling to find an enforceable contract to that effect. 483

Later cases have, however, held that damages are recoverable only for the distress caused by the actual breach of contract, i.e. the failure to give proper notice, and not for distress caused by the fact of the dismissal itself, or by its manner and consequences. (Brown v. Waterloo Board of Commissioners of Police (1983) 150 D.L.R. (3d) 729; Fitzgibbons v. Westpres Publications (1983) 3 D.L.R. (4th) 366 (B.C.S.C.).

In Vorvis v. Ins. Corp. of B.C. a refusal to award damages for mental distress at trial was upheld by the B.C.C.A., but on the narrow ground that the evidence in the case failed to show that distress had been caused by the dismissal. There was evidence of harsh and distressing treatment by the employer before dismissal, and the court indicated that, if this were the wrong complained of, damages might be awarded. The case is an invitation to counsel in such a case to include in their pleadings an allegation of breach of contract by the employer before the dismissal.

464 Clearly, this area of the law is developing rapidly. Several writers have put forward interesting suggestions as to the underlying principles. The suggestion just referred to, that punitive considerations are appearing, cannot be lightly dismissed. Professor Veitch has written:

> These awards for mental distress arising from breach of contract look very much like the punitive and exemplary awards which are regular features of intentional tort actions in Canada. ... In contract situations we have seen the unscrupulous vacation operator, the too busy law firm, the callous employer, the greedy investment broker, the impersonal conglomerate and the vindictive trade union held liable in damages for the intangible injuries caused by their proven lack of concern for the interests and expectations of the ordinary individual.[484]

Professor Veitch welcomes the award of exemplary damages in such cases, deriving support for his thesis from the statutory provisions in several jurisdictions expressly allowing exemplary damages for unfair business practices.[485] Another point is that some of the cases have involved injury to reputation which, as the defamation cases show, is notoriously hard to dissociate from punitive considerations.[486]

465 There are, however, some difficulties in seeking to explain and justify these awards as punitive. First, there is no general rule that breach of contract ought always to be deterred. It is not generally improper for a promisor deliberately to break his contract in order to make a greater profit elsewhere, for the prevailing view is that if he

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[483] In *Pilon, supra*, footnote 480, Galligan, J., said, at p. 382 D.L.R., p. 715 O.R., "Long-term employees in positions of responsibility, such as Mr. Pilon, were paid less than the going rate in the industry for comparable jobs and in return were told that they have lifetime security. Pilon accepted that assurance and relied upon it."

[484] *Supra*, footnote 482, at p. 238.

[485] Business Practices Act, Ont., s. 41(2).

[486] See §521, *infra*.

tenders full compensation to the plaintiff he does the latter no wrong. This general position is defended elsewhere in this book.[487] Consequently the present writer would not accept that a mere breach of contract justifies exemplary damages. The case of a breach of a statutory code of fair business practice can be distinguished as a case that involves more than a mere breach of contract, and therefore is of public concern. The other side of the coin is that if the awards of damages were to be rested on punitive considerations, no award could be made where the defendant had acted innocently or even negligently (in the absence of some element of recklessness).[488] But the distress and disappointment suffered by Mr. Jarvis would have been the same whether or not the conduct of Swans Tours or any of its particular employees was considered worthy of punishment.

466 Discussion of the cases from an economic point of view has taken two quite different approaches. In an article in the Law Quarterly Review in 1979 it was suggested that *Jarvis v. Swans Tours* and the cases that followed it were in effect giving compensation for the "consumer surplus", that is, the particular value to the plaintiff of goods or services in excess of their market value.[489] The decisions were welcomed as recognizing and compensating a real loss.

467 On the other hand, another recent economic analysis has taken a quite different line. Professor Rea's conclusion in a paper published in 1982[490] is that an attempt to give full compensation for non-pecuniary losses may be economically inefficient. The reason seems to be that a rational person would not choose fully to insure against mental distress caused by breach of contract because the cost of the insurance would be too high. Since the risk of paying damages must be passed on to customers as a cost of doing business, the effect of the *Jarvis* case is to compel all travellers to purchase unwanted insurance along with agents' services. It might be more efficient for travellers to be able to buy the services and to insure themselves if they wish to do so, separately, against mental distress.

468 There appears to be some force in this argument, and indeed it can plausibly be argued that similar considerations lie behind the exclusion in *Hadley v. Baxendale*[491] itself of damages for extraordinary losses. However, this seems more an argument for restraint in measuring compensation than an argument for the exclusion of damages for mental distress as such. So far, awards for mental distress in breach of contract cases have been comparatively modest, and Professor Rea's arguments suggest the need for caution. It would not seem justifiable, however, to restrain the courts altogether from compensating non-pecuniary losses. These are, after all, real losses and it is commonly supposed that the law pays too little rather than too much attention to non-pecuniary considerations.

[487] See §§969-974, 1002, 1003, *infra*.

[488] See §§998, 999, *infra*.

[489] Harris, Ogus, Phillips, "Contract Remedies and the Consumer Surplus", 95 L.Q.R. 581 (1979).

[490] Rea, "Non-pecuniary Loss and Breach of Contract", 11 J. Leg. Stud. 35 (1982).

[491] (1854), 9 Ex. 341, 156 E.R. 145. See §§1116-1155, *infra*.

EXEMPLARY DAMAGES

§§ 1002-1003

1002 It has been said in many cases that, with the exception of breach of promise of marriage,[73] exemplary damages cannot be awarded for breach of contract.[74] This rule is based on the assumption underlying much of contract law that a breach of contract, coupled with an offer to pay just compensation, does no harm to the plaintiff, is not morally wrong, and may be desirable on the grounds of efficiency.[75]

Further, there is a legitimate interest, in a commercial setting, in an ability to predict, and insure against, the consequences of breach.

1003 This analysis is, it is submitted, acceptable in most commercial cases.[75a] Where, however, the plaintiff does have a personal interest in performance of the sort the court would protect by a decree of specific performance, or by an injunction to restrain the breach, a case can be made for deterring interference with such interests. In many such cases

[73] *Verhoski v. Hunt* (1960), 67 Man. R. 342 (Q.B.); *Ewart v. Tetzloff* (1959), 18 D.L.R. (2d) 539 (B.C.S.C.); *Naujokat v. Bratushesky*, [1942] 2 D.L.R. 721 (Sask. C.A.); *Collard v. Armstrong* (1913), 12 D.L.R. 368 (Alta. S.C. en banc).

[74] *A.-G. Nfld. v. Newfoundland Ass'n of Public Employees* (1976), 74 D.L.R. (3d) 195 (Nfld. S.C.); *Guildford v. Anglo-French Steamship Co.* (1883), 9 S.C.R. 303; *Addis v. Gramophone Co.*, [1909] A.C. 488 (H.L.); *Toronto Hockey Club Ltd. v. Arena Gardens of Toronto, Ltd.*, [1926] 4 D.L.R. 1 (P.C.); *Burford v. Cosa Corp. of Canada Ltd.*, [1955] O.W.N. 8 (H.C.J.); *Perera v. Vandiyar*, [1953] 1 W.L.R. 672 (C.A.); *Turner v. Jaiko* (1978), 93 D.L.R. (3d) 314 (B.C. Co. Ct.); *Harvey Foods Ltd. v. Reid* (1971), 18 D.L.R. (3d) 90 (N.B.S.C. App. Div.); *Cardinal Construction Ltd. v. The Queen in right of Ontario* (1981), 128 D.L.R. (3d) 662, 38 O.R. (2d) 161 (C.A.); *Greening Industries Ltd. v. Penny* (1965), 53 D.L.R. (2d) 643 (N.S.S.C.), Robitaille v. Vancouver Hockey Club (1981) 124 D.L.R. (3d) 208 at 250; Vorris v. Ins. Corp. of B.C. (B.C.C.A. not yet reported).

Contra: Rowland's Transport Ltd. v. Nasby Sales & Services Ltd. (1978), 16 A.R. 192 (S.C.T.D.), but the exemplary damages were not quantified, being set off against the unquantified profit derived by the plaintiff from the use of goods to which the defendant seller lacked title, a result that could be supported without reference to exemplary damages. See *Rowland v. Divall*, [1923] 2 K.B. 500 (C.A.); *New Brunswick Electric Power Com'n v. Int'l Brotherhood of Electrical Workers, Local 1733* (1978), 22 N.B.R. (2d) 364 (S.C.Q.B.) (exemplary damages for breach of collective agreement).

75. See § 699, supra.

75a See Attorney General of Ontario v. Tibenis

as, for example, wrongful eviction or harassment of a tenant,[76] the defendant will usually, though not necessarily, be guilty of a tort as well as a breach of contract, and there is no doubt that exemplary damages can be given for the tort.[77] It is increasingly held that concurrent liability in contract and tort exists in many cases formerly treated as purely contractual.[78] This development will, it seems, have the effect of enlarging the scope of exemplary damages. Thus, if a professional person deliberately gives bad advice to a client, or breaks a confidence for the purpose of causing him damage or embarrassment, or of making a profit, exemplary damages would seem to be quite appropriate.[79] Where a breach of contract is alleged to constitute a defamation, it has been held that the plaintiff must bring a separate action for defamation.[80] The question seems to be, at root, one of procedural convenience. There is no general objection to joining actions in contract and tort, provided the joinder is fair to the defendant. In such a case there would seem to be no objection to exemplary damages. In *Brown v. Waterloo Regional Board of Com'rs of Police*,[81] Linden, J., though refusing an award on the facts of the particular case, held that there was no general rule precluding exemplary damages in contract cases. It has been held in recent years that damages for breach of contract can include intangible matters such as mental distress caused by the breach, and loss of mental satisfaction that would have accompanied performance.[82] The analogy with aggravated damages and tort cases is obvious. Although in the leading case, *Jarvis v. Swans Tours Ltd.*[83] the court disavowed the intention of awarding exemplary damages,[84] it is not easy, in seeking to compensate such intangible losses, entirely to exclude punitive considerations.

[76]See *Drane v. Evangelou*, [1978] 1 W.L.R. 455 (C.A.); *Parkes v. Howard Johnson Restaurants Ltd.* (1970), 74 W.W.R. 255 (B.C.S.C.); *Teffi v. Kooiman* (1978), 87 D.L.R. (3d) 740 (Man. Q.B.); *Ozmond v. Young* (1980), 109 D.L.R. (3d) 304, 28 O.R. (2d) 225 (Div. Ct.); *Nantel v. Parisien* (1981), 18 C.C.L.T. 79 (Ont. H.C.J.).

[77]See *Denison v. Fawcett* (1958), 12 D.L.R. (2d) 537, [1958] O.R. 312 (C.A.), appeal to S.C.C. withdrawn [1958] O.W.N. 468*n*; *Grenn v. Brampton Poultry Co.* (1959), 18 D.L.R. (2d) 9 (Ont. C.A.). In *Jennett v. Federal Ins. Co.* (1976), 72 D.L.R. (3d) 20, 13 O.R. (2d) 617 (H.C.J.), a claim for exemplary damages against an insurer for refusing to pay statutory benefits was not struck out.

[78]See Reiter, "Contracts, Torts, Relations and Reliance", in *Studies in Contract Law*, eds., Reiter and Swan (Toronto, Butterworths, 1980), pp. 269-72.

[79]See *Flame Bar-B.-Q. Ltd. v. Hoar* (1979), 106 D.L.R. (3d) 438 (N.B.C.A.) (accountant presenting petition in bankruptcy against client).

[80]See §§528-535, *supra*.

[81](1982), 136 D.L.R. (3d) 49, 37 O.R. (2d) 277 (H.C.J.). See also *Centennial Centre of Science and Technology v. VS Services Ltd.* (1982), 40 O.R. (2d) 253 (H.C.J.) (claim allowed on amendment to pleadings).

[82]See §§454-468, *supra*.

[83][1973] Q.B. 233 (C.A.).

[84]All the judges rested their conclusion on compensatory principles: see p. 238, *per* Lord Denning; p. 240, *per* Edmund Davies, L.J.; p. 241, *per* Stephenson, L.J.

In Pilato v. Hamilton Place Convention Centre, exemplary damages were awarded by the Ontario High Court for wrongful dismissal, but the British Columbia Supreme Court in Vorvis v. Ins. Corp. of B.C. has held that there is no place for exemplary damages in wrongful dismissal cases, or, in general, in contract cases. A recent Ontario case suggests a distinction between "ordinary commercial contracts" in which exemplary damages are not available, and other contracts (including wrongful dismissal) where they may be. (A.-G. for Ontario v. Tibenis Productions) It was suggested above that where the plaintiff has a personal interest that is specifically enforceable, punishment of a person who acts deliberately to defeat it may be appropriate. With an ordinary employment case the employee would not have a right to specific performance, but a right to reinstatement under collective agreements is common, and a case could, it is submitted, be made for punishing an employer who acts with the intention of defeating that right.

ASPECTS OF INFLATION, AND ITS IMPACT ON DAMAGES

(a) Date for assessment of damages and damages in lieu of specific performance (§§ 65-110)

65 Considerable difference of legal opinion has been caused by the question of the proper date for assessment of damages. A sum of money must be assessed as a substitute for property that the plaintiff would have had if the wrong had not been done. Varying dates for assessment have been selected in different contexts with the consequence that anomalies and conflicts become apparent to one attempting to survey the law of damages as a whole. Discussion of the problems dealt with here has, in the past, been generally controlled by the form of action adopted by the plaintiff to assert his rights. Modern courts are rightly uncomfortable with an appearance of variation of substantive rights according to forms of action, and in several cases strenuous efforts have been made to avoid such a variation. These efforts have not always been successful, for it is never possible for the common law to discard entirely the legacy of its past. However, the task of the writer of a law book is to discover the rights actually available to a person on a given set of facts under current law, no matter what labels may have been attached to them by courts and, secondly, to suggest rational criteria by which any anomalies or conflicts may be satisfactorily resolved.

66 The choice of date for damage assessment becomes important in the present context, where the property of which the plaintiff has been deprived changes in value between the date of the wrong and the date of the judgment. Where the value of the property declines during this period, it is to the plaintiff's advantage to have damages assessed at the date of the wrong, and it is almost invariably held that the plaintiff is entitled to an assessment at that date. The plaintiff can assert that he was, by the defendant's wrong, deprived of the value of the property at the date of the wrong, and that he is entitled to have that value made good. It must be recognized that this will often put the plaintiff in a better position than if the wrong had not been done. For, if the property had been transferred as agreed, or if it had not been taken, as the case may be, it might be shown beyond a doubt that the plaintiff would have retained the property and would have suffered a loss caused by its decline in value. Nevertheless the plaintiff will be entitled to recover the value at the date of the wrong. In *Solloway v. McLaughlin*,[123] where shares were converted and subsequently replaced on a falling market in circumstances where the plaintiff would not have sought to deal with

[123] [1938] A.C. 247, [1937] 4 D.L.R. 593 (P.C.).

the shares in the interim, the defendant argued that the plaintiff had suffered no loss. It was (counsel argued) as though goods in a safe had been wrongfully taken and replaced before their owner wanted them. However, the Privy Council held that the plaintiff was entitled to damages: "[He] had vested in him a right to damages for conversion which would be measured by the value of the shares at the date of the conversion."[124] Damages were reduced by the value of the replaced shares, but only by their (lower) value at the date of replacement. The result in the particular case might be supported on the narrow ground that the defendant was in a fiduciary position, but Lord Atkin's explanation applies generally: "If the shares had been converted and not returned, there can be no question that the [plaintiff] would have been entitled to receive the proceeds of the conversion though he himself had planned to hold and thought he had succeeded in holding the shares until a time when the value was nothing."[125] This dramatic example shows that a plaintiff may find himself enormously better off by the recovery of damages than he would have been had the wrong not been done. In effect, the occurrence of a wrong in such a case is a stroke of luck to the plaintiff and (some would say) enables him to gather a windfall. However, it is submitted that the result is justified, and that the justification rests on the impracticability of any alternative rule. The law of damages constantly sets a course between the one extreme of inflexible rules of thumb for damage assessment and the other extreme of excessive expenditure of time and energy in a search for the elusive goal of perfect compensation. The rule considered here represents, it is submitted, a wise refusal to pursue the latter goal too far. Human events are so uncertain that it would do greater harm than good to inquire into what the plaintiff would have done with the property if the defendant had delivered it, or had refrained from taking or destroying it. A creditor might be shown to be a spendthrift who would have wasted the amount of his debt had it been paid (who would perhaps, in that case, have damaged his health by spending the money on riotous living), but a defence along those lines to an action on the debt cannot be permitted, even though the creditor (by now reformed) is better off as a result than he would have been on timely payment. One object of the rules of damage assessment must be to minimize the cost

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[124] *Id.*, at pp. 257-8 A.C., p. 596 D.L.R.

[125] *Id.*, at p. 259 A.C., p. 597 D.L.R. See also *Aronson v. Mologa Holzindustrie A/G Leningrad* (1927), 32 Com. Cas. 276 (C.A.); *Cuff-Waldron Manufacturing Co. v. Heald*, [1930] 3 D.L.R. 901 (Sask. C.A.).

of litigation to both parties; this is in the public interest, for all members of the community are potential plaintiffs and potential defendants. The cost of inquiry into how the plaintiff would have used his property had the defendant not deprived him of it outweighs the cost of over-compensation in the kind of case considered here. The problem is analogous to that of underuse by the plaintiff, considered below.[126]

67 It is the converse case that has given rise to legal controversy, that is, where the value of the property increases between the date of wrong and the date of judgment.[127] Considerations of convenience again support an early "crystallization"[128] of the damages, as do considerations of symmetry: if the plaintiff is to have the advantage of assessment at the date of the wrong when it benefits him, he ought to bear the risk of that measurement when it does not. Where the plaintiff is permitted to recover judgment date value if the value rises or, at his option, date of wrong value if the value falls he is permitted to speculate at the defendant's expense, reaping the benefit of an increase in value without bearing the risk of the loss.

68 This argument seems particularly strong in the case of speculative property, such as some corporate shares. If shares promised by a seller are not delivered, the buyer ought to make his own judgment, immediately, on whether or not he wishes to speculate in those shares. If, on the seller's breach, the buyer chooses not to buy shares of the same company, but the shares of some other company he will be entitled to keep any profit he makes on his substitute investment and he ought not to recover from the seller the profit on an investment he chose not to make. The failure of the buyer to profit by the increase in value between the date of the wrong and the date of judgment is due not to the seller's wrong but to the buyer's choosing to invest his money elsewhere. If the law permitted the buyer to recover the increase in value of the shares promised, when and only when, he omitted to replace them, there would be an incentive upon the buyer, if he anticipated a rise in value, not to replace the shares, even though he thought them the best possible investment, but to choose another, perhaps less profitable, investment, knowing that failure to replace the shares would increase

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[126]See §§135-142, *infra*.

[127]This problem is discussed at greater length in Waddams, "Date for Assessment of Damages", 97 L.Q.R. 445 (1981).

[128]The word is used in this context by the Supreme Court of Canada in *Asamera Oil Corp. Ltd. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633 at p. 674, 89 D.L.R. (3d) 1 at p. 31, and by Oliver, J., in *Radford v. De Froberville*, [1977] 1 W.L.R. 1262 (Ch. D.), at p. 1287.

the defendant's ultimate liability. The argument for an early crystallization of damages is that it leaves the litigants as free as possible to conduct their affairs as they would otherwise think best, thereby minimizing the total cost of prolonging the dispute.

69 Another argument tending in the same direction is that if damage assessment is postponed, the plaintiff will have an incentive to delay and to prolong litigation on a rising market. In the case of appeals final assessment will be further postponed. The logic of postponement would lead to the view that a search for perfect compensation requires assessment at the very latest practicable moment, that is, at the date the damages are actually paid, and that in case of a delay after judgment, evidence should be heard of any further increases in value before the judgment is actually satisfied. Few would take the argument to these lengths.[129] However, any postponement of final assessment is costly and the costs of litigation ought not to be unnecessarily increased.

70 It was early held that a disappointed buyer, at least when he had not prepaid the price, was entitled only to the value of the goods or shares at the date of the breach. Emphasis was placed in the early cases on the fact that the plaintiff had not prepaid, and so had had the use of the purchase money. In *Gainsford v. Carroll*,[130] the court said: "Here the plaintiff had his money in his possession and he might have purchased other bacon of the like quality the very day after the contract was broken, and if he has sustained any loss, by neglecting to do so, it is his own fault."[131] The case was followed, and its reasoning adopted, in a case of non-delivery of shares, *Shaw v. Holland*.[132]

71 These cases were concerned to distinguish earlier cases on non-replacement of stock in which, on a rising market, the plaintiff had been held entitled to damages assessed at the date of the trial.[133] It is natural that the court in *Gainsford v. Carroll*, in rejecting this measure,

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[129] But in other fields events occurring after judgment have been taken into account, and, where a debt is payable in a foreign currency, the creditor has been given the benefit of conversion at the date of actual payment. See §§799-824, *infra*. In *Hechter v. Thurston* (1977), 80 D.L.R. (3d) 685 (Man. Q.B.), revd 98 D.L.R. (3d) 329 (C.A.), restd [1980] 2 S.C.R. 254, 120 D.L.R. (3d) 576*n*, the relevant date for assessment of damages in a land sale case was held to be the date of judgment, not final assessment.

[130] (1824), 2 B. & C. 624, 107 E.R. 516.

[131] *Id.*, at p. 625.

[132] (1846), 15 L.J. Ex. 87. The date of breach was also taken in *Dawson v. Helicopter Exploration Co. Ltd.* (1958), 12 D.L.R. (2d) 1 (S.C.C.).

[133] *Shepherd v. Johnson* (1802), 2 East 210, 102 E.R. 349; *McArthur v. Seaforth* (1810), 2 Taunt. 257, 127 E.R. 1076.

would seize on an apparent distinction between the cases, that is, that since the price had not been prepaid, the plaintiff was in a better position to purchase substitute goods in the market. But the actual decision in *Gainsford v. Carroll* denies judgment date assessment. It can hardly be said, therefore, that *Gainsford v. Carroll* is distinct authority for the proposition that where the price is prepaid, the buyer is entitled to judgment date value.

72 In *Startup v. Cortazzi*[134] the case arose where a part of the price had been paid in advance. It was held that the plaintiff was entitled to the return of the money with interest (this had been paid into court) and to damages based on the value of the goods at the time of breach, but not to the value of the goods at the time of trial. Counsel for the plaintiff argued that prepayment of the price entitled the plaintiff to the high measure. "If they had their money, they might have applied it in the purchase of other merchandize, by which they might have obtained a profit equivalent to the amount of damages now claimed."[135] The court, in upholding a jury verdict for the defendant, rejected this argument. Lord Abinger said: "It was not proved that the plaintiffs could have made more than 5 per cent. on that money, or that they had not credit at their bankers to that extent, and thereby had sustained any peculiar inconvenience."[136] Alderson, B., said:

> The more correct criterion is the price at the time when the cargo would have arrived in due course according to the contract; when, if it had been delivered, the plaintiffs would have been enabled to resell it. Another criterion is, to consider the loss of the gain which the party would have made, if the contract had been complied with. In the present case, the loss which the plaintiffs have sustained arises from their having been kept out of their money. That is a matter to be calculated by the interest of the money up to the time when, by the course of practice, the money could have been obtained out of Court.[137]

73 The Sale of Goods Act, in adopting the value of the goods at the date of breach as the basis for the *prima facie* measure of damages,[138] tends in the same direction as *Startup v. Cortazzi*, though it was held in one case [139] that the court can depart from what is a *prima facie*

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[134](1835), 2 C.M. & R. 165, 150 E.R. 71. The opposite view was taken, however, in *Elliot v. Hughes* (1863), 3 F. & F. 387, 176 E.R. 173.

[135]*Startup v. Cortazzi, supra*, footnote 134, at p. 167.

[136]*Startup v. Cortazzi, supra*, at p. 168.

[137]*Startup v. Cortazzi, supra*, at p. 169.

[138]Sale of Goods Act (Ont.), s. 49(3). See footnote 8, *supra*.

[139]*Peebles v. Pfeifer*, [1918] 2 W.W.R. 877 (Sask. K.B.). But this view was rejected in *Asamera Oil Corp. Ltd. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, 89 D.L.R. (3d) 1.

measure only; the rule in *Startup v. Cortazzi* has indeed been criticized on the ground that it undercompensates.[140] However, it is submitted that the rule gives fair compensation, and moreover is by far the most practical working rule. Prepayment of the price to a defaulting seller results in the seller's wrongfully having use of the buyer's money for a period of time. This wrongful use of money can be compensated, as Alderson, B., said by an award of interest. In inflationary times, interest rates reflect the decline in the value of money which will offset a rise in the value of the goods attributable to inflation. The buyer would be doubly compensated if he recovered full interest rates (reflecting inflation) and damages based on increased value of the goods promised (also reflecting inflation). The award of interest at rates that are readily determinable is the most practical way of securing adequate but not excessive compensation.

74 In *The "Volturno"*[141] Lord Wrenbury explained the rule of early crystallization in memorable terms. He was speaking in the context of a tortious claim, but his view is equally persuasive, it is submitted, in contract cases, provided the buyer has no claim for specific performance. Lord Wrenbury said:

> If the plaintiff had been damaged by the defendant tortiously depriving him of three cows the judgment would be: Declare that on January 1 the plaintiff suffered by the defendant's tort a loss of three cows. Declare that on January 1 the plaintiff would have been entitled to go into the market and buy three similar cows and charge the defendant with the price. Declare that the cost would have been 150*l*. Adjudge that the plaintiff recover from the defendant 150*l*. It would be nihil ad rem to say that in July similar cows would have cost in the market 300*l*. The defendant is not bound to supply the plaintiff with cows. . . . The defendant is liable to pay the plaintiff damages, that is to say, money to some amount for the loss of the cows: the only question is, how much? The answer is, such sum as represents the market value at the date of the tort of the goods of which the plaintiff was tortiously deprived.[142]

With the minor modification that "the date of the tort" should be taken to mean "the earliest date at which, acting reasonably, the plaintiff could have replaced the goods",[143] it is submitted that this passage

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[140] See *McGregor on Damages*, 14th ed., §225. In *Aronson v. Mologa Holzindustrie A/G Leningrad* (1927), 32 Com. Cas. 276 (C.A.), Atkin, L.J., quoting Sedgwick (also relied on in *Peebles v. Pfeifer*, *supra*, footnote 139) suggested, *obiter*, that judgment date value should be allowed (pp. 289-90).

[141] *S.S. Celia v. S.S. Volturno*, [1921] 2 A.C. 544 (H.L.).

[142] *Id.*, at p. 563.

[143] See §§79, 86, *infra*.

remains persuasive, and, subject to certain exceptions discussed in this chapter and elsewhere,[144] represents the modern position in both contract and tort.

75 The argument in sale cases, that if the seller has had possession of the buyer's money the buyer is precluded from purchasing a substitute, can very rarely be substantiated as a matter of fact. The fact that the seller has the buyer's money makes the buyer less wealthy than he would otherwise be, but in the ordinary commercial case, it does not inhibit the buyer from making what investments seem to him best, possibly by borrowing money. A rule based on the principle that the buyer can postpone the date of assessment unless he has every penny in his pocket required to make a substitute purchase, would justify the postponement even in the case where the price has not been prepaid and the market price has risen by a trifling amount at the date of breach, for the buyer could argue that until the seller paid what he owed (the difference between the price and value at the date of breach) he had not the full amount of money required to purchase substitute goods. But no one has taken the argument to this length. Again, if the right to postpone assessment should depend on prepayment, problems arise in case of prepayment of part of the price. *Startup v. Cortazzi* was itself a case where part only of the price had been prepaid. It seems most unsatisfactory for dramatic differences in damage assessment to turn on whether or not a small part payment has been made by the buyer.

76 There is another point. If judgment date assessment is supported on the theory that the buyer has been deprived of the opportunity of owning goods at present (that is, at the date of judgment), and of receiving the increase in their value, insuperable difficulties arise where the buyer has in fact purchased a substitute on the seller's default, and holds it at the date of judgment. If he is still to be entitled to the judgment date value of the goods promised, he will receive twice over the rise in value between the two dates, and the theory just mentioned[145]

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[144] See §§82-91, *infra*.

[145] *I.e.*, that recovery of the judgment date value is needed to put the plaintiff in the position he would have occupied if the contract had been performed: see *Weber v. R.G. Steeves Construction Co. Ltd.* (1981), 32 B.C.L.R. 31 (S.C.), where profit made on a purchase and resale of a condominium was brought into account on an assessment of damages postponed for nine months after it became apparent that specific performance was unavailable. It is submitted that the preferable rule is early crystallization with profits on such a purchase treated as collateral.

does not support such double compensation.[146] If on the other hand he is to be deprived of judgment date assessment on the ground that he has in fact mitigated his loss, distinctions will have to be drawn between cases where he has bought identical goods to those promised, and cases where he has simply made a successful investment of money. It will also become relevant to discover whether the plaintiff would or could have purchased such goods even if the defendant had not defaulted. Intractable problems will arise where the buyer has bought goods similar but not identical to those promised. Gains to the innocent party that he could have made whether the wrong occurred or not are generally treated as collateral gains that do not reduce damages.[147] This approach also suggests the undesirability of establishing a rule which requires substitute purchases to be brought into account.

77 In *Asamera Oil Corp. Ltd. v. Sea Oil & General Corp.*[148] the Supreme Court of Canada held that on failure by a bailee to return shares the owner was not entitled to recover damages based on the value of the shares after a date at which he could reasonably have replaced them in the market. *Startup v. Cortazzi* and the other cases mentioned here were discussed, the court making it clear that the result ought not to vary according to prepayment of the price by a buyer.[149] The general rule was reaffirmed by the House of Lords in *Johnson v. Agnew*:[150]

> 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.[151]

78 The Supreme Court of Canada in the *Asamera* case, supported its conclusion on principles of mitigation, concluding that the buyer in the case under discussion, could reasonably have avoided the loss he

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[146]This point was made to support early crystallization in *Kaunas v. Smyth* (1976), 75 D.L.R. (3d) 368 at p. 377, 15 O.R. (2d) 237 at p. 246 (H.C.J.).

[147]See §§1254-1275, *infra*.

[148][1979] 1 S.C.R. 633, 89 D.L.R. (3d) 1. The earlier case of *Toronto-Dominion Bank v. Uhren* (1960), 24 D.L.R. (2d) 203 (Sask. C.A.) seems inconsistent.

[149]See *Asamera Oil Corp., supra*, footnote 148, at pp. 657-8 S.C.R., pp. 18-19 D.L.R.

[150][1980] A.C. 367 (H.L.).

[151]*Id.*, at pp. 400-1. See also *MacIver v. American Motors (Canada) Ltd.* (1976), 70 D.L.R. (3d) 473 (Man. C.A.), at p. 489.

claimed by buying a substitute in the market on the seller's default. The conclusion seems amply justified for the reasons mentioned. However, it may be questioned whether it is fully supported by the principle of mitigation. This is usually expressed as a rule that the innocent party must act reasonably, or more properly, that he cannot recover damages for a loss that he could reasonably have avoided.[152] It does not seem right, however, to say that a disappointed buyer acts "unreasonably" in failing to purchase a substitute. A reasonable person can never predict changes in market prices, because the current price at any time fully reflects predictions about the future. Thus, it can never be unreasonable to fail to predict a rise in prices and it seems unwise to rest the principle of breach date assessment on the basis that the buyer acts unreasonably in failure to purchase a substitute. The actual decision in *Asamera* indicates, it is submitted, that the Supreme Court of Canada was not, in reality, applying a test of reasonable conduct, for there was no proof that the plaintiff ever had acted unreasonably in failing to anticipate what turned out to be a rise in share prices of over 1,500 per cent. The rule seems rather that, to use Estey, J.'s word, damages should "crystallize"[153] at a certain point (in the *Asamera* case it was some time after the date of the wrong), and that from then the defendant's obligation to the plaintiff is only to pay a certain money sum (the sum that would have been assessed had a tribunal determined the matter at that date), and that subsequent delay in payment of that sum is to be compensated by the award of interest.[154] This approach, it is submitted, is fully consistent with justice to the plaintiff and as argued above has a very great advantage of convenience.

79 The theory of crystallization depends on the assumption that the plaintiff on the defendant's default had the opportunity of replacing the goods promised to him in the market-place. In some cases, however, there is no such reasonable opportunity. The property promised by the defendant may be unique;[155] the plaintiff may be impecunious;[156] the defendant may himself deter the plaintiff from making a substitute purchase by giving continuous assurances of performance,[157] or for

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[152]See §1194, *infra*.

[153]See *Asamera Oil Corp.*, *supra*, footnote 148, at p. 674 S.C.R., p. 31 D.L.R.

[154]On the award of interest see §§825-915, *infra*.

[155]In that case the plaintiff will often have a reasonable claim to specific performance, or specific restitution.

[156]See §§1219-1225, *infra*.

[157]In the *Asamera* case the defendant had urged the plaintiff not to press its claim.

other good reasons the plaintiff may think that he will ultimately recover use of the property in question. In these cases it has been held that the plaintiff may be entitled to a greater recovery than the value of the property at the date of breach.

80 Where property sold to the plaintiff is unique, there is often a case to be made for specific enforcement. The effect of a decree of specific performance is to require compliance at the date of the decree, so its effect, in the case of property increasing in value, is to give to the plaintiff the benefit of the increase up to the date of judgment, and indeed beyond it to the date of actual compliance with the decree. This result is justified where the property is unique, for the very finding that property is unique implies that no adequate substitute for it is available.[158] Thus, where the plaintiff is buying a house for personal occupation, his entitlement to specific performance carries with it the implication that it is not reasonable to expect him to purchase a substitute on the vendor's default, and that on a rising market, justice to the purchaser requires that he obtain the benefit of the increased value of the property. This approach to specific performance suggests, however, that the remedy should perhaps not be freely available to a speculative purchaser who is quite capable of purchasing or who indeed actually has purchased a substitute property on the vendor's default.[159]

81 A modern approach to remedial questions requires a broad perspective; the question of the availability of a specific remedy, equitable or legal, cannot nowadays be isolated from its effect on the rules governing the assessment of damages.

82 A case often cited to support a judgment date assessment of damages is *Bwllfa & Merthyr Dare Steam Collieries (1891), Ltd. v. Pontypridd Waterworks Co.*[160] The following striking passage occurred in Lord Macnaghten's speech: "Why should he [the arbitrator] listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him why should he shut his eyes and grope in the dark?"[161] It appears at first sight that this dictum would support judgment date assessment in all cases. It could be argued that in an ordinary case of non-delivery by a seller a

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[158]This seems to be the basis of the decision in *Robertson v. Dumaresq* (1864), 2 Moo P.C. 66, where damages for failure to make a government land allocation were assessed at the date of judgment.

[159]See Sharpe, *Injunctions and Specific Performance* (1983), §§613-620.

[160][1903] A.C. 426 (H.L.).

[161]*Id.*, at p. 431, cited with approval in *Hunting Merritt Shingle Co. Ltd. v. Minister of National Revenue*, [1951] Ex. C.R. 148 at p. 150.

rise in market value is always the best evidence of the buyer's present loss. The inconvenience of such a rule of assessment has been alluded to earlier. It is now suggested that the *Bwllfa* case, when the actual decision is considered in the light of its facts, also supports a general rule of breach date assessment. A statute had empowered an operator of waterworks to prevent a landowner from working mines on his land where this might interfere with the waterworks, and the statute included a provision that "full compensation" was to be paid to the miner. The evidence in the case showed that after the issue of the notice inhibiting mining, but within the time that would have been required to extract the coal, the price of coal rose dramatically. The task of the court was to apply the phrase "full compensation". The case was therefore not, strictly speaking, a damages case at all though the analogy is obviously close. The decision of the House of Lords was that the higher price was to be used as the basis of compensation. But the court went to extraordinary lengths to distinguish the case from an ordinary case of sale. Lord Robertson said: "The true inquiry here is not what is the value of the coalfield or of the coal, but what would the colliery company, if they had not been prohibited, have made out of the coal during the time it would have taken them to get it."[162] Lord Halsbury said: "It was not a purchase of the coal, nor is it analogous to a purchase of the coal."[163] So anxious was he to make the distinction that he committed himself to this cryptic but vigorous dictum: "It is what it is, and it appears to me that considering what it is I think the question propounded is solved by the statement of what it is."[164] The case, then, so far from establishing a general rule of judgment date assessment, rather tends to reaffirm a general rule of breach date assessment from which the decision was thought to constitute a very special departure.

83 The reason for the departure from the general rule in the *Bwllfa* case is, it is suggested, that no market existed in which the plaintiff could reasonably have been expected to replace the interest that the defendant had taken. The general rule in sale cases rests on the assumption that on the seller's breach the buyer can go into the market to purchase a substitute. No such possibility existed for the coal-miner. It would be a rarity indeed if he could find for sale in the market-place mining rights in a few acres of coal-bearing land adjacent to his operating coal-mine.

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[162] *Bwllfa & Merthyr Dare Steam Collieries, supra,* footnote 160, at p. 433, quoting the trial judge in [1901] 2 K.B. 798 at p. 805.
[163] *Bwllfa & Merthyr Dare Steam Collieries, supra,* at p. 428.
[164] *Bwllfa & Merthyr Dare Steam Collieries, supra.*

84 This basis of the general rule was stressed by Oliver, J., in *Radford v. De Froberville*.[165] "In contracts for the sale of goods, for instance, where there is an available market, the date of non-delivery is generally the appropriate date because it is open to the plaintiff to mitigate by going into the market immediately. Where there is no readily available market a later date may be appropriate."[166] In the earlier case of *J. & E. Hall v. Barclay*,[167] Greer, L.J., said: "Where you are dealing with goods which can be readily bought in the market, a man whose rights have been interfered with is never entitled to more than what he would have to pay to buy a similar article in the market."[168] The court went on to award a higher measure of damages for conversion of the plaintiff's chattels just because there was no market in which the plaintiff could purchase a substitute.

85 The link with specific enforcement now becomes apparent,[169] for it is in just those cases where the market cannot afford a substitute that the courts have been willing to decree specific enforcement. The advantage that this gives to the plaintiff on a rising market can be justified on the same basis as was adopted in the cases just mentioned; the reason the plaintiff is not held to the value of his property at the date of the wrong is that he had no reasonable opportunity of purchasing a substitute on that date.

86 Other established departures from the rule of assessment at the date of the wrong may be explained on the same basis. Rarely is a substitute instantly available. The appropriate time for crystallization would seem to be, therefore, the time of the earliest reasonable opportunity to replace the property. In *Ogle v. Vane*[170] and in *Wilson v. London & Globe Finance Corp., Ltd.*[171] it was held that the buyer was entitled to wait, even on a rising market, until it became clear that the seller really was not going to deliver. The same was held by the Supreme Court of Canada in *Samuel v. Black Lake Asbestos & Chrome Co.*[172] Thus,

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[165][1977] 1 W.L.R. 1262 (Ch. D.).
[166]*Id.*, at p. 1285.
[167][1937] 3 All E.R. 620 (C.A.).
[168]*Id.*, at p. 623.
[169]See *Dawson v. Helicopter Exploration Co. Ltd.* (1958), 12 D.L.R. (2d) 1 (S.C.C.), at p. 11 (absence of specific performance given as reason for early assessment date).
[170](1867), L.R. 2 Q.B. 275, affd 3 Q.B. 272 (Ex. Ch.); *Barnett v. Javeri & Co.*, [1916] 2 K.B. 390. *Ogle v. Vane* was distinguished in *Re Voss* (1873), L.R. 16 Eq. 155.
[171](1897), 14 T.L.R. 15 (C.A.), followed in *Snagproof Ltd. v. Brody* (1922), 69 D.L.R. 271 (Alta. S.C. App. Div.).
[172](1921), 62 S.C.R. 472, 63 D.L.R. 617.

if the defendant offers assurances of eventual performance it will be reasonable for the buyer to postpone the purchase of a substitute, and not unjust to hold the defendant to the higher market price obtaining at a later date. In *Asamera Oil Corp. Ltd. v. Sea Oil & General Corp.*[173] the owner of shares, in an action for non-return by a bailee, was held to be entitled to wait six years before purchasing substitute shares on a rising market. The long period is probably to be explained by the particular facts of the case including the fact that the defendant had urged the plaintiff to postpone litigation, thereby (it may be deduced) in effect promising eventually to return the shares. It may be confidently stated that this principle survives the Sale of Goods Act, for the difference between contract and market price at the date of breach is stated in the Act to be only a *prima facie* measure, and *Ogle v. Vane* was expressly cited with approval by Lord Wilberforce in *Johnson v. Agnew*. Lord Wilberforce said of the rule in the Sale of Goods Act: "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."[174] Since Lord Cairns' Act in 1858[175] Courts of Equity, wherever they have jurisdiction to entertain an application for an injunction or for specific performance, have jurisdiction to award damages in substitution for a specific order. This power has survived the Judicature Act[176] and has recently assumed importance in the context of assessment of damages. In *Wroth v. Tyler*[177] the

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[173][1979] 1 S.C.R. 633, 89 D.L.R. (3d) 1. See also the discussion at §§105-108, *infra*.

[174][1980] A.C. 367 (H.L.), at p. 401.

[175]Chancery Amendment Act, 1858. See Sharpe, *Injunctions and Specific Performance* (1983), §§19-22, 369.

[176]See Judicature Act (Ont.), s. 21, and footnote 192, *infra*. In England the Act was repealed, but held to survive in effect in *Leeds Industrial Co-operative Society, Ltd. v. Slack*, [1924] A.C. 851 (H.L.).

[177][1974] Ch. 30, followed in *Hechter v. Thurston* (1977), 80 D.L.R. (3d) 685 (Man. Q.B.), revd 98 D.L.R. (3d) 329 (C.A.), restd [1980] 2 S.C.R. 254, 120 D.L.R. (3d) 576*n*; *Metropolitan Trust Co. of Canada v. Pressure Concrete Services Ltd.* (1973), 37 D.L.R. (3d) 649, [1973] 3 O.R. 629 (H.C.J.), affd 60 D.L.R. (3d) 431, 9 O.R. (2d) 375 (C.A.); *306793 Ontario Ltd. v. Rimes* (1979), 100 D.L.R. (3d) 350, 25 O.R. (2d) 79 (C.A.); *Calgary Hardwood v. C.N.R.* (1977), 74 D.L.R. (3d) 284 (Alta. S.C.T.D.), affd 100 D.L.R. (3d) 302 (S.C. App. Div.); *E.J.H. Holdings Ltd. v. Bougie* (1977), 7 A.R. 213 (Dist. Ct.); *Western Oil Consultants v. Great Northern Oils Ltd.* (1981), 121 D.L.R. (3d) 724 (Alta. Q.B.). However, judgment date assessment was refused, on grounds of mitigation, in *Chand v. Sabo Bros. Realty Ltd.* (1977), 81 D.L.R. (3d) 382 (Alta. S.C.T.D.), vard 96 D.L.R. (3d) 445 (S.C. App. Div.), where the purchaser's deposit had been promptly returned

vendor of a residential house was unable to make a good title on account of the registration by his wife of a charge giving her a right of occupation. The purchasers sued for specific performance and had reason to suppose, as did the trial judge,[178] up to the very last moment, that the wife would withdraw her charge and permit the contract to be performed. However, she could not be ordered to do so, and Megarry, J., assessed damages in substitution for a decree of specific performance. The value of the house, along with other house prices in England, had risen dramatically between the date due for completion and the date of the trial. Megarry, J., held that although common law damages might be limited to the difference between contract and market price at the date of breach (he left this point open)[179] nevertheless damages in lieu of specific performance were to be measured at the date of judgment. The result seems to follow from an application of Lord Cairns' Act, for it would be odd if damages in substitution for specific performance should be assessed on a basis that would give the purchaser less value than he would have received by an actual decree of specific performance.

87 The result of the case was thus to give to the purchasers the benefit of the increase in the value of the house between the date of breach and the date of judgment. This result had attractions in *Wroth v. Tyler* itself where the plaintiffs had invested their life savings in the purchase and might, if damages had been otherwise assessed, have lost forever their chance to own a house. The result seems less attractive, however, where the plaintiff is a corporation purchasing vacant land for speculation.[180] There seems no good reason why such a buyer, especially if the deposit is low, should not buy a substitute within a reasonable time after the vendor's default and no injustice, therefore, in estimating damages at the date of the breach. The further conclusion may eventu-

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after default. The same view was taken in *Kaunas v. Smyth* (1976), 75 D.L.R. (3d) 368, 15 O.R. (2d) 237 (H.C.J.). In the *Asamera* case, *supra*, footnote 173, at p. 652 S.C.R., p. 14 D.L.R., Estey, J., suggested that "judgment date", for purposes of assessing value, should be taken as at the end of the trial. In *Metropolitan Trust Co. of Canada v. Pressure Concrete Services Ltd.*, *supra*, R. E. Holland, J., directed assessment to the date of delivery of reserved judgment. In *Hechter v. Thurston*, *supra*, at p. 690, Nitikman, J., held that assessment should be at the date of hearing, not the later date of final assessment.

[178] See *Wroth v. Tyler*, *supra*, footnote 177, at p. 63.

[179] *Wroth v. Tyler*, *supra*, at p. 57.

[180] As in *306793 Ontario Ltd. v. Rimes* (1979), 100 D.L.R. (3d) 350, 25 O.R. (2d) 79 (C.A.).

ally be accepted as some recent cases have held,[181] that such a purchaser should not be entitled to an actual decree of specific performance even where that is possible.[182]

88 Some of the earlier-mentioned objections to postponing the date of assessment become real in this context. The plaintiff will have an incentive to delay the final assessment as long as possible. In *Malhotra v. Choudhury*[183] the English Court of Appeal was faced with a claim for damages in substitution for specific performance where the value of the property had been steadily rising during protracted litigation. The defendant argued that the plaintiff should not be entitled to enhance his damages through "dragging his heels through the law courts".[184] The court reduced the damages on the ground that the plaintiff "did not sufficiently mitigate his damage by proceeding with greater celerity".[185] It is quite common in Canadian jurisdictions, even where the plaintiff is eager, for a trial to occur after a much longer delay than the two years involved in *Malhotra v. Choudhury*. If it is objectionable for the plaintiff to profit by a delay of two years in *Malhotra v. Choudhury*, it seems also objectionable for him to profit by a delay of two years occurring for any reason.[186] If possible, a rule should be chosen that makes the parties indifferent to delay. At the very least, it seems undesirable to set up a rule that gives the plaintiff an incentive to prolong litigation. Even though, as in *Malhotra v. Choudhury*, the plaintiff's conduct can be controlled in extreme cases, there will be many cases in which the plaintiff's conduct, while less than eager, will fall short of what the court would be willing to castigate.

89 In the case of an appeal final assessment will be further postponed as illustrated by *Domb v. Isoz*[187] where the purchaser of a house, having sued for specific performance and having lost at the trial appealed successfully, abandoning his claim for specific performance at the appeal hearing. The English Court of Appeal held that the plaintiff was entitled to damages based on the value of the house at the date of the appeal hearing. In the case of a further appeal assessment could

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[181] See Sharpe, *Injunctions and Specific Performance* (1983), §614.

[182] In the *Rimes* case, *supra*, footnote 180, at p. 352 D.L.R., pp. 80-1 O.R., MacKinnon, A.C.J.O., suggested that the question might be open. See also Sharpe, *op. cit.*, *supra*, footnote 181, §§613-620.

[183] [1980] Ch. 52 (C.A.).

[184] *Id.*, at p. 81.

[185] *Ibid.*

[186] On delay as a defence to specific performance, see Sharpe, *op. cit.*, §§82-98.

[187] [1980] Ch. 548 (C.A.).

well be delayed for many years. That the result may be harsh to the defendant is illustrated by the fact of *Domb v. Isoz* where the plaintiff had bought a substitute house soon after the date of the defendant's breach. In a period of inflation, the result will be that the plaintiff is given the benefit of the increase in value of two houses, whereas if the wrong had not been done he would have received this benefit only once. The defendant, though he must have had a perfectly respectable defence (for he won at trial, and the case can be supposed where he wins in the Court of Appeal also but loses in the highest court), might well be ruined by such a judgment. In many cases in order to satisfy the judgment he will have to sell the house that he had (not unreasonably) considered to be his own house and his only protection against inflation.

90 In *Domb v. Isoz* where the plaintiff had lost at trial, he can hardly be faulted for appealing, but it becomes clear from these considerations that the plaintiff, even when successful at trial, would have an incentive to appeal on a rising market in order to keep the date of final assessment open. It is perhaps unlikely that a plaintiff, having successfully recovered full judgment date value at trial, would be able to appeal solely on the ground that he anticipated a further rise in value before the Court of Appeal should hear his case, but where the plaintiff has any legitimate ground for an appeal against the amount of his judgment he will have an added incentive to appeal in the prospect of postponement of final assessment.

91 The facts of *Domb v. Isoz*, where the plaintiff had bought a substitute house soon after the defendant's default, illustrate the difficult problem earlier alluded to of whether, and if so when, the loss of the kind in question here can be said to have been avoided. The ordinary person would be inclined to say that the plaintiff in *Domb v. Isoz* had protected himself, by buying a substitute house, from the effect of subsequent increases in house prices. If so, he had mitigated his loss and the decision of the court is over-compensatory. But such a principle, as suggested earlier, is exceedingly difficult to apply, for it is impossible to set up a criterion that will easily distinguish between investments that are to be categorized as avoidance of loss and those to be categorized as collateral gains. It seems wrong for the plaintiff to be over-compensated, but it seems wrong too to set up a rule that will encourage the plaintiff not to purchase a substitute, if he would otherwise choose to do so, for fear of suffering a reduction of damages. There seems to be no solution to this dilemma so long as the law permits postponement

of damage assessment in these circumstances, and postponement seems inevitable so long as the plaintiff is entitled to and is reasonably pursuing an actual decree of specific performance. The point was clearly put by Macdonald, C.J., in *Horsnail v. Shute*:[188]

> But where the plaintiff is pursuing his remedy for enforcement of the contract that doctrine [*i.e.*, the doctrine of mitigation] can have no application. The plaintiff was within his rights in persisting in his claim for specific performance until the impossibility of success was disclosed. It was upon discovery of that fact, wrongly concealed from him by defendant, and then only, that he was thrown back upon his claim for damages.[189]

92 Another difficulty concerns the question of advance payment. If the plaintiff had paid the whole of the purchase price in advance support might be lent to the view that the defendant's default prevented the purchase of a substitute, particularly in the case of a very substantial transaction like the purchase of a house. In most house purchase cases the purchaser will have paid a deposit, usually a small proportion of the total price. It may still be argued that in the case of a purchaser of limited means intending to borrow a large part of the price, payment of the deposit (which will usually be held by a real estate agent during the litigation) effectively inhibits the making of a substitute purchase. Megarry, J., evidently assumed that this was so in *Wroth v. Tyler*[190] but it is not clear that proof of that fact was an essential part of the plaintiff's case. A question not answered is whether the result would have been the same if the purchaser had in fact sufficient means to procure a substitute. Again, what would be the position if the plaintiff had paid only a trifling deposit or no deposit at all? It is, to say the least, inconvenient for the date of damage assessment to vary according to the plaintiff's particular financial circumstances or the amount of the deposit in particular transactions.

93 The postponement of the date for assessment of damages in *Wroth v. Tyler* depended on the application of Lord Cairns' Act. Megarry, J., was at least unsure whether the same result could have been achieved at common law.[191] If Megarry, J.'s doubts were justified it would become essential to discover when the court has jurisdiction to award

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[188](1921), 62 D.L.R. 199 (B.C.C.A.).
[189]*Id.*, at p. 203.
[190][1974] Ch. 30 at p. 57.
[191]*Ibid.*

damages in substitution for specific performance. Lord Cairns' Act reads as follows:

> 2. In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct.[192]

The power given by this provision is thus available in all cases in which the court has jurisdiction to entertain an application for specific performance. But what does this mean? It can well be said that the court always has jurisdiction to entertain an application, though for many good reasons it may, after entertaining it, refuse it. On this interpretation there would be no restriction on the power to award damages under the Act. On the other hand, if it is said that the court does not have jurisdiction to entertain an application for specific performance if specific performance would for good reason be refused, then the power to award damages in substitution for specific performance has no scope at all, for where a substitution is in question it must be supposed that specific performance has been refused, presumably for good reason. Intermediate positions are not easy to define. In *Price v. Strange*[193] Buckley, L.J., said:

> There are, of course, classes of contracts of which the court acting on accepted principles will not in any circumstances decree specific performance. Contracts for the sale and purchase of any commodity readily available upon the market at an ascertainable market price and contracts for personal services are examples. In the case of any such contract it would, I think, be correct to say that the court has no jurisdiction to entertain an application for the specific performance of the contract.[194]

The court went on to hold however that where specific performance was possible but was refused as a matter of discretion the court still had

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[192] Modern Judicature Act provisions are in similar terms. See Judicature Act, Ont., s. 21; Alta., s. 20; Yukon, s. 10(1)(*i*); N.W.T., s. 19(*i*); Court of Queen's Bench Act, Man., s. 60; Queen's Bench Act, Sask., s. 45(9).

[193] [1978] Ch. 337 (C.A.).

[194] *Id.*, at p. 369.

jurisdiction to entertain the application, so damages could be awarded in substitution therefor. This is a difficult distinction. Even though the refusal of specific performance can be reliably predicted on the basis of a well-established discretion it appears that in Buckley, L.J.'s view the jurisdiction to entertain the application remains. But in that case why can it not be said that in the ordinary sale of goods case, which he cites as one in which the Act does not apply, the court equally has discretion to entertain the application, for it is surely through the exercise of the court's discretion that specific performance is generally refused in such cases. The consequence of this line of thinking would be that the court always has power to award damages in substitution for specific performance and if so a well-advised plaintiff ought always to cast his claim in the form of a claim to specific performance or damages in substitution. This would have startling results. A disappointed buyer of gold bars for example would be encouraged to frame his action for non-delivery as a claim for specific performance (even though he knew it would inevitably be refused) in order to obtain the benefit of judgment date assessment on a rising market. Such a circumvention of the ordinary rules for damage assessment in such cases would be most unwelcome.

94 No doubt it was in part a consideration of these prospects that induced the House of Lords in *Johnson v. Agnew*[195] to hold categorically that Lord Cairns' Act does not warrant the assessment of damages on any basis other than at common law. Of *Wroth v. Tyler* Lord Wilberforce said:

> If this establishes a different basis from that applicable at common law, I could not agree with it, but in [a later case] Magarry 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 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.[196]

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[195] [1980] A.C. 367 (H.L.).

[196] *Id.*, at p. 400. This passage was endorsed by the Ontario Court of Appeal in *306793 Ontario Ltd. v. Rimes* (1979), 100 D.L.R. (3d) 350 at p. 354, 25 O.R. (2d) 79 at p. 83. To the same general effect is *Elsley v. J. G. Collins Ins. Agencies Ltd.*, [1978] 2 S.C.R. 916 at p. 934, 83 D.L.R. (3d) 1 at p. 13.

95 The meaning of this is that the result in *Wroth v. Tyler* is approved but only on the basis that the same measure of damages would have been awarded at common law. Lord Wilberforce made it clear that the general rule is that damages are assessed at the date of breach:

> 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 breach—a principle recognised and embodied in section 51 of the Sale of Goods Act 1893.[197]

He adds that departure from this principle is possible but must be justified: "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."[198] Lord Wilberforce then gives examples of cases where justice requires postponement. These are *Ogle v. Vane*[199] where the defendant after breach gave assurances of performance, *Hickman v. Haynes*[200] where performance was postponed at the defendant's request, and *Radford v. De Froberville*[201] where the defendant had contracted to build a wall on land adjacent to the plaintiff's and so purchase of substitute performance was impossible.

96 The language used by Lord Wilberforce and the examples he chose show that he considered that if the date for assessment of damages was to be postponed it had to be for reasons that would appeal to a modern court of justice assessing damages on general compensatory principles. It is submitted that any other view, besides being inconvenient as argued above, perpetrates an anachronistic distinction between the equity and common law sides of the modern court.

97 The remaining question is what is left of the decision in *Wroth v. Tyler*. It seems plain from the passage quoted above that Lord Wilberforce thought the result acceptable, assuming that it could be justified on general compensatory principles. Megarry, J., clearly thought that full compensation to the plaintiffs required the result he reached. He said, having referred to the general principle that an award of damages

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[197] *Johnson v. Agnew, supra*, footnote 195, at pp. 400-1.
[198] *Johnson v. Agnew, supra*, at p. 401.
[199] (1867), L.R. 2 Q.B. 275, affd 3 Q.B. 272 (Ex. Ch.), followed in *Glenn v. Schafler* (1911), 18 W.L.R. 671 (Sask. S.C.); *Samuel v. Black Lake Asbestos & Chrome Co.* (1921), 62 S.C.R. 472, 63 D.L.R. 617.
[200] (1875), L.R. 10 C.P. 598.
[201] [1977] 1 W.L.R. 1262 (Ch.).

should put the party complaining so far as money can do it in the same situation as if the contract had been performed:

> In the ordinary case of a buyer of goods which the seller fails to deliver, the buyer can at once spend his money in purchasing equivalent goods from another, as was pointed out in *Gainsford v. Carroll* (1824) 2 B. & C. 624, and so the rule works well enough; but that is a very different case. It therefore seems to me that on the facts of this case there are strong reasons for applying the principle [of full compensation] rather than the rule [of breach date assessment].[202]

At a later point he said: "if the plaintiffs obtain neither a decree of specific performance nor £5,500 by way of damages [the judgment date assessment], theirs also is a dismal prospect. Having made a binding contract to purchase for £6,000 a bungalow now worth £11,500, they would recover neither the bungalow nor damages that would enable them to purchase anything like its equivalent."[203] It is evident therefore that Megarry, J., is not proposing a departure from the general rule of breach date assessment in the ordinary sale of goods case, but that he considers that reasons of justice require departure from the general rule in the particular case before him. The reason may lie in the following passage:

> I am satisfied on the evidence that the plaintiffs had no financial resources of any substance beyond the £6,000 that they could have put together for the purchase of the defendant's bungalow, and that the defendant knew this when the contract was made. The plaintiffs were therefore, to the defendant's knowledge, unable at the time of the breach to raise a further £1,500 in order to purchase an equivalent house forthwith, and so, as events have turned out, mitigate their loss.[204]

This passage may be important for it is one of the reasons given for a departure from the general rule, and since *Johnson v. Agnew*, a reason other than the existence of Lord Cairns' Act is needed to justify the result. On this basis the case could be limited to a purchaser who is without the means of mitigating his loss by the purchase of a substitute on the defendant's breach. In a case (like *Wroth v. Tyler* itself) where a couple have put up their life savings as a deposit on a first house it is readily understandable that the means to purchase a substitute will be

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[202] *Wroth v. Tyler*, [1974] Ch. 30 at p. 57.
[203] *Id.*, at p. 62.
[204] *Id.*, at p. 57.

lacking. Thus, the result in *Wroth v. Tyler* would be justifiable on its facts. But in any case where the purchaser has the means, or access to the means, to buy substitute property, assessment of damages would, on this view, be at the date when such a purchase could reasonably have been made. On this interpretation, practically all commercial purchasers would be excluded from the benefit of postponed assessment, for rarely is the loss of the use of the deposit critical to such purchasers, and so would be a substantial number of individual purchasers who will have the capacity to borrow to finance a substitute purchase.

98 The chief difficulty with this view is the general readiness of the courts to award specific performance in land sale cases.[205] If the purchaser has the right to an actual decree of specific performance where this is possible he can secure protection against a rise in value by obtaining a decree. It seems anomalous for an award of damages instead of a decree to give substantially less than the financial equivalent of specific performance itself. The implication of holding the plaintiff to an early date for assessment of damages on the assumption that he can replace the property in the market is that the plaintiff loses any specific proprietary interest in the actual property agreed to be sold and becomes entitled instead to a crystallized sum of money (with interest until payment). This, however, cannot be the result in any case where the plaintiff has a right to specific enforcement. In the context of the present law of specific performance the position appears to be that the plaintiff is entitled to postpone the date for assessment until it becomes clear that actual performance will not be forthcoming (as, for example, when he learns that performance will be impossible), but further increases beyond that date (when the contract is "lost" to use the word of Lord Wilberforce)[206] will not be chargeable to the defendant. This explanation leaves the result in *Wroth v. Tyler* intact for it was a feature of the case that the plaintiff (and indeed the judge)[207] had reason to expect right up to the last moment that the defendant's wife would remove her charge and that actual performance would be forthcoming.

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[205]See Sharpe, *Injunctions and Specific Performance*, (1983), §§613-620.

[206]*Johnson v. Agnew*, *supra*, footnote 195, at p. 401. Postponement of assessment to this point was approved in *Horsnail v. Shute* (1921), 62 D.L.R. 199 (B.C.C.A.) (see passage quoted at footnote 189, *supra*), and *Schweickardt v. Thorne*, [1976] 4 W.W.R. 249 (B.C.S.C.).

[207]See *Wroth v. Tyler*, *supra*, footnote 202, at p. 63.

95 In cases of destruction or conversion of goods the *prima facie* measure of damages is their value at the time and place of the loss. If, however, the plaintiff does not learn of the loss for a period of time during which the value rises, it would seem that he is entitled to the higher value.[208] This would be consistent with the general rule of sales cases. Justice is done to the defendant if he is awarded a sufficient sum of money to enable him to replace the goods at the time of their loss, or at the earliest time thereafter that he could reasonably be expected to purchase a substitute. Interest should be added to this sum until payment.[209] The defendant, once he knows the property has been destroyed or irretrievably lost, cannot have a reasonable expectation of receiving the specific goods. Consequently, if he chooses not to replace them he is of course free to do so — in effect he decides not to invest in ownership of such goods — but he cannot hold the defendant liable for the profit he might have made from an investment he chose to forgo.

100 In cases where the plaintiff can assert a proprietary interest in specific goods there is a close analogy to cases where the plaintiff is entitled to specific performance. Thus, if the plaintiff brings an action in detinue the court has jurisdiction to order specific delivery of the chattel claimed. Such an order has the effect of giving the plaintiff the benefit of any increase in the value of the chattel between the date of the wrong and the date of judgment. Just as in the case of damages in lieu of specific performance it seems to follow that on refusal of specific delivery the plaintiff must be entitled to damages representing the value of the chattel at the date of judgment. The analogy was drawn in *Malhotra v. Choudhury*:[210]

> The equitable remedy of specific performance has features markedly different from damages at common law for breach of contract. But there is an analogy at common law to the equitable remedy of specific performance. This is to be found in the action in detinue. . . . the action in detinue partakes of the nature of an action in rem in which the plaintiff seeks specific restitution of his chattel. In this action where an order for a writ of specific delivery can be made, the plaintiff has always been entitled instead to claim its value in money assessed at date of judgment.[211]

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[208]See *The Queen in right of Alberta v. Arnold*, [1971] S.C.R. 209, 14 D.L.R. (3d) 574.

[209]On the award of interest see §§825-914, *infra*.

[210][1980] Ch. 52 (C.A.).

[211]*Id.*, at pp. 78-9, *per* Cumming-Bruce, L.J. See also *Steiman v. Steiman et al.* (1983), 143 D.L.R. (3d) 396 (Man. C.A.), at p. 407.

101 An action in conversion, on the other hand, looks primarily to the date of the wrong, apparently giving the plaintiff a substantially inferior remedy on a rising market.[212] It is always awkward for results to vary according to forms of action, and in *Sachs v. Miklos*[213] Lord Goddard, C.J., made strenuous efforts to demonstrate that conversion in the circumstances here considered was as generous to the plaintiff as detinue. The case involved furniture sold during the war without authority by a bailee. The plaintiff did not discover the facts until after the war when the value of the furniture had risen tenfold. Lord Goddard, giving the judgment of the Court of Appeal, held that the measure of damages in detinue and conversion should be the same, with the increase in value to be added to the *prima facie* measure of damages for conversion as consequential damages. The entitlement of the plaintiff to recover the higher measure of damages depended, however, on his not having knowledge of the conversion, a point on which no finding of fact had been made: "If he did have that knowledge, then, it seems to me, this great rise in value which has taken place since is not damage which he can recover as flowing from the wrongful act."[214]

102 Lord Goddard's assertion that the measure of damages was the same in detinue and conversion was castigated in *Malhotra v. Choudhury* as unnecessary, too wide and based on a misleading headnote.[215] However, it is submitted that, in substance, Lord Goddard's approach was sound. So long as the plaintiff has reason to expect that the defendant will restore the specific goods it is not reasonable to expect him to procure substitute furniture. When the plaintiff learns that the goods have been sold he must make his own decision on replacement (notionally as Lord Goddard said the measure of damages assessed at that date will be sufficient to replace the furniture)[216] and cannot hold the defendant to subsequent increases in value. It will be seen that this approach closely matches Lord Wilberforce's speech in *Johnson v. Agnew* where it was held that assessment of damages in a case where

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[212]The primary measure of damages is usually said to be the value of the goods at the time of the conversion. See *Mackenzie v. Blindman Valley Co-operative Ass'n*, [1947] 4 D.L.R. 687 (Alta. S.C.).

[213][1948] 2 K.B. 23 (C.A.), applied in *Aitken v. Gardiner* (1956), 4 D.L.R. (2d) 119, [1956] O.R. 589 (H.C.J.), to a case of detinue for shares, and *Steiman v. Steiman (No. 2)* (1981), 11 Man. R. (2d) 376 (Q.B.), vard 143 D.L.R. (3d) 396 (Man. C.A.), a case of conversion of jewellery.

[214]*Sachs v. Miklos*, *supra*, footnote 213, at p. 40.

[215]See *supra*, footnote 210, at p. 79. See also *Steiman v. Steiman*, *supra*, footnote 211, at pp. 407-9.

[216]*Sachs v. Miklos*, *supra*, footnote 213, at p. 40.

specific performance might be sought should take place at the date the contract is "lost", that is, at the date when it becomes clear that actual performance will not be forthcoming.[217] In the earlier case of *Rosenthal v. Alderton & Sons, Ltd.*,[218] also concerning the wrongful sale of second-hand furniture by a bailee, it was held that the owner could sue in detinue so as to recover the judgment date value. It was held that the bailor could elect to sue in detinue but the court added the significant words "at any rate where he was not aware of the conversion at the time".[219] These words indicate that the result in the case is not inconsistent with the rule supported here, namely, that the assessment of damages should take place at the earliest date on which the plaintiff, acting reasonably, could have replaced the goods. So long as there is a prospect of his receiving specific restitution, as there is so long as the defendant has it in his power to restore the goods, the plaintiff acts reasonably in not replacing them. Even though the defendant refuses absolutely to restore the goods to the plaintiff (whose ultimate legal success is of course to be assumed), the plaintiff may reasonably expect that the defendant will change his mind after taking legal advice or upon being subjected to an adverse judgment. Indeed the plaintiff, whether he sues in conversion or detinue, is constantly open to the possibility of the defendant's offering to restore the goods, in which case it was early established that the plaintiff's action would be stayed if he refused to accept redelivery.[220]

103 In the sale of specific goods the property in the goods generally passes to the buyer when the contract is made.[221] In a case of non-delivery the buyer is entitled, therefore, to sue the seller in detinue or conversion. He would also be entitled to avail himself of self-help and possibly of the legal remedy of replevin to gain actual possession of the goods. It appears in such cases that the buyer can reasonably refrain from replacing the goods so long as it remains in the seller's power to deliver them. It was established in *Cohen v. Roche*[222] that

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[217]See §91, *supra*.

[218][1946] K.B. 374 (C.A.).

[219]*Id.*, at p. 379.

[220]*Fisher v. Prince* (1762), 3 Burr. 1363, 97 E.R. 876; *Earle v. Holderness* (1828), 4 Bing. 462, 130 E.R. 845.

[221]Sale of Goods Act, Alta., s. 21(1); B.C., s. 24; Man., s. 20; N.B., s. 19; Nfld., s. 19; N.W.T., s. 20; N.S., s. 20; Ont., s. 19; P.E.I., s. 20; Sask., s. 20; Yukon, s. 20.

[222][1927] 1 K.B. 169. To the same effect is *Chychaluk v. Protheroe* (1951), 2 W.W.R. 513 (Man. K.B.), affd 6 W.W.R. (N.S.) 48 (C.A.).

the buyer would not be entitled to an order of specific delivery in detinue unless the goods were of such a kind as to justify an order of specific performance. Nevertheless, so long as by the law of sale the property is vested in the buyer, it appears difficult to avoid the conclusion that the buyer is entitled to call for actual delivery, and on a rising market should be entitled to postpone the date for damage assessment to the date when it finally becomes apparent that delivery will not be forthcoming, which may be as late as the date of judgment.

104 Replevin and self-help are available in all cases where the plaintiff can assert ownership of specific property. It seems to follow that so long as these remedies are available the date of the assessment of damages is postponed. If the law affords the plaintiff a remedy that if exercised would give him possession of specific property it must in administering the alternative remedy of damages award to the plaintiff a money sum equal to the value of the property at the time the plaintiff could lawfully have repossessed it. The logic is the same as that applied in *Wroth v. Tyler*.[223] If damages were reduced to the value of the property at the date of the wrong, logic and convenience would require the elimination of the plaintiff's right to exercise proprietary remedies, but this would be to permit the defendant in effect to deprive the plaintiff of his property rights simply by making a wrongful assertion.

105 Many of these difficult questions arose in the Supreme Court of Canada case of *Asamera Oil Corp. Ltd. v. Sea Oil & General Corp.*[224] This was an action for failure by a bailee to return shares. The value of the shares at the date of the wrong was 29¢; they subsequently rose to a value of $46.50, dropping back by the date of the trial (nine years after the wrong) to $22. As the dispute involved 125,000 shares it will be appreciated that millions of dollars turned on the choice of date of assessment of damages. Though in the lower courts the action had proceeded as one in detinue the Supreme Court of Canada held that "the action in substance is a simple case of breach of contract".[225] Unfortunately the judgment does not explain why the plaintiff could not exercise proprietary remedies, but presumably the reason must be that the plaintiff lacked a specific interest in the particular shares or in a particular certificate, the particular shares loaned having been sold by the defendant in 1958. The defendant's obligation was evidently therefore treated as an obligation to replace rather than to restore

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[223] See §86, *supra*.

[224] [1979] 1 S.C.R. 633, 89 D.L.R. (3d) 1. For a fuller discussion see Waddams, "Damages for Failure to Return Shares", 3 C.B.L.J. 398 (1979).

[225] *Asamera Oil Corp.*, *supra*, at p. 644 S.C.R., p. 8 D.L.R.

specific shares. At least when the plaintiff came to know of the sale, he no longer had reason to assert a proprietary interest.

106 The decision of the Supreme Court of Canada was that, like a buyer of goods, the plaintiff was not entitled to hold the defendant to any increase in the value of the shares after the date at which, acting reasonably in all the circumstances, he could have purchased replacement shares. The conclusion was based on the duty to act reasonably to mitigate loss. As has been suggested earlier[226] it does not seem entirely satisfactory for the result to rest on the duty of the plaintiff to act reasonably, for it could not be shown that it was unreasonable for the plaintiff to anticipate the rise in market value of the shares and it seems plain that the court's conclusion did not rest on any such finding. It is suggested therefore that the slightly wider formulation used here actually represents the decision of the court. The point at which damages are assessed is the point at which the plaintiff ought to say to himself that "his shares" are now lost to him and that he has to make a fresh decision whether or not to invest in similar shares.

107 The Supreme Court of Canada held that a six-year period should be allowed to the plaintiff during which, in fact, the shares had risen to about $7. This seems, at first sight, a rather generous allotment of time but certain facts in the case appear to have made it reasonable for the plaintiff to postpone any decision to replace the shares. These are, first, that an injunction was obtained restraining the defendant from disposing of the shares. The injunction was interpreted not to affect any specific identifiable shares, simply requiring the defendant to retain any 125,000 shares of the company. However, the existence of the injunction may well have led the plaintiff to consider that he had a reasonable prospect of actually obtaining a block of shares from the defendant. Not until some years after the date of the wrong did the plaintiff learn that the specific shares loaned had been sold by the defendant before the date due for their replacement. This fact did not emerge incontrovertibly until the defendant admitted it on discovery in 1968. Thus, the plaintiff might plausibly say that for a number of years after 1960 he had reason to expect actual restitution from the defendant. The second important fact was that the defendant had strenuously urged the plaintiff not to press its action, and this too might reasonably be taken as an assurance that the plaintiff's legal rights to the shares would be observed.

108 The decision may be taken to establish, then, that damages will be

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[226] See §78, *supra*.

measured at the date when the plaintiff, acting reasonably in all the circumstances, could have made a substitute purchase.[227] Where the plaintiff maintains a proprietary interest in goods or shares, as also in the case where he was reasonably pursuing a specific remedy, he cannot be expected to consider replacing the property for, by hypothesis, he reasonably expects the defendant eventually to produce it. But where it becomes clear that the specific property is definitely lost to the plaintiff he must make his own investment decision and cannot hold the defendant to further increases in value.

109 In *Westward Farms Ltd. v. Cadieux*,[228] the Manitoba Court of Queen's Bench held that damages for breach of a contract to give the plaintiff an option to buy land were to be assessed at the date when a reasonable person might have purchased a substitute. A period of six months following the breach was allowed as a reasonable time within which to acquire a substitute.

110 The discussion has so far proceeded on the assumption of a steadily rising value of the property. The question now arises as to fluctuation between date of wrong and date of judgment. The *Asamera* case illustrates the possibility of a rise after the date of the wrong, followed by a fall at date of judgment to an intermediate point. Many of the cases concern the wrongful sale of shares by a broker. There is some suppor for a rule permitting the plaintiff to claim the highest value reached b the shares between the date of the wrong and the date of trial on the argument that he has been deprived of an opportunity to sell the shares at that price. This rule was adopted in a 19th century English case,[229] though rejected in others,[230] and prevails in some American jurisdictions.[231] It was originally adopted in New York, but later abandoned

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[227] The same view was taken in *Samuel & Escombe v. Rowe* (1892), 8 T.L.R. 488 (Q.B.) and in *Steiman, supra*, footnote 211.

[228] [1981] 3 W.W.R. 673 (Man. Q.B.), revd on other grounds 138 D.L.R. (3d) 137 (C.A.), leave to appeal to S.C.C. refused 18 Man. R. (2d) 269*n*. See also *Cull v. Heritage Mills Developments Ltd.* (1974), 49 D.L.R. (3d) 521, 5 O.R. (2d) 102 (H.C.J.) (acceptance of anticipatory breach).

[229] *Archer v. Williams* (1846), 2 Car. & K. 26, 175 E.R. 11. See also *McNeil v. Fultz* (1906), 38 S.C.R. 198 at p. 205; *Toronto General Trusts Corp. v. Roman* (1962), 37 D.L.R. (2d) 16, [1963] 1 O.R. 312 (C.A.), affd [1963] S.C.R. vi, 41 D.L.R. (2d) 290*n*, and *Brady v. Morgan* (1967), 65 D.L.R. (2d) 101, [1967] 2 O.R. 680 (C.A.), which must now be read in the light of the *Asamera* case. See also *Siscoe Gold Mines Ltd. v. Bijakowski*, [1935] S.C.R. 193, [1935] 1 D.L.R. 513.

[230] *McArthur v. Seaforth* (1810), 2 Taunt. 257, 127 E.R. 1076. See also *Ames & Co. v. Sutherland* (1905), 9 O.L.R. 631 (Div. Ct.), affd 11 O.L.R. 417 (C.A.), affd 37 S.C.R. 694.

[231] See McCormick, *Damages*, 1935, 187.

in favour of a rule allowing the plaintiff to recover the highest value between the date of the conversion and the end of a reasonable period for the plaintiff to effect a replacement.[232] This latter rule was approved by the Supreme Court of Canada in *Asamera* and is consistent with the view put forward above. After the plaintiff learns that his shares have been sold, he has no reasonable expectation of recovering them and must make a new investment choice. If he could recover the highest value between conversion and trial, perhaps many years later, he would be permitted to speculate at the defendant's expense. In a case where the plaintiff's property is wrongfully detained by the defendant down to the trial the situation is different, for there the plaintiff can assert proprietary remedies and ought, as has been suggested above, to be entitled to recover the value of the property at the date of judgment. It does not follow, however, that in case of fluctuations he should be entitled to a higher intermediate value. In the absence of evidence that the plaintiff would in fact have sold the property at its highest value, he would be over-compensated if he were awarded damages on that basis. As McCormick said, such a rule as an estimate of probabilities would be absurd: "it is in the highest degree improbable that the plaintiff with uncanny prescience would have waited until the market had reached its summit and would have sold at that moment."[233] The rule earlier discussed[234] permits the plaintiff to claim the value of the property at the date of the wrong even if it subsequently would have declined; the possibility of an action in detinue permits the plaintiff, where he can assert a proprietary claim, to recover the value of the property at the date of judgment if this is to his advantage. If the defendant has sold the plaintiff's property he may be compelled to account for the proceeds.[235] If the plaintiff can produce evidence that he actually would have sold the property at a higher price he can recover the higher price as consequential damages for loss of the use of the property.[236] The combined effect of these rules, it is submitted, gives sufficient protection to the plaintiff. The addition of an automatic presumption in his favour that he would have sold at the top of the market has the appearance of going beyond a genuine attempt to assess the plaintiff's probable loss.[237]

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[232] *Id.*, at pp. 187-9.

[233] *Id.*, at p. 187. To the same effect see Estey, J., in the *Asamera* case, *supra*, footnote 224, at p. 16. In *Hardie v. Trans-Canada Resources Ltd.* (1976), 71 D.L.R. (3d) 668 (Alta. S.C. App. Div.) damages for failure to give an option to purchase shares, were based on the average share price during the period the option would have been open.

[234] See §66, *supra.*

[235] See §§953, 954, *infra.*

[236] See §§123-134, *infra.*

[237] See *Simmons v. London Joint Stock Bank*, [1891] 1 Ch. 270 (C.A.), at p. 284, affd *loc. cit.* p. 287 (C.A.), revd on other grounds [1892] A.C. 201 (H.L.); *Michael v. Hart & Co.*, [1902] 1 K.B. 482 (C.A.). The question was left open in *Munsell v. British Linen Co. Bank*, [1892] 3 Ch. 159. In *Ames & Co. v. Sutherland*, *supra*, footnote 230, the claimant admitted that he would, in the absence of the wrong, have held the shares until trial. The court held that this evidence was "very material upon the question of damages": 9 O.L.R. at p. 638. In *Goodall v. Clarke* (1910), 21 O.L.R. 614 (Div. Ct.) (see especially Clute, J., at p. 620), and in *Nelson v. Baird* (1915), 22 D.L.R. 132 (Man. K.B.), claims to highest intermediate value were rejected).

(b) Allowance for inflation (§§ 794-9)

794 The principle of nominalism epitomized in the dictum that "a dollar is a dollar", though at first sight unrealistic in an inflationary period, is, as F. A. Mann has shown, citing authorities from several countries, an essential part of every stable monetary system.[4] Money does not have an intrinsic value in terms of any metal or other commodity. Dr. Mann writes: "As the unit of account e.g. the pound sterling, is not identical with a quantity of metal the obligation to pay pounds cannot be equiparated to an obligation to deliver a certain weight of metal."[5] Nor does money have an intrinsic value in terms of buying power: "Moreover the extent of monetary obligations is independent of any *functional* or exchange of money, i.e. its purchasing

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[1]See §§916-949, *infra*.
[2]See §§1226-1252, *infra*.
[3]See §§825-915, *infra*.
[4]Mann, *The Legal Aspect of Money*, 3rd ed. (Oxford, University Press, 1971).
[5]*Id.*, at p. 72.

power."[6] Scrutton, L.J., said in *The "Baarn"*:[7] "A pound in England is a pound whatever its international value."[8] Denning, L.J., in *Treseder-Griffin v. Co-operative Ins. Society*[9] said: "A man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth at that time."[10]

795 It is indeed difficult to see how any other principle could operate in respect of debts, because certainly in modern times the declining value of currency is well known to the parties at the time of their transaction. If they stipulate for payment of a certain sum of money on a date five years in the future it is obvious that the debtor gets an advantage from the decline in value of the money. But that is presumably obvious to the creditor as well and so it must be taken that the anticipated advantage has been allowed for in the terms of the contract, as by an agreed interest rate, or by index or escalation clauses, or else by stipulating for payment of a larger nominal sum five years in the future than would have been required in a period of monetary stability. If this is so, the debtor has paid for the benefit to him of the change in the value of money and it would be most unjust, except perhaps in the case of a complete monetary breakdown, to deprive him of the benefit by revaluing his obligation.

796 Well known and well understood devices are available to protect creditors from the effects of nominalism. In former times gold clauses were common whereby the debtor's obligation was linked to the current value of gold bullion or gold coin.[11] These have since 1939 been illegal in Canada.[12] But equally effective devices are freely available and commonly used, such as linking payments to an agreed index like the cost of living index,[13] or to the value of a named foreign currency.[14] Escalation clauses and short repayment periods for loans are other common methods. If the creditor does not stipulate for such a protection it can legitimately be assumed that, in the absence of some vitiating factor like mistake or unconscionability, he has taken the

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[6] *Id.*, at p. 73.
[7] [1933] P. 251 (C.A.).
[8] *Id.*, at p. 265.
[9] [1956] 2 Q.B. 127 (C.A.).
[10] *Id.*, at p. 144. See also his comments in *Re United Rys. of Havana and Regla Warehouses Ltd.*, [1961] A.C. 1007 (H.L.), at p. 1070.
[11] See Mann, *op cit.*, *supra*, footnote 4, at pp. 124-43.
[12] Gold Clauses Act, s. 7.
[13] *Multiservice Bookbinding Ltd. v. Marden*, [1979] Ch. 84, at p. 104.
[14] *Ibid.*

risk of a decline in the value of money, up to the date when payment falls due.

797 It has been argued that there are good reasons for crystallizing a damages claim at a fixed sum at an early date.[15] In summary, the argument is that an early crystallization reduces the distorting effect of pending litigation on the plaintiff's investment decisions. Delay in payment of the crystallized sum can, it has been suggested, more conveniently be compensated by interest than by delaying the date for damage assessment.

798 In several recent cases, Canadian courts have been pressed to adjust damage awards to take account of inflation between the date of the wrong and the date of judgment.[16] The argument is that if the defendant causes a loss in 1980 for which the just measure of compensation would then be $100,000, he ought at the date of judgment in 1982 to pay $125,000 if that is the sum of money having the same purchasing power in 1982 as $100,000 would have had in 1980. This argument has been rejected by the British Columbia Court of Appeal in *McCaig v. Reys*[17] and by the Ontario Court of Appeal in *Leitch Transport Ltd. v. Neonex Int'l Ltd.*[18] The conclusion reached in these cases is, it is submitted, sound. Certainly some protection is required for the plaintiff. The question is whether an allowance for inflation is the most convenient method. It is submitted that the person entitled to damages can be adequately protected by an award of interest. In both British Columbia and Ontario, courts have power to award interest on damages at commercial rates and though interest rates do not usually exactly match inflation, they reflect inflationary expectations. It would certainly be over-compensatory for a plaintiff to recover both interest at commercial rates from the date of the wrong and, in

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[15] See §§65-110, *supra*.

[16] In *Hatch v. Fillmore* (1968), 1 D.L.R. (3d) 475 (N.S. Co. Ct.), and in *Stephens v. Gulf Oil Canada Ltd.* (1974), 45 D.L.R. (3d) 161, 3 O.R. (2d) 241 (H.C.J.), an allowance was made. The point was not decided on reversal by the Court of Appeal, 65 D.L.R. (3d) 193, 11 O.R. (2d) 129. An allowance was refused in *McCaig v. Reys* (1978), 90 D.L.R. (3d) 13 (B.C.C.A.); *Genessee Holdings Ltd. v. West York Motors Canada Ltd.* (1978), 6 C.P.C. 63 (Ont. C.A.); *Leitch Transport Ltd. v. Neonex Int'l Ltd.* (1976), 106 D.L.R. (3d) 315, 27 O.R. (2d) 363 (C.A.). An allowance for increased building costs was refused in *Inder Lynch Devoy & Co. v. Subritzky*, [1979] 1 N.Z.L.R. 87 (C.A.).

See also Miller v. Riches (1984) D.L.R. (3d) (Alta. C.A.) (pretrial losses in fatal accident case).

[17] *Supra*, footnote 16.

[18] *Supra*, footnote 16.

addition, an allowance to adjust the damages for inflation.[10] The Ontario Court of Appeal in the *Leitch Transport*[20] case relied upon the difficulties of fixing and applying an acceptable measure of inflation and suggested that a reasonable business person would not have foreseen the sharp decline in the purchasing power of money. These reasons are not, it is submitted, very convincing. An index of inflation could quite readily be chosen and the difficulties of application could be surmounted; further, nothing is more foreseeable than continuing inflation; indeed, that point was advanced above as one of the reasons for *not* revaluing debts. Evidently the court itself was a little uncertain of the force of its arguments because it added: "Since we are bound by authority in this Province to disallow the claim for an allowance for inflation, we are not required to answer these very difficult questions."[21] This sounds like a reluctant conclusion with an invitation to the Supreme Court of Canada to consider a change in the law. However, it is submitted that the conclusion of the Ontario Court of Appeal is sound. The plaintiff's complaint is in substance that he has lost the use of the money that would have been paid to him if prompt recompense had been made for, had it been paid promptly, the plaintiff could have protected himself against inflation by capital investment or by investment at commercial interest rates. The award of interest, with the discretion of the court, as under the Ontario Judicature Act, to vary the rate up or down from the prime rate if appropriate, provides, it is submitted, the fairest and most convenient way of compensating the plaintiff for his loss.

(c) Foreign money obligations

799 In a period of rapidly changing international exchange rates, rules governing conversion of foreign money obligations become important. When a foreign currency obligation is enforced in Canada there must, at some point, be a conversion of foreign money into Canadian dollars.

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[10] See §§871-878, *infra*. The Manitoba Law Reform Commission has proposed that damage awards be adjusted for inflation, but with prejudgment interest limited to three per cent: *Prejudgment Compensation on Money Awards: Alternatives to Interest*, No. 47, 1982.

[20] *Supra*, footnote 16, at pp. 324-5 D.L.R., pp. 371-2 O.R.

[21] *Leitch Transport, supra*, footnote 16, at p. 325 D.L.R., p. 372 O.R. The authority referred to is the oral judgment in *Genessee Holdings Ltd. v. West York Motors Canada Ltd., supra*, footnote 16, in which the point was discussed only very briefly.

Even if judgment is actually given in a foreign currency, as is now possible in England,[22] a conversion into the domestic currency is required for purposes of levying execution.[23] Even if a foreign currency obligation should be enforced by equitable means such as receivership or sequestration, a point of time would usually come at which the receiver or sequestrator have to make a conversion for the purpose of determining how many of the defendant's receipts or assets should be taken.

800 Possible dates for conversion include the date of the wrong, the date of the institution of the action, the date of judgment, and the date of actual payment.

801 Before 1970 it was thought to be firmly established law in England[24] and Canada[25] that the "breach date" rule applied in such circumstances. Not only did judgment have to be given in the domestic currency, but conversion had to take place at the date of default. The argument for this view is that the damage complained of is done to the plaintiff on the date of default; his cause of action arises at that date, and his remedy is the amount that he would then have recovered, had instant justice been done. The delay between default and judgment can be fully compensated by an adequate award of interest. The creditor ought not to throw upon the debtor the risk of currency fluctuations; he could have mitigated his loss in the case of a depreciating domestic currency had he wished to do so, by hedging against the change in exchange rates. Against this, it can be argued that the creditor is entitled to be made whole according to the facts as they appear at the time of judgment. It is by the debtor's default that the creditor is being compelled to bear the undesired risk of a decline in the domestic currency. Mitigation of loss by currency speculation is often impracticable and may be illegal.

802 In 1976 the House of Lords, reversing the former law, accepted these last arguments and held that an English court could make an award of damages expressed in foreign currency.[26] In a remarkable

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[22] *Miliangos v. George Frank (Textiles) Ltd.*, [1976] A.C. 443 (H.L.).
[23] *Id.*, at pp. 468-9. See Practice Direction, [1976] 1 W.L.R. 83.
[24] *Re United Rys. of Havana and Regla Warehouses Ltd.*, [1961] A.C. 1007 (H.L.).
[25] *Custodian v. Blucher*, [1927] S.C.R. 420, [1927] 3 D.L.R. 40; *Gatineau Power Co. v. Crown Life Ins. Co.*, [1945] S.C.R. 655, [1945] 4 D.L.R. 1. But see *Smith v. Canadian Pacific Ry. Co.* (1963), 41 D.L.R. (2d) 249 (Sask. Q.B.) (damages for personal injuries awarded in United States currency).
[26] *Miliangos, supra*, footnote 22.

speech Lord Wilberforce clearly indicated that considerations of justice and commercial convenience ought to prevail over legal precedent. He said:

> But if I am faced with the alternative of forcing commercial circles to fall in with a legal doctrine which has nothing but precedent to commend it or altering the doctrine so as to conform with what commercial experience has worked out, I know where my choice lies. The law should be responsive as well as, at times, enunciatory, and good doctrine can seldom be divorced from sound practice.[27]

At a later point in his speech he said:

> The law on this topic is judge-made: it has been built up over the years from case to case. It is entirely within this House's duty, in the course of administering justice, to give the law a new direction in a particular case where, on principle and in reason, it appears right to do so.[28]

803 In Canada the question is complicated by the Currency and Exchange Act[29] which provides:

> 11. All public accounts throughout Canada shall be kept in the currency of Canada; and any statement as to money or money value in any indictment or legal proceeding shall be stated in the currency of Canada.

804 In *Batavia Times Publishing Co. v. Davis*,[30] Carruthers, J., held that he was bound by this provision to reject the conclusion reached by the House of Lords and that he could not therefore give a judgment in foreign currency. He added that judgments in foreign currency would raise procedural and practical problems.[31] However, he accepted the argument that the conversion of a foreign judgment into Canadian dollars ought to take place at the date of judgment, not at the date of breach. The earlier English "breach date" rule had been

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[27] *Supra*, footnote 22, at p. 464.
[28] *Supra*, footnote 22, at p. 469.
[29] R.S.C. 1970, c. C-39, s. 11.
[30] (1977), 82 D.L.R. (3d) 247 and 88 D.L.R. (3d) 144, 18 O.R. (2d) 252 and 20 O.R. (2d) 437 (H.C.J.), affd 102 D.L.R. (3d) 192*n* and 105 D.L.R. (3d) 192*n*, 26 O.R. (2d) 249*n* and 800*n* (C.A.). The same conclusion was reached by the Quebec Court of Appeal in *Baumgartner v. Carsley Silk Co. Ltd.* (1971), 23 D.L.R. (2d) 255.
[31] In 88 D.L.R. (3d) at p. 154, 20 O.R. (2d) at p. 447.

applied in two Supreme Court of Canada cases.[32] However, Carruthers, J., considered himself free to adopt the judgment date rule. He said:

> The decision of the House of Lords in *Miliangos* has reversed the English cases, and in particular, the rule of law upon which the Canadian cases, including those of the Supreme Court of Canada to which I have referred, have proceeded. Although strictly speaking *Miliangos* has not overruled those decisions of the Supreme Court of Canada including the decision of the Judicial Committee of the Privy Council in *Owners of Steamship "Celia" v. Owners of Steamship "Volturno"* [1921] 2 A.C. 544,[33] and they therefore remain today as authorities binding upon the lower Courts of Canada, I find it difficult to accept that those cases should now be applied by the lower Courts. Apart from the fact that the "breach-day" rule which they applied no longer exists in England, when I consider that justice requires that a creditor should not suffer by reason of a depreciation of the value of currency between the due date on which the debtor should have met his obligation and the date when the creditor was eventually able to obtain judgment, I think what Lord Wilberforce had to say . . . is most pertinent.[34]

Carruthers, J., then quoted a passage from the *Miliangos* case.

805 In *Gross v. Marvel Office Furniture Manufacturing Ltd.*,[35] Cory, J., while conceding that final judgment would have to be expressed in Canadian currency, permitted the issue of a specially endorsed writ for a sum expressed in United States dollars.

806 A different view was taken by Kirke Smith, J., in *Am-Pac Forest Products v. Phoenix Doors Ltd.*,[36] where he reluctantly considered

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[32] *Custodian v. Blucher* and *Gatineau Power Co. v. Crown Life*, *supra*, footnote 25.

[33] A House of Lords decision, not Privy Council as stated by Carruthers, J., and so not, it would seem, binding on Canadian courts.

[34] *Batavia Times Publishing Co. v. Davis*, *supra*, footnote 30, 88 D.L.R. (3d) at pp. 151-2, 20 O.R. (2d) at pp. 444-5 (H.C.J.). The case was followed on this point in *Minister of State of the Principality of Monaco v. Project Planning Associates* (1980), 32 O.R. (2d) 438 (H.C.J.), affd *loc. cit.* (C.A.), leave to appeal to S.C.C. refused *loc. cit.* In *Clinton v. Ford* (1982), 137 D.L.R. (3d) 281, 37 O.R. (2d) 448 (C.A.), the court was held to have a discretion to adopt, or to reject, the judgment date rate of exchange.

[35] (1979), 93 D.L.R. (3d) 342, 22 O.R. (2d) 331 (H.C.J.). See also *Airtemp Corp. v. Chrysler Airtemp Canada Ltd.* (1980), 121 D.L.R. (3d) 236, 31 O.R. (2d) 481 (H.C.J.). The question was left open when the judgment was affirmed by the Divisional Court, D.L.R. *loc. cit.* p. 240, O.R. *loc. cit.* p. 484. See also *National Westminster Bank v. Burston* (1980), 28 O.R. (2d) 701 (S.C.).

[36] (1979), 14 B.C.L.R. 63 (S.C.).

himself bound to apply the old English rule even though now obsolete in England. However, in the later British Columbia case of *Williams and Glyn's Bank Ltd. v. Belkin Packaging Ltd.*,[37] McKenzie, J., cited the *Miliangos* and the *Batavia Times* cases with approval, and applied the judgment date rule of conversion of foreign currency into Canadian dollars. The *Am-Pac* case was not cited. The *Belkin Packaging* case went to the Supreme Court of Canada where it was determined on another point, the court stating that it was unnecessary to deal with the question of the date for currency conversion. The Supreme Court of Canada has thus explicitly left the matter open. The consequence is that uncertainty will continue until the Supreme Court finds occasion to deal with it. On the other hand the court was, it is submitted, wise, in view of the complexity of the issues, to refrain from any pronouncement that would fetter its freedom in dealing with the question on a future occasion.

807 The weight of Canadian authority is therefore that s. 11 of the Currency and Exchange Act requires judgments to be given in Canadian dollars. It would seem, however, that the section does not prevent a court from giving judgment in the following form: "The defendants shall pay such a sum in Canadian dollars as shall at the date of payment be equal to [a named sum in a foreign currency]."[38] It is true that such an order would raise certain procedural problems but these would be no more difficult than those successfully overcome in England where judgments are actually given in foreign currency. A Practice Direction[39] was issued soon after the *Miliangos* case explaining in detail how execution was to be levied on judgments in foreign currency. A similar procedure could, it would seem, be evolved by Canadian courts to enforce an order such as is here contemplated if it were clear that justice required that result.

808 The question of the power to give judgments in foreign currency is not identical with the question of what date should be chosen for conversion of foreign obligations into Canadian currency, but the questions are closely related. If it is concluded that judgment should be given in foreign currency the automatic effect is to postpone con-

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[37](1979), 108 D.L.R. (3d) 585 (B.C.S.C.), revd on other grounds, 123 D.L.R. (3d) 612 (C.A.), affd 47 N.R. 241 (S.C.C.).

[38]The scope and constitutionality of the section are discussed by the British Columbia Law Reform Commission in Working Paper No. 33, Foreign Money Liabilities, 1981. See also Riordan, "The Currency of Suit in Actions for Foreign Debts", 24 McGill L.J. 422 (1978).

[39][1976] 1 W.L.R. 83.

version to the date of payment, or to the date of levying of execution if that proves to be necessary. On the other hand, if it is concluded that judgment should not or cannot be given in foreign currency the question is still open whether conversion to Canadian dollars should take place at the date of the wrong or at the date of the judgment. The arguments on this question are fairly evenly balanced and analogies are close to other areas in which the choice of date for the assessment of damages has become important. As has been shown, the cases are divided on whether Canadian courts are free to depart from the rule of assessment at the date of the wrong. An examination of the arguments on this question is therefore of particular importance.

809 It is useful to distinguish the case where the domestic currency appreciates from the case where it depreciates. A creditor is owed a debt, let us suppose, of 10,000 francs. At the date when the debt should have been paid the exchange rate is ten francs to the dollar. If at the date of judgment the Canadian dollar has appreciated to twenty francs to the dollar, the creditor will seek conversion at the date of breach, for a recovery of $1,000. The debtor's argument against this result is that the creditor receives a windfall by obtaining judgment for enough dollars to buy himself 20,000 francs — twice the amount he was owed. On the other hand, if the Canadian dollar depreciates to five francs to the dollar the shoe is on the other foot. It is the creditor who will seek conversion at the date of judgment on the ground that he needs $2,000 to buy the 10,000 francs he is owed.

810 These are distinct problems, as is shown by the analogy with property cases. The case of the appreciation of Canadian currency is analogous to a case where the plaintiff is wrongfully deprived of property that later diminishes in value. As was shown in an earlier chapter,[40] the conclusion here is always that the plaintiff is entitled to the value of the property at the date of the wrong even though, as a result, he may be better off than if the wrong had not been done. This rule, it has been suggested, rests on a wise refusal to pursue too far the inquiry into what would have happened if the wrong had not been done. It is sufficient for the plaintiff to show that he was impoverished by the defendant's wrong at the date of the wrong, and his damages are the amount of that impoverishment.[41] In the foreign cur-

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[40] See §66, *supra*.

[41] This point is very forcefully made by *Corbin on Contracts* (St. Paul, West Publishing Co., 1964), §1005. "[The judgment date rule] results in a severe loss to the creditor and is in direct conflict with our most fundamental rule as to compensatory damages."

rency case the creditor is, in effect, a buyer of foreign currency complaining of non-delivery. There is a strong argument for allowing him to recover the value of the currency when it should have been delivered. Had the currency been paid promptly the plaintiff would have invested it in some way; he might have converted it promptly into Canadian dollars or into gold or into some other asset that would have resisted the depreciation of the currency of payment. He might have used the money to meet business expenses that would have led to profits that would have resisted the fall in the value of that currency. In *Miliangos v. George Frank (Textiles) Ltd.*,[42] Lord Simon of Glaisdale, dissenting, put a dramatic example of a foreign seller delivering valuable goods to an English buyer, which the buyer refuses to pay for until after the collapse of the foreign currency, when he tenders a truck-load of worthless foreign banknotes.[43] This example stresses both the potential unfairness to the creditor and the unjust enrichment of the debtor when the breach date rule is departed from in such a case. In *Re Dawson*,[44] an action against a trustee who had misappropriated trust funds in foreign currency, it was suggested (though the question did not arise for decision) that in the case of a depreciation in the foreign currency the trust beneficiaries would be entitled to claim the amount of the funds in domestic currency measured at the date of the misappropriation.

811 In *Quartier v. Farah*[45] the Ontario Appellate Division held that a French lawyer, suing for the amount of his fee after the decline of the French currency, was not entitled to damages measured by conversion at the date of breach, but was entitled only to the lesser amount converted at the date of judgment. The court stressed that the plaintiff was entitled only to the nominal sum owed to him in francs and pointed out that the defendant might have effectively tendered this amount in France or satisfied a French judgment by paying that amount.[46] However, it may be said in reply to this point that expectations of weakening currency will often give rise to rules designed to protect creditors in such circumstances, so that the foreign law in such cases might well make provision for the creditor to recover a high rate of interest, and a tender might well be held to be insufficient if it did not include interest up to the date of the tender. Such are now the

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[42][1976] A.C. 443 (H.L.).
[43]*Id.*, at pp. 488-9.
[44][1966] 2 N.S.W.R. 211 (S.C.), at p. 220, *per* Street, J.
[45](1921), 64 D.L.R. 37, 49 O.L.R. 186 (S.C. App. Div.).
[46]*Id.*, at pp. 47-8 D.L.R., p. 198 O.L.R.

rules in Canada protecting domestic creditors with respect to purely domestic claims.[47] But whether or not such rules would protect the creditor in the particular foreign country cannot be determinative of the proper remedy in the Canadian court. If general considerations of justice favour recovery of the breach date sum it cannot be an answer that the creditor would have fared worse had he sued in a foreign jurisdiction.[48]

812 The case of *Quartier v. Farah* has been rarely cited and probably was considered to have been impliedly overruled by later Supreme Court of Canada decisions adopting the breach date rule.[49] The uncertainty introduced by the varied reactions to the *Miliangos* case now makes it arguable that *Quartier v. Farah* should be followed. It is here submitted, however, that on general principles the creditor's arguments are the stronger, and that the breach date rule should be preserved in case of appreciation of Canadian currency.

813 It is not entirely clear whether the *Miliangos* case preserves the creditor's right in England to conversion at the date of breach where that is to his advantage. The *Miliangos* case did not expressly say that the creditor was ever to be *compelled* to accept judgment in foreign currency. Indeed, Lord Wilberforce said that a creditor who wants judgment in foreign currency must specifically request it in his pleadings.[50]

814 On the other hand there are some indications the other way. Lord Wilberforce emphasized that the creditor's concern was with the value of the foreign currency "for good or ill".[51] Lord Simon of Glaisdale in his dissenting speech gave a dramatic example of the collapse of a foreign currency, apparently assuming that the acceptance of the majority view carried with it the implication that the creditor would be restricted to recovery in the now worthless foreign money.[52] The English Law Commission assumed in a working paper that a creditor

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[47] See, *infra*, §§879-882.

[48] This point is made by Corbin, *loc. cit., supra*, footnote 41: "It is true that this 'severe loss' is one that he would have had to suffer if he had brought his suit in the country where payment was to be made in the currency of that country .... But if he can and does sue for just reparation in the courts of the United States, there is nothing that requires us to adopt the remedial system of another country."

[49] *Custodian v. Blucher*, [1927] S.C.R. 420, [1927] 3 D.L.R. 40; *Gatineau Power Co. v. Crown Life Ins. Co.*, [1945] S.C.R. 655, [1945] 4 D.L.R. 1.

[50] *Supra*, footnote 42, at p. 468.

[51] *Supra*, footnote 42, at p. 466.

[52] *Supra*, footnote 42, at pp. 488-9.

would be compelled, in some cases at least, to accept judgment in a foreign currency.[53]

815 In *Ozalid Group (Export) Ltd. v. African Continental Bank Ltd.*,[54] the defendant delayed in paying a sum of United States dollars to the plaintiff. The plaintiff, by exchange control regulations, was obliged to convert all United States dollars promptly into sterling and would have done so if the money had been duly paid. Sterling appreciated against the dollar during the period of the delay and the plaintiff claimed the loss in sterling caused by the relative decline in the value of the dollar. It was held that the plaintiff was entitled to compensation for this loss. Donaldson, J., said:

> I can find no trace in the speeches [in *Miliangos*] of any intention to make a claim in this form [in foreign currency] obligatory. The overriding reason for changing the law was to provide a procedure which would enable the courts to compensate the plaintiff in full for the wrong which he had suffered. A change which *required* the plaintiff to claim in foreign currency and to accept sterling at the rate prevailing at the date of judgment could in some circumstances work as great an injustice as the old procedure requiring him to claim in sterling and to adopt the date of breach rate of exchange. (His italics.)[55]

He added, however, "but this is not to say that a plaintiff has a free choice" and he went on to say that in this case it was sterling that would "most truly express his loss and accordingly most fully and exactly compensate him for that loss."[56] He subsequently cited a case in which he said that the plaintiff would now be "required" to make his claim in francs.[57] It appears from this that, while the plaintiff does not have a "free choice", he can seek to persuade the court that it is not the foreign currency that "would most truly express his loss and most fully and exactly compensate him", in which case he will be allowed the benefit of breach date conversion. An alternative explanation of the case favoured by the English Law Commission in its working paper on foreign money liabilities is that the judgment should be regarded not as a judgment for a debt but as one for the compensation for loss

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[53] Law Com'n, *Private International Law: Foreign Money Liabilities*, Working Paper No. 80 (London, H.M.S.O., 1981).
[54] [1979] 2 Lloyd's Rep. 231 (Q.B.).
[55] *Id.*, at pp. 233-4.
[56] *Id.*, at p. 234.
[57] *Ibid.*, citing *Société des Hôtels Le Touquet Paris-Plage v. Cummings*, [1922] 1 K.B. 451 (C.A.).

caused by delay in payment — a loss that was, in the circumstances, within the defendant's contemplation.[58]

816 It is, of course, often possible to reach similar results by different legal routes. A creditor to whom an obligation is owed in foreign currency may, it seems, be protected against depreciation of the currency on several theories. He might be permitted to take advantage of the breach date rate of exchange; he might persuade the court that although the money of account was foreign the domestic currency "most truly expressed" his loss; he might recover damages as compensation for the loss caused by the debtor's failure to make prompt payment. A fourth possibility is that he might recover interest at a rate that compensated for the depreciation in value of the foreign currency.[59] Any of these theories might yield the same result though there are significant differences in onus of proof and in the operation of the rules of remoteness. It appears that the law in England after the *Miliangos* case is that the creditor, when the foreign currency depreciates, has no automatic right to elect conversion into sterling at the date of breach, but if he can prove an actual loss that the defendant should have contemplated he may well be entitled to the equivalent result under another theory.

817 Where Canadian currency depreciates between the date of wrong and the date of judgment the problem is analogous to that of a purchaser of property that increases in value in the same period. The plaintiff's argument is that had the wrong not been done he would now (that is at the date of judgment) be in possession of property more valuable than at the date of the wrong. As has been seen, the general rule in property cases is in favour of assessment at the earliest date after the wrong at which the plaintiff, acting reasonably, could have replaced the property, though there have been some recent inroads on that principle.[60] In the context of a foreign currency debt the application of the general principle would lead to a denial of the creditor's claim for judgment date conversion, and, by stronger reasoning, of a claim for judgment actually expressed in foreign currency. The creditor's argument that he is undercompensated unless he recovers sufficient money to pay his debt now in the foreign currency would be met by the argument that his loss flowing from the depreciation of Canadian currency is not caused by the wrong; the creditor could have

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[58] *Supra*, footnote 53, at p. 108.
[59] See §§892-895, *infra*.
[60] See §§65-110, *supra*.

protected himself against that loss by transferring funds from Canadian into the foreign currency.

818 Lord Wrenbury put the comparison with the purchase of property in vivid language:

> Assume that a judge is sitting in July to try an action for damages for a tort committed on the preceding January 1. Let me express the judgment in the form of a declaration, followed by an adjudication upon it. The judgment should, I think, be as follows: Declare that on January 1 the plaintiff suffered by reason of the defendant's tort a loss of 300,000 lire. Declare that on January 1 the equivalent sum in British currency was (say) 7500*l*. Adjudge that the plaintiff owes the defendant 7500*l*. There is no difference in principle arising from the fact that the loss is of lire as distinguished from (say) cows. If the plaintiff had been damaged by the defendant tortiously depriving him of three cows the judgment would be: declare that on January 1 the plaintiff suffered by the defendant's tort a loss of three cows. Declare that on January 1 the plaintiff would have been entitled to go into the market and buy 3 similar cows and charge the defendant with the price. Declare that the cost would have been 150*l*. Adjudge that the plaintiff recover from the defendant 150*l*. It would be nihil ad rem to say that in July similar cows would have cost in the market 300*l*. The defendant is not bound to supply the plaintiff with cows. He is liable to pay him damages for having, on January 1, deprived him of cows. The plaintiff may be going out of farming and may not want cows, or, when judgment is given, he may have enough already. The plaintiff is not bound to take cows and the defendant is not bound to supply them. The defendant is liable to pay the plaintiff damages, that is to say, money to some amount for the loss of the cows: the only question is, how much? The answer is, such sum as represents the market value at the date of the tort of the goods of which the plaintiff was tortiously deprived.[61]

Lord Wrenbury went on to say that compensation for delay in payment should be given in the form of interest: "They [that is interest] would be damages not for the original tort, but for another and a subsequent wrongful act."[62]

819 In *Miliangos* Lord Wilberforce made scathing reference to Lord Wrenbury's example:

> Whereas in the case of the inevitable contract to supply a foreign cow, the intending purchaser has to be treated as going into the market to buy one as of the date of breach, this doctrine cannot be applied to

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[61] *The "Volturno"*, [1921] 2 A.C. 544 (H.L.), at pp. 562-3.
[62] *Id.*, at p. 564.

a foreign money obligation, for the intending creditor has nothing to buy his own currency with — except his own currency.[63]

The application of this comment will however depend very much on the particular facts. It is undeniable that some creditors — those, for example, with bank accounts in both the relevant currencies — usually have the means to guard against currency fluctuations. Secondly, Lord Wilberforce speaks of the foreign currency as the creditor's "own currency" but this will not always be the case. Both parties to the dispute may be Canadian and the foreign currency transaction might, indeed, be purely speculative. In the latter case there seems no reason to depart from the sale analogy. Moreover, the transaction needed to protect the creditor, foreign or domestic, against a decline in Canadian currency is simpler than Lord Wilberforce suggests. All that is needed is for the creditor to borrow the requisite sum of Canadian money immediately on the debtor's default and purchase foreign currency to the amount of the debt due.[64] Then, on his recovering judgment in Canada for the amount of the debt converted into Canadian currency at the date of breach, together with interest at Canadian rates, he will be fully compensated. This transaction though not convenient to a private individual creditor resident abroad, would be readily available to many business creditors.

820 One way of testing the justice of judgment date assessment (and *a fortiori* of judgment in foreign currency) is to ask whether, supposing the plaintiff to have protected himself in one of the ways described against a decline in Canadian currency, justice would be done if he then recovered the sum converted at judgment date (or if he recovered the judgment in foreign currency). Suppose a debt of 10,000 francs and a breach date exchange rate of ten francs to the dollar. The creditor, correctly anticipating a decline in Canadian currency, immediately borrows $1,000 and buys 10,000 francs or transfers $1,000 from his Canadian dollar account to his franc account. Two years later he obtains judgment when the exchange rate is five francs to the dollar. Surely he is adequately compensated by an award of $1,000 plus interest at Canadian rates. Most people would say that he would recover a windfall if he got judgment for $2,000 (especially if interest

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[63] *Miliangos v. George Frank (Textiles) Ltd.*, [1976] A.C. 443 (H.L.), at p. 468.

[64] An even simpler method, where the creditor has accounts in both currencies, is for him to transfer the appropriate sum from his Canadian dollar account to his foreign currency account immediately on the occurrence of the breach.

were added).[65] If this conclusion is correct in a case where the creditor has in fact anticipated the depreciation, there is a very strong argument of convenience for adopting it as a general rule wherever the creditor was capable of protecting himself in this way. For it would be inconvenient to have a rule that required examination of the plaintiff's entire financial dealings, particularly in the case of a large enterprise, in order to determine whether or not he had profited from the alteration in the exchange rate.

821 In a case where specific performance is available, a plaintiff can, in a sense, profit twice over from a rise in value if he purchases a similar property at the date of breach. But in cases where a judgment of specific performance is given there is rarely a perfect substitute to be found; indeed it is usually because there is no readily available substitute that damages are considered to be an inadequate remedy. In the case of money, a substitute is always available. There seems no good reason therefore to allow the creditor what is the equivalent of specific performance (that is, the value of the foreign currency owed at the date of payment), or damages in substitution for specific performance (that is, the value of the foreign currency at the date of judgment).

82: The conclusion from these considerations is that Canadian courts should be cautious before departing from the breach date rule of conversion, and still more cautious before adopting a rule of practice of actually ordering payment in foreign currency. No doubt there are some cases in which, as a matter of fact, the creditor could not reasonably have protected himself against a decline in Canadian currency. These cases can be met, it is suggested, by a *prima facie* breach date rule, with a power to depart from it where the creditor could not reasonably have protected himself. The result reached in the *Miliangos* case may well be defensible on this basis, and for this reason a power in the court to award judgment in a foreign currency is to be welcomed. But it is suggested that any such power, whether introduced by legislation or by judicial decision, should be left unfettered by any rigid verbal formula. The discussion in the preceding paragraphs indicates that there will be a substantial number of cases in which justice requires adherence to the breach date rule of conversion. The existence of a general power to depart from that rule would not mean that the power would be exercised arbitrarily, or that principles for its exercise would not develop. An analogy may be made with the power of the court to

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[65] See §§892-895, *Infra*.

award specific performance, which indeed has a close affinity with judgment in foreign currency. The power to award specific performance is unfettered by any rigid formula, but the courts have developed rules to govern its exercise: this enables courts to develop rational principles on a case-by-case basis while maintaining the necessary flexibility to take account of new arguments and changing circumstances.[66] In *Clinton v. Ford*[67] the Ontario Court of Appeal affirmed that the court was empowered, but not obliged, to depart from the breach date rule.

823 In the *Miliangos* case itself the new rule was not extended beyond contract debts. Lord Wilberforce said: "In my opinion it should be open for future discussion whether the rule applying to money obligations, which can be a simple rule, should apply as regards claims for damages for breach of contract or for tort."[68] It is, however, difficult to draw a distinction on this question between damages and debt, or between contract and tort, and a series of English cases has extended *Miliangos* to those areas.[69] In cases where there is more than one foreign currency involved, as where a shipping enterprise that keeps its accounts in francs incurs repair costs in pesos, the question arises of a choice between francs and pesos. Although this question can arise whether or not judgment is given in a foreign currency[70] it did not normally arise under the former breach date conversion rule since at that date the relationship of each of the foreign currencies to the domestic currency was normally the same as their relationship to each other. It is departure from the breach date rule that produces problems, for in the interval between the date of the wrong and the date of conversion the relationship of the currencies to each other and to Canadian money may well have altered. In *The "Despina R."*[71] the House of Lords held that the proper currency was "the currency in which his [the plaintiff's] loss is felt". Lord Wilberforce said:

> It appears to me that a plaintiff, who normally conducts his business through a particular currency, and who, when other currencies are immediately involved, uses his own currency to obtain those currencies, can reasonably say that the loss he sustains is to be measured

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[66] See Sharpe, *Injunctions and Specific Performance* (1983).
[67] (1982), 137 D.L.R. (3d) 281, 37 O.R. (2d) 448 (C.A.).
[68] *Supra*, footnote 63, at p. 468.
[69] *The "Despina R."*, [1979] A.C. 685 (H.L.); *Services Europe Atlantique Sud v. Stockholms Rederiaktiebolag SVEA of Stockholm, ibid.*
[70] See *The "Canadian Transport"* (1932), 43 Ll. L.R. 409 (C.A.).
[71] *Supra*, footnote 69, at p. 697.

> not by the immediate currencies in which the loss first emerges but by the amount of his own currency, which in the normal course of operation, he uses to obtain those currencies.[72]

824 Assuming that a departure is to be made from conversion at the date of the wrong, Lord Wilberforce's approach seems sound. The currency must be chosen, as Lord Wilberforce expressed it in a case decided concurrently with *The "Despina R."*, "which most truly expresses the plaintiff's loss."[73] In case of doubt Lord Wilberforce made it clear that the burden of proof was on the plaintiff to show that he really did conduct his enterprise in a currency other than that of the immediate loss and that he had felt the loss in that other currency.[74] It would follow from proof of these facts that the date for conversion of the currency of immediate loss into the plaintiff's operating currency would always be at the earliest time at which, acting reasonably, the plaintiff could have transferred funds from his operating currency to meet the expense. Subsequent variations in the value of the currency of initial loss either against the second foreign currency or against Canadian dollars would therefore be irrelevant.

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[72] *Supra*, footnote 69, at p. 697.

[73] *Services Europe Atlantique Sud*, *supra*, footnote 69, at p. 701, adopting a phrase used by Lord Denning, M.R., in the Court of Appeal, [1979] Q.B. 491, at p. 514.

[74] *The "Despina R."*, *supra*, footnote 69, at p. 699.

MITIGATION AND COLLATERAL GAINS

§§ 1254-1275

1254 The proposition that the plaintiff cannot recover compensation for loss he has avoided has the appearance of a truism. If the plaintiff has avoided the loss then he has not suffered it, so the proposition asserts no more than that he cannot recover compensation for a loss that he has not suffered. But, like many apparently simple statements, this proposition conceals a very difficult problem.

1255 After the defendant's wrong, the plaintiff continues to engage in the ordinary transactions of his business; some of these will turn out to be profitable. The difficulty is to determine when such profits should be taken into account for the benefit of the wrongdoer. The problem is akin to some of the intractable problems of legal causation. After the wrong has been done the plaintiff finds himself in a state of affairs that includes the alteration caused by the wrong. In that altered state of affairs he enters into a profitable transaction which he could not have entered into in exactly the same form if his affairs had been unaltered by the defendant's wrong. In one sense it can be said that all such profits are attributable to the wrong, for in the absence of the wrong they would not have been made. But this rule would plainly be too generous to the defendant. In another sense it might be said that all such profits are due to the plaintiff's enterprise, not to the defendant's wrong, but this would be too generous to the plaintiff, for where a profit is very closely linked with the defendant's wrong common sense requires the conclusion that the effect of the profit is to reduce the loss caused by the wrong.[153]

1256 Problems of this nature arise throughout the law of damages, and are inherent in the most basic principles governing damage assessment. They have accordingly already been discussed in various contexts in earlier chapters.[154] The discussion here is concerned with attempts that have been made to lay down general tests.

1257 It is very common for the courts to speak of gains made by the plaintiff as "collateral"[155] or as *"res inter alios acta"*.[156] These phrases indicate the court's conclusion that the particular gain is not to be taken into account for the defendant's benefit, but they provide very little guidance to one seeking to determine what gains are to be so classified. In many cases the argument turns on whether the plaintiff suffers an actual loss by the defendant's wrong or whether the effect of subsequent

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[153] See *Pagnan & Fratelli v. Corbisa Industrial Agropacuaria*, [1970] 1 W.L.R. 1306 (C.A.) ("contrary to justice common sense and authority" to allow recovery of "fictitious loss").

[154] See §§3, 4, 143, 144, 265, 266, 679-682, *supra*.

[155] *Royal Bank of Canada v. Clark* (1978), 88 D.L.R. (3d) 76 (N.B.S.C. App. Div.), affd [1980] 1 S.C.R. 177*n*, 105 D.L.R. (3d) 85*n*.

[156] See *Joyner v. Weeks*, [1891] 2 Q.B. 31 (C.A.).

events is to prevent any loss from arising.[157] Again, it is clear what conclusion is indicated by saying that the plaintiff suffers no actual loss. It is less clear that the phrase gives useful guidance in the difficult cases.

1258 The leading case is generally taken to be *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Rys. Co. of London, Ltd.*,[158] where the defendant had, in breach of warranty, delivered defective machinery. The plaintiff replaced the machinery with machines of a superior design that were more efficient than the defendant's machines would had been even if they had answered to the warranty. It was held that the increased profitability of the new machines was to be taken into account with the consequence (so profitable were the new machines by comparison with those of the old design) that the plaintiff recovered only nominal damages.

1259 In the Canadian Privy Council case of *Erie County Natural Gas & Fuel Co. v. Carroll*,[159] the plaintiff acquired gas leases to secure a supply of gas in substitution for a supply wrongfully held by the defendant. Ultimately the plaintiff disposed of these leases at a profit. It was held that he was bound to bring the profit into account. Otherwise the plaintiff would make "a profit by the defendants' breach of their obligation of about $128,965.22, a somewhat grotesque result."[160] A Supreme Court of Canada case where, again, a profit made by the plaintiff was taken into account is *Cockburn v. Trusts & Guarantee Co.*[161] where the plaintiff lost his employment on the liquidation of the company that employed him. He attended the liquidation sale and bought goods, which he resold at a profit. It was held that the plaintiff's claim for damages for wrongful dismissal was to be reduced by the profit he made on the sale.

1260 It is clear that these principles apply in tort as well as contract.[162] It is always assumed that if the plaintiff recovers part of his loss from one tortfeasor, damages against another tortfeasor liable for the same loss are reduced.[163]

1261 On the other hand, there are many cases where the plaintiff has been

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[157] See footnote 154, *supra*.
[158] [1912] A.C. 673 (H.L.).
[159] [1911] A.C. 105 (P.C.).
[160] *Id.*, at p. 115, *per* Lord Atkinson.
[161] (1917), 55 S.C.R. 264, 37 D.L.R. 701. See §654, *supra*.
[162] *Bellingham v. Dhillon*, [1973] Q.B. 304.
[163] *Burn v. Morris* (1834), 2 Cr. & M. 579, 149 E.R. 891; *Nowell v. B.C. Electric Ry. Co.*, [1929] 4 D.L.R. 280 (B.C.S.C.), revd [1930] 1 D.L.R. 491 (C.A.). See *Hawboldt Industries Ltd. v. Sanborn's Motor Express Ltd.* (1979), 36 N.S.R. (2d) 1 (S.C.T.D.).

held entitled to recover damages from the defendant in respect of a loss despite an offsetting transaction that might appear to reduce or remove the loss. Many such cases have been discussed in earlier chapters. Thus, a buyer of defective goods is entitled to damages for breach of warranty even though he resells them to a sub-buyer who pays the full price.[104] A seller is entitled to damages representing the difference between contract price and market price, even though he subsequently resells the goods or shares at above the contract price.[105] A buyer is entitled to the difference between the contract price and the market price even though he has resold the goods at a lower price and will not be liable to the sub-buyer.[106] In many cases these rules can be supported on grounds of convenience, for an inquiry into exactly what position the plaintiff would have occupied if the wrong had not been done often proves impractical.

1262 The "lost volume" problem is another instance. Where a buyer of goods fails to accept delivery and the plaintiff resells at the same price, it appears, at first sight, that the loss is made good. But the seller will suffer a loss of profit if he had a surplus of goods, for he can justifiably assert he has lost one sale.[107] A similar conclusion was reached by the Supreme Court of Canada in *APECO of Canada, Ltd. v. Windmill Place*[108] where the lessor of space in a building, on the lessee's repudiation, rented the same space to another tenant. The Supreme Court of Canada quoted from Viscount Haldane's speech in *British Westinghouse*: "The subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business."[109] The Supreme Court of Canada held that the rent from the second transaction need not be taken into account, describing it as: "an independent transaction which in no way arose out of the consequences of the breach by the appellant."[170]

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[104]See §§265, 266, *supra*.
[105]See §§679-682, *supra*.
[106]See §§137-139, *supra*.
[107]See §§670-672, *supra*.
[108][1978] 2 S.C.R. 385, 82 D.L.R. (3d) 1.
[109]*British Westinghouse*, [1912] A.C. 673 (H.L.) at p. 690, applied in *Porter & Sons v. Muir Bros. Dry Dock Co.*, [1929] 2 D.L.R. 561, 63 O.L.R. 437 (S.C. App. Div.), where the plaintiff's profit, on raising for the insurer a scow sunk by the defendant, was not taken into account to reduce the damages payable for the sinking.
[170]*APECO*, *supra*, footnote 168, at p. 389 S.C.R., p. 3 D.L.R. In *Acadia University v. Sutcliffe* (1978), 30 N.S.R. (2d) 423 (S.C. App. Div.), where the plaintiff, on the defendant's default, filled his room with another occupant, damages were reduced, but as the new occupant moved from a double room, only by the difference between double and single rates.

1263 Though this passage does not make it obvious why the case differs from *British Westinghouse* it is suggested that the distinction, and the result, are sound. In *APECO*, the plaintiff would probably have rented other space to the second tenant (the building was still half vacant) even if the defendant had fulfilled its contract and occupied the premises itself, so the plaintiff would have had two tenants instead of one. On the other hand, in *British Westinghouse*, the plaintiff was not a dealer in machinery. It could use only one set of machinery at a time, and consequently could not have profited from purchasing the new machines without scrapping the old — a step that it would have found profitable even if the defendant had fulfilled the contract.

1264 A similar distinction was made by McCormick in relation to a contract to sell advertising space:

> When the advertiser fails to take space contracted for in a newspaper, magazine, street car, or the like, the question arises, has the advertiser been assigned certain particular space by the contract? If not, has the publisher or person letting the advertising only a limited amount of such space available so that, when the particular advertiser cancels, the other party's opportunity to sell advertising is thereby increased? If either of these questions is answered "Yes", then the space freed by the advertiser's breach must be relet if it can be by reasonable efforts, and the advertiser must be given credit for the proceeds which have been or could have been thus realized when damages against him are assessed. On the other hand, if, as is usually the case, the advertiser merely contracts to use a certain amount of space generally, and the publisher or advertising agency can expand the space available indefinitely to meet the demands of other customers, then the advertiser's default has resulted in no benefit to the seller of space, and no credit for similar space sold to others should be allowed.[171]

1265 The same point arises in service contracts. If the plaintiff has promised to devote his services exclusively to the defendant, as in the ordinary full-time employment contract, the plaintiff must give credit in an action against the employer for wrongful dismissal for earnings from other sources.[172] On the other hand if the contract is for part-time work or for services that the plaintiff could have performed vicariously, earnings from other sources will not normally be taken into account, because it will generally be the case that the plaintiff could have earned them in addition to earning the profit on the defendant's

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[171] McCormick, *op. cit., supra*, footnote 21, at p. 151.

[172] *Cemco Electrical Manufacturing Co. Ltd. v. Van Snellenberg*, [1947] S.C.R. 121, [1946] 4 D.L.R. 305. See §§651, 652, *supra*.

contract. If, but only if, it is shown that the plaintiff is working to full capacity, credit should be given to the defendant for the extraneous earnings.

1266 In *Karas v. Rowlett*[173] the distinction was put as follows by Rand, J.:

> It is settled . . . that the performance in mitigation and that provided or contemplated under the original contract must be mutually exclusive, and the mitigation, in that sense, a substitute for the other. Stated from another point of view, by the default or wrong there is released a capacity to work or to earn. That capacity becomes an asset in the hands of the injured party, and he is held to a reasonable employment of it in the course of events flowing from the breach.[174]

The Supreme Court of Canada refused to reduce the damages for loss of a lease of a business by business profits derived from other sources, on the ground that the latter were not incompatible with the earning of profits under the lost lease.

1267 These considerations suggest what seems to be a test often applied, that is, whether the plaintiff could, even in the absence of the wrong, have made the disputed profit. If so, it is treated as collateral. If not, it goes to reduce the plaintiff's loss. A profitable purchase of shares or goods would usually be treated as collateral because usually it could have been made even if the wrong had not been done. But the result in *Cockburn v. Trust & Guarantee Co.*[175] may be defended on the basis that the opportunity to buy at the company's liquidation sale would never have arisen but for the wrong complained of (that is the plaintiff's dismissal caused by the liquidation). In the *Erie County*[176] case the plaintiffs were users of natural gas who required a supply to operate their limestone kiln. The profitable purchase of the gas lease in question was made solely to secure the supply. Lord Atkinson expressly said: "They did not require the gas, and did not use it, for any purpose other than to supply their plant."[177] The assumption is that the plaintiffs could not, in the absence of the defendant's breach, have made the

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[173] [1944] S.C.R. 1, [1944] 1 D.L.R. 241.

[174] *Id.*, at p. 8 S.C.R., pp. 252-3 D.L.R.

[175] (1917), 55 S.C.R. 264, 37 D.L.R. 701. See also *Jacks v. Davis* (1980), 112 D.L.R. (3d) 223 (B.C.S.C.), affd 141 D.L.R. (3d) 355 (C.A.) (tax savings to be brought into account in action for wrongfully causing the plaintiff to purchase a "tax shelter"); *Dipple v. Wylie* (1916), 30 D.L.R. 59 (Man. K.B.) (damages for defective and delayed threshing of grain reduced by profit realized on account of rise in market prices).

[176] [1911] A.C. 105 (P.C.).

[177] *Id.*, at p. 112.

profit in question, and, on that assumption, it is submitted that the case is rightly decided. In *Pagnan & Fratelli v. Corbisa Industrial Agropacuaria Limitada*[178] the buyer of goods rejected them as damaged, but subsequently bought the same goods at a reduced price. It was held that the profit on the second purchase was to be brought into account. The court described the loss claimed as "fictitious",[179] saying that it was contrary to justice, common sense and authority[180] to allow it. Again the case is one where the particular profit could not possibly have been made if the contract had been performed: it was the breach itself that created the opportunity of profit.

1268 In *Nadreph Ltd. v. Willmett & Co.*[181] the defendant solicitor, by giving negligent advice, caused the plaintiff's tenant to vacate certain premises as a result of which the plaintiff was compelled to compensate the tenant. It was held that the solicitor's liability was to be reduced by the benefit to the plaintiff of being able to relet, at a higher rent, the vacated premises. The test was said to be whether the benefit "can be said to relate sufficiently closely to a particular head of damage as to be appropriate to be set off against that head of damage".[182] Again, the plaintiff could not have had the higher rent if the defendant had not caused the vacancy. Where the defendant's default causes a loss of business, but creates an opportunity for business that would not otherwise have been available to the plaintiff, the plaintiff is only entitled to recover the net loss of business. In *Hill & Sons v. Edwin Showell & Sons Ltd.*,[183] where such a case arose, Viscount Haldane said:

> [The plaintiff] can therefore *prima facie* claim what would have been his profit. But he is none the less bound by another principle which imposes on him the duty of taking all reasonable steps to mitigate the loss to himself consequent on the breach. Moreover, if, in the course of his business, he has taken action which has actually arisen out of the situation in which his machinery was rendered free by reason of the breach, and by taking on new contracts occasioned by this situation has diminished his loss, he must give credit for the diminution, even though he may have gone somewhat out of his way

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[178] [1970] 1 W.L.R. 1306 (C.A.).
[179] *Id.*, at p. 1314.
[180] *Id.*, at p. 1316.
[181] [1978] 1 All E.R. 746 (Ch.).
[182] *Id.*, at p. 753.
[183] (1918), 87 L.J.K.B. 1106 (H.L.).

> to make fresh efforts because of the position in which he found himself with unemployed machinery.[184]

It is submitted that this line of reasoning is sound, and is to be preferred to an earlier case in which, on the defendant's preventing the plaintiff from carrying passengers on one ship, the plaintiff carried them on another, but the profits made by the alternative arrangement were not brought into account.[185]

1269 In *Royal Bank of Canada v. Clark*[186] the defendant solicitor negligently advanced the plaintiff bank's money without security. The borrower failed to repay the advance, but part of the advance was used to repay an earlier loan. It was held that the repayment was a collateral benefit and not taken into account, though it was also described as a "windfall"[187] to the bank. It is submitted that the case is rightly decided, for the bank was entitled to have its earlier loan repaid, and might have done so, even if the defendant had obtained proper security for the subsequent loan.

1270 *Oshawa Group Ltd. v. Great American Ins. Co.*[188] was an action on a fidelity insurance bond for loss caused by the fraudulent receipt of bribes by a purchasing agent. The defendant argued that the plaintiff had suffered no loss in that its resale prices reflected the actual cost of the goods purchased by its agent. This argument was rejected by the Ontario Court of Appeal, rightly, it is submitted. In a free market, the price charged for goods reflects market prices. Had the fraud not been committed the plaintiff would have obtained its goods more cheaply, and could have sold the same quantity at the prices actually charged, making a larger profit on the same quantity, or (if it thought it profitable to do so) have reduced the price and sold a larger quantity. If the defendant's argument were sound, business enterprises would be incapable of suffering losses. Again, it is suggested that the key factor is that the plaintiff could have charged the prices actually charged, in addition to retaining the benefit of the cheaper goods that it would have obtained from its suppliers in the absence of the fraud.

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[184] *Id.*, at p. 1108. See also *Andros Springs (Owners) v. World Beauty (Owners) (The World Beauty)*, [1970] P. 144 (C.A.).

[185] *Jebsen v. East & West India Dock Co.* (1875), L.R. 10 C.P. 300.

[186] (1978), 88 D.L.R. (3d) 76 (S.C. App. Div.), affd [1980] 1 S.C.R. 177*n*, 105 D.L.R. (3d) 85*n*.

[187] *Id.*, at p. 82.

[188] (1982), 132 D.L.R. (3d) 453, 36 O.R. (2d) 424 (C.A.), leave to appeal to S.C.C. refused 43 N.R. 267*n*.

1271 Support is also given to this approach by *Dawson v. Helicopter Exploration Co. Ltd.*,[180] where the plaintiff, on breach of the defendant's contract to employ his services to point out mineral deposit showings, was held not to be bound to bring into account a profit derived from his staking his own claim in the same area. The lower court, in coming to the opposite conclusion had relied on *Cockburn v. Trusts & Guarantee Co.*,[100] being of the view that the profit could not have been acquired if there had been no breach. The Supreme Court of Canada reversed the decision, but accepted the test. Rand, J., said: "The rule, in such a case, governing mitigation is not in dispute. If the interest acquired by the damaged person is something he could not have been able to obtain if the contract had been carried out, it must be brought into account; if it could have been acquired consistently with his performance of the contract, it is not available as mitigation."[101]

1272 In *Male v. Hopmans*,[102] the defendant physician was held liable for hearing loss caused by a drug administered to cure an infection of the knee. The Ontario Court of Appeal, reversing the decision of the trial judge, held that damages for the loss of hearing were not to be reduced by an allowance for the improvement to the knee. The court said that the point was a "troublesome" one, but that a reduction would be proper only if the defendant proved that the benefit to the knee was a direct result of the deafness. It is submitted that this decision is sound: in the absence of the defendant's wrong the plaintiff might have had both an improved knee and his hearing.

1273 Other considerations must explain the approach of the courts to gifts and welfare, and to insurance benefits. Many of the cases involve personal injuries and have been discussed in an earlier chapter,[103] but the question can arise also in cases of wrongful dismissal. In *Jack Cewe Ltd. v. Jorgenson*,[104] the question in issue was whether, in an action for wrongful dismissal, the defendant should be credited with unemployment insurance benefits received by the plaintiff. It was held that such benefits were not to be taken into account, on the ground

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[180](1958), 12 D.L.R. (2d) 1 (S.C.C.).
[100](1917), 55 S.C.R. 264, 37 D.L.R. 701.
[101]*Dawson*, *supra*, footnote 189, at p. 10.
[102](1967), 64 D.L.R. (2d) 105, [1967] 2 O.R. 457 (C.A.).
[103]See §§472-503, *supra*.
[104][1980] 1 S.C.R. 812, 111 D.L.R. (3d) 577. Similar conclusions were reached in *Sublett v. Facit-Addo Canada Ltd.* (1977), 79 D.L.R. (3d) 286, 16 O.R. (2d) 791 (H.C.J.), and *Zachoda v. Stelco Steel Co. of Canada* (1980), 111 D.L.R. (3d) 308 (Alta. Q.B.).

In England, unemployment benefits are deductible, but only to the extent of the net benefit received, taking account of any limit in the period of eligibility. Westwood v. Sec. of State for Employment [1984] 2 W.L.R. 418 (H.L.).

that the wrongdoing employer ought not to benefit from unemployment insurance. The argument for the employer is that the plaintiff could not, in the absence of the wrong, have received the benefits, and that consequently he will be over-compensated on receipt of damages representing his full salary in addition to the benefits. If the plaintiff had found alternative employment, it is plain that his earnings would have been brought into account. It seems anomalous that when he is paid for doing nothing (a greater benefit it would seem) he should not equally be bound to account. An ideal solution would seem to be to hold that the employee, though entitled to recover his full salary from the wrongdoing employer, would then be bound to account to the Unemployment Insurance Commission for the benefits. It has been held, however, at the provincial Court of Appeal level, that the relevant provisions of the Unemployment Insurance Act do not permit this result.[105] The Supreme Court of Canada in the *Jorgenson* case expressly left the question open.

1274 The case for excluding welfare benefits, like that for excluding gifts made to the plaintiff by third parties, may be supported on the basis of "crystallization" of the loss. The defendant causes a loss at the time of the wrong and the plaintiff is entitled to be compensated for it whatever happens afterwards. As Wright, J., put it, in another context, in *Joyner v. Weeks*:[106] "a cause of action vested in the plaintiff against the defendant, and this could not be taken away or affected by the subsequent res inter alios acta."[107]

1275 If the plaintiff makes arrangements to secure a subsequent indemnity by accepting a gift from a third party, it is well established that this does not detract from the existence of the loss at the time of its occurrence.[108] The same principle, it is submitted, applies to indemnity paid by prior arrangement. If a person who had insured himself against loss were unable to recover from the wrongdoer, anomalous distinctions would appear. One who burns a building causes a loss, whether the building is insured or not. The loss does not disappear because, by prior arrangement, an insurer has agreed to share the loss or to indemnify the owner. If the owner could not recover, justice would

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[105] *Peck v. Levesque Plywood Ltd.* (1979), 105 D.L.R. (3d) 520, 27 O.R. (2d) 108 (C.A.); *Jorgenson v. Jack Cewe Ltd.* (1978), 93 D.L.R. (3d) 464 (B.C.C.A.), affd [1980] 1 S.C.R. 812, 111 D.L.R. (3d) 577.

In McKay v. Camco Inc. (1983) 43 O.R. (2d) 603 (H.C.) disability benefits paid by the employer itself were taken into account to reduce damages.

[106] [1891] 2 Q.B. 31 (C.A.).

[107] *Id.*, at p. 34.

[108] See §§478-481, 733, *supra*. See also *A.-G. Nfld. v. Newfoundland Ass'n of Public Employees* (1976), 74 D.L.R. (3d) 195 (Nfld. S.C.).

require the wrongdoer to be liable to the insurer for the economic loss suffered by the latter. In the case of co-insurance and re-insurance complex proceedings would be required. The present law, whereby the owner recovers in full from the wrongdoer in a single action, and the insurer's rights to subrogation are determined as between insurer and insured is a convenient way of achieving the appropriate result. If the insurer has not contracted for the right of subrogation, it might appear that the plaintiff is over-compensated, but that will be because of the terms of his insurance contract, for the benefit of which the plaintiff will have paid in full by his premiums. In the case of social welfare benefits, if the plaintiff is over-compensated, this is because of the generosity of the welfare legislation, to the benefits of which the plaintiff is entitled by social insurance, or by the statute itself if, on its proper construction, there is no right of subrogation. The remedy, if this is thought to be an evil, is to amend the legislation, not to reduce the wrongdoer's liability.

PROBLEMS FOR DISCUSSION

1. What are the long term consequences of increasing damages for wrongful dismissal (by adding damages for mental distress and/or exemplary damages)? Such awards will increase the employer's total cost. Would it be a sound analysis to say that this will diminish the wage rate that the employer could otherwise afford? Would rational employees bargain for higher wage rates in exchange for foregoing damages for mental distress and exemplary damages? Would such an agreement be upheld?

2. A law clerk, in breach of a contract to preserve confidentiality, publishes a book revealing details about the inner workings of an appellate court. Is this a case for exemplary damages?

3. What is the rational way to calculate interest when damages are assessed at the date of judgment? Consider this example. D causes P a property loss in 1974 that would then have been assessed at $1,000. Judgment is given in 1984 for the current cost of making good the loss, say, $2,600. The figure of $2,600 includes, in effect, compensation for inflation (assuming inflation at 10% and increasing the $1,000 annually). If interest rates throughout were 12 1/2%, it would surely be overcompensatory to award another $3,250 ($2,600 x 12.5% x 10) as interest. The plaintiff would be far better off with such an award than if the wrong had not been done. And in no realistic sense has the defendant wrongfully withheld $2,600 for 10 years. On the other hand the plaintiff has been deprived of the use of his property for ten years. What is the proper rate of interest? How can it be given in Provinces where an award at specified rates is mandatory.